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THE UK SUPREME COURT ANNUAL REVIEW

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EDITOR'S INTRODUCTION

Christopher Sargeant*

Now in its third year of publication, this edition of the UK Supreme Court Review considers the jurisprudence of the Supreme Court from the 2012–13 judicial year. As in previous editions, it contains a now customary blend of articles analysing some of the major issues and cases which have arisen before the Court, the views of its present and former Justices on key legal issues and an exhaustive summary of every decision the Court has handed down. In addition, this edition of the Review includes a symposium concerning a variety of issues raised by the forthcoming referendum on Scottish independence, which will be held on 18 September 2014 and which, if successful, will have a massive effect on the future jurisdiction, composition and caseload of the Court.

Part I of the Review contains seven articles from a range of contributors including past and present Justices of the Court and leading academics. The discussion is also framed by a thoughtful foreword written by Lady Justice Gloster. It begins with an article by Professor Hector MacQueen which provides an insightful analysis into the life of Lord Rodger, a previous Justice of the Court, who sadly passed away on 26 June 2011. Following this, both Lord Neuberger and Daniel Clarry provide fascinating glimpses into a range of issues concerning the sister body of the Court, the Judicial Committee of the Privy Council. Professor Alan Paterson by contrast analyses the decision-making processes of the Supreme Court. In a fascinating contribution, he argues that dialogue is the critical factor in this regard, both in terms of the way in which the Justices interact with others but also between themselves.

The second half of Part I begins with an article by Baroness Hale which considers some of the major issues that have faced the Court in the context of judicial review, a field which continues to be subjected to considerable and ongoing reform. I then discuss the case of *Bank Mellat (No 1)*,¹ a deeply controversial decision in which a divided Supreme Court held both that it could hold a secret judicial hearing in order to consider evidence which was considered

* PhD Candidate, Fitzwilliam College, Cambridge. I am grateful to Emily Charlotte Jameson for her comments on a previous draft.

¹ [2013] UKSC 38.

too damaging to the public interest to be disclosed to either the other party or the public at large, and also that it would do so in this case. Part I concludes with an article by Lord Walker, addressing the difficult but frequently raised question of how far Judges should develop the common law?

Part II of the Review contains a series of five articles concerning a range of issues raised by the forthcoming Scottish independence referendum. It is also framed by an engaging foreword written by Professor James Crawford. The symposium begins with an article by Lord Sumption which addresses the historical background to the independence debate, outlining the development of the United Kingdom into its present day form. Lord Hennessy and Lord Justice Aikens by contrast adopt a more forward looking stance, examining both the political and legal consequences that may emerge should the independence campaign prove successful. These perspectives are also enhanced by Daniel Clarry and Estelle Wolfers who reproduce a question and answer session discussing these issues led by the previous two authors. The symposium concludes with an article by Professor Kenneth Armstrong analysing the key legal issues surrounding the membership of an independent Scotland in the European Union.

In part III of the Review, six shorter articles consider different areas of the jurisprudence of the Supreme Court, grouped by their general themes. These include criminal law, evidence and procedure, European dimensions, family law, human rights law, jurisdiction and devolution issues and private law. Part IV provides eighteen short articles summarising each of the decisions of the Court in the 2012–13 judicial year, grouped by their subject areas. Finally, part V provides information on the composition of the Court and also statistical information concerning (amongst other matters) the decisions of the Court and the voting practices of its Justices.

Having set out the basic structure of the Review, I would like to extend my sincerest thanks to everyone involved in its production. A number of people however deserve a special mention in order to reflect their particular input. Firstly, to all those who have given up their time to write an article for the Review, I am eternally grateful. Secondly, to Estelle Wolfers my co-editor, to Daniel Clarry, Valentin Jeutner and Cameron Miles, our Editors-in-Chief and to Matthew Kennedy, Matthew Davie, Pierre Pêcheux and Alexander Psaltis, our hardworking team of editors, your work has been very much appreciated and I cannot thank you enough for your help. Thirdly, to Sidney Richards, for his invaluable technical assistance, I offer my unending gratitude. Finally to Ben Wilson, the Director of Communications at the Supreme Court, for assisting our

communication with the Justices of the Court and for providing helpful feedback on the Review, I am truly thankful.² Thank you also to Shona Wilson-Stark for assisting us in our earliest days and to Emily Charlotte Jameson both for the article she has written and also for her general assistance throughout. It has been a pleasure working with you all and I look forward to doing so again in the future.

² The respective authors of course remain responsible for any errors or omissions in their articles.

FOREWORD

*Lady Justice Gloster**

The invitation to write the foreword to the UK Supreme Court Review edition of the *Cambridge Journal of International and Comparative Law* for 2013/2014 is, I fear, somewhat of a poisoned chalice. In his letter of invitation Christopher Sargeant persuasively wrote:

I am of course aware that Lady Justice Gloster is very busy and has many demands on her time. As we have a number of eminent authors publishing pieces in the Review this year ... we feel however that as a former Cambridge student, the first female judge in charge of the Commercial Court and now an [complimentary, but inaccurate, adjective redacted on grounds of modesty] member of the Court of Appeal, it would be a great privilege *for our readers to gain an understanding of her views on the Supreme Court.*¹

What a temptation indeed! But not one which, if succumbed to, would necessarily be career-enhancing or promote the cause of diversity in the judiciary... Suffice it to say that the only occasion on which (I believe) any judgment of mine (whether one in which I concurred, or one which I delivered, and whether at first instance or in the Court of Appeal) has been overturned by the Supreme Court was a historic case² in the sense that (or so I was told) it was the first time that the constitution of the Court of Appeal, Civil Division, had been comprised entirely of Lady Justices.³ That, of course, did not prevent the Supreme Court from overruling us. But I would not, on wiser reflection, disagree with the Supreme Court's view that we got it wrong—at least on that occasion.

To work out my 'angle' for this Foreword, I went back to discover the origins of the *Cambridge Journal of International and Comparative Law*. I did not recall it having crossed my hazy intellectual horizons as an undergraduate at Girton in

* Judge of the Court of Appeal of England and Wales.

¹ My emphasis.

² *Re LC (Children), Re LC (Children) (No 2)* [2014] UKSC 1, on appeal from [2013] EWCA Civ 1058.

³ Hallett, Black and Gloster LJ.

the late sixties. But that was not surprising, not merely because of what perhaps might best be described as the superficial nature of my undergraduate academic enthusiasms, but also because, of course, the journal did not come into existence until the 2012 edition. We are told in its initial Editors' Introduction that:

The independent Journal naturally complements the renowned series of Cambridge monographs—currently edited by Professors Crawford and Bell—which were established in 1946 by Professors Lauterpacht, Gutteridge and McNair. Whereas the monographs are edited by accomplished academics in the fields of international and comparative law, the Journal is run by a young, up and coming team of doctoral candidates at the Law Faculty, and builds on the experience of its predecessor, the Cambridge Student Law Review (2003-2011).⁴

And that the Editors' 'vision' 'is for the Journal to become an open platform for a constructive and critical dialogue between the junior and senior ends of the academic spectrum, as well as between international scholars and practitioners.'⁵

I am not sure that the commercial lawyer in me places a great deal of evidential weight on 'visions' but it was nonetheless with those inspiring aims in mind that I turned to consider the offering in this year's *CJICL UK Supreme Court Review* edition 2013/2014.

It makes good bedtime reading. The Review kicks off with Professor Hector MacQueen's encomium to Lord Rodger—an affectionate sketch of the man, not merely the lawyer.⁶ Apart from introducing me to two new enticing pieces of vocabulary—'palingenetic' and 'kenspeckle'—(not everyday terms bandied around in the Court of Appeal), the article rightly emphasises the rich contribution made by Lord Rodger's intellectual upbringing in the study of Roman law texts, and how this led to Lord Rodger's 'firmly textual' approach to the interpretation of contracts (as opposed to a 'contextual' one).⁷ (And 'hooray' says all of us... or at least some of us.)

I hope that the study of Roman Law is still compulsory for undergraduates at Cambridge; but I fear not. The notion that, post the Woolf reforms, it is

⁴ A Sanger & R Yotova, 'Editors' introduction: continuity and change.' (2012) 1(1) *CJICL* 1.

⁵ *Ibid.*

⁶ H MacQueen, 'Lord Rodger—Jurist then Judge' (2014) 3(1) *CJICL* 11.

⁷ *Ibid.*

somehow elitist or indecent to refer to Roman Law concepts or Latin terms in our judgments is a revisionist approach to our common law inheritance.

Then we have two articles on the Judicial Committee of the Privy Council in the 21st century, the first by Lord Neuberger,⁸ the second by Daniel Clarry.⁹ Lord Neuberger—albeit with his characteristic charm and humility—does a good marketing job for the continuing utility of the Privy Council. But if I had been the author of Daniel Clarry’s article, and writing for a journal such as this, which specialises in international and comparative law, I could not have resisted jumping on that ‘open platform’ and engaging in some ‘critical dialogue’ comparing, on the one hand, the internationally appreciated, cooperative approach of Lord Hoffmann sitting in the Privy Council in *Cambridge Gas*¹⁰ to the principle of modified universality in cross-border insolvency cases, and, on the other hand, what some commentators regard as the unnecessarily restricted and insular approach to the *Cambridge Gas* decision taken by the majority of the Supreme Court in *Rubin v Eurofinance SA, New Cap Reinsurance Corporation v AE Grant*,¹¹ based on textbook principles of enforcement of judgments.¹²

Whilst Daniel Clarry’s article refers to *Cambridge Gas* and *Rubin*,¹³ (and indeed two of the ‘Overview articles’ in the review provide useful case summaries of *Rubin*),¹⁴ it seems to me that a useful opportunity critically to examine Lord Collins’ reasons for deciding (dare I say, in my view both *obiter* and incorrectly) that the Judicial Committee had got it wrong in *Cambridge Gas* has been missed. The fact that one panel of Supreme Court Justices may subsequently revisit, or disapprove, the reasoning in recent cases heard by their brethren (or sometimes even by some of the same members of the Supreme Court constitution) in the Privy Council (and vice versa) is an interesting function of both courts that is worthy of exploration.

The Review then offers us a mini-taster of Professor Alan Paterson’s book ‘Final Judgment: The Last Law Lords and the Supreme Court’—a compulsory

⁸ Lord Neuberger, ‘The Judicial Committee of the Privy Council in the 21st Century’ (2014) 3(1) *CJICL* 30.

⁹ D Clarry, ‘Institutional Judicial Independence and the Privy Council’ (2014) 3(1) *CJICL* 46.

¹⁰ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

¹¹ *Rubin v Eurofinance SA* [2013] 1 AC 236.

¹² E.g. C G J Morse, D McLean & L Collins, *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, 2012) para 14R-OS4.

¹³ D Clarry, ‘Institutional Judicial Independence and the Privy Council’ (2014) 3(1) *CJICL* 46, 69.

¹⁴ A O’Brien, ‘Overview: Company and Insolvency Law’ (2014) 3(1) *CJICL* 257; Z Deli, ‘Overview: International Law’ (2014) 3(1) *CJICL* 297.

item on every Court of Appeal judge's last year's Christmas wish list.¹⁵ Apart from a nice and accurate reference to the Court of Appeal as 'a highly collegial court in this sense' (i.e. working together as a team pursuing the common good of the 'right answer' in law), there is a riveting extract from a discussion with Lord Millett about his unsuccessful attempts to persuade Lord Hoffmann onto his side in relation to the appropriate test for dishonesty in cases involving knowing assistance in a breach of trust: see *Twinsectra Limited v Yardley*.¹⁶ Lord Millett, in a minority of one, stuck out for an objective test. As Professor Paterson points out, in the subsequent Privy Council case of *Barlow Clowes International Limited v Eurotrust International Limited (Isle of Man)*,¹⁷ Lord Hoffmann effectively recanted his earlier view¹⁸ and restated the objective principles for establishing dishonest assistance liability, as formulated in *Royal Brunei Airlines v Tan*,¹⁹ upon which Lord Millett had relied in *Twinsectra*.

I hope I'm allowed to interpose a personal recollection. *Barlow Clowes International* is a case etched on my heart. I was leading counsel for the liquidators at the 31-day first instance trial and I conducted the cross-examination of the defendants. It was very wild and stormy litigating on the Isle of Man in winter. The Acting Deemster properly found that the defendants had given dishonest assistance to Mr Clowes. Then the House of Lords' decision in *Twinsectra* came winging in and, on the basis of that case, and much to my dismay, the Staff of Government Division took a completely different view about the issue of dishonesty. Never have tables been so decisively turned. And then, in my very last court appearance as a QC before being appointed a Commercial Court judge, I had the revengeful delight of appearing before the Judicial Committee on the liquidators' application for leave to appeal. I was not even called on and, after leading counsel for the defendants²⁰ had been given a hard time on the basis of his reliance on *Twinsectra*, leave to appeal was granted to the liquidators. Such moments are golden. My only sadness was that, by the time the appeal came on for hearing, I had been on the High Court Bench for some time and necessarily someone else got the brief.

But back to the Review. Baroness Hale then presents an interesting paper

¹⁵ A Paterson, 'Decision-making in the UK's Top Court' (2014) 3(1) *CJICL* 77.

¹⁶ *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

¹⁷ *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2006] 1 WLR 1476.

¹⁸ *Ibid*, paras 14–18.

¹⁹ *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

²⁰ Lord Neill of Bladen QC.

on the utility (or otherwise) of interveners.²¹ From a comparative lawyer's point of view, she makes an interesting reference to the fact that in the German Constitutional Court each judge has four (!) clerks who are themselves trained judges and write a comprehensive treatise in each case, with, commonly, a comparative law chapter. In my experience there have been a number of cases, where, sitting at first instance or in the Court of Appeal, I certainly would have benefited from a comparative exercise undertaken to demonstrate the similar or differing positions on the relevant issue taken in other common law or European jurisdictions. As Baroness Hale points out, funds are not available in the UK for Supreme Court Justices, let alone Lord Justices of Appeal, to have even one law clerk. But, like her, I agree that in an adversarial system it is usually preferable that the parties' representatives themselves should provide the courts with the relevant comparative materials and their submissions in relation to them, rather than that the court should be conducting its own researches at second-hand through a law clerk. Nonetheless I would like to encourage counsel for the parties in appropriate cases to take a much broader and less insular view of whether comparative law materials might assist the Court's determination of the dispute. But some of my colleagues might not thank me for extending that invitation...

The next article is Christopher Sargeant's incisive and skilful criticism²² of the important constitutional case of *Bank Mellat v HM Treasury (No 1)*, where nine Supreme Court Justices considered whether the Supreme Court had the power to adopt a closed material procedure on an appeal; and, if so, whether it was appropriate to adopt such a procedure in the particular circumstances of the case.²³ Christopher's displeasure at the result in relation to both issues is couched in delightfully academic, but nonetheless trenchant, terms. Thus in relation to the first issue he comments:

Nevertheless, it is dubious whether the relevant statutory authorisation necessary is in fact present... For this reason alone, the minority approach of Lords Hope, Kerr and Reed on this issue is undoubtedly to be preferred.

And in relation to the second issue he says:

²¹ Baroness Hale, 'Who Guards the Guardians' (2014) 3(1) *CJICL* 100.

²² C Sargeant, 'Two Steps Backwards, One Step Forward: The Cautionary Tale of *Bank Mellat (No1)*' (2014) 3(1) *CJICL* 111.

²³ [2013] UKSC 38.

[T]he majority are also undoubtedly too quick to obviate ‘a fundamental element of the common law right to a fair trial’²⁴ ... This suggests an overly relaxed attitude within the Supreme Court to the protection of fundamental civil liberties. *Bank Mellat* must therefore be considered unsatisfactory.

And many lawyers, not merely the dissenting Justices, might well agree with him, particularly in circumstances where, as the Supreme Court subsequently held, the closed judgment of Mitting J contained nothing which altered or supplemented the findings in his open judgment in any material respect.

I was only sorry that Christopher’s article did not proceed to support, or demolish, the reasoning in the sequel to *Bank Mellat (No 1)*—namely *Bank Mellat v HM Treasury (No 2)*²⁵ where, once again, the student approaching Tripos examinations will have a hard time memorising the particular issue in relation to which the minority members of the court²⁶ agreed, or disagreed, with the majority judgment given by Lord Sumption.²⁷ But let us hope that that article is another story. The dissenting judgment of Lord Reed is well worthy of study, not least because it contains a masterly comparative law analysis of what the concept of proportionality involves and the meaning of the word ‘proportionate’.²⁸

Finally we are spoilt by Lord Walker’s sensitive overview as to the circumstances in which the Supreme Court may, or may not, as the case may be, ‘change’ or develop the common law.²⁹ I was not sure at the end of the article where precisely his personal view lay as to the extent to which it was legitimate for the Supreme Court to engage in creative judicial activity. However I formed the impression that in appropriate circumstances he certainly considers (rightly in my view) that the Supreme Court has a significant role to play. Importantly, to my mind he successfully rebutted the view forcefully articulated in Brice Dickson’s article in the 2013 edition of this journal that:

Within the legal culture of the United Kingdom, despite its common law base, there is today limited room for judicial creativity, even in

²⁴ *Al-Rawi v Security Services* [2012] 1 AC 531, para 37 per Lord Dyson, who was one of the four justices in the minority in relation to the second issue in *Bank Mellat (No 1)*.

²⁵ [2013] UKSC 39.

²⁶ Lords Reed, Neuberger, Dyson and Carnwath.

²⁷ With whom Lady Hale, Lord Kerr and Lord Clarke agreed in whole.

²⁸ See *ibid*, paras 68–78 and 92–94. Lords Neuberger, Hope and Dyson agreed with Lord Reed’s analysis.

²⁹ Lord Walker, ‘How far should Judges develop the common law?’ (2014) 3(1) *CJICL* 124.

courts which deal only with appeals on points of law. This is partly because of the strict doctrine of precedent ... but also because of the predictable mindset of our senior judges, who would not have reached the highest level of the judiciary if they were known to be non-conformist individuals who enjoy indulging in judicial flights of fancy.³⁰

Lord Walker's contribution demonstrates, as do the differences of approach of the Supreme Court Justices in the *Bank Mellat* cases, that there is, thankfully, no such thing as the 'predictable mindset of our senior judges', nor that their elevation depends on their satisfying some objective criteria of conformity. But Lord Walker would probably agree that any legal changes which Supreme Court Justices do bring to bear on the common law are likely to be more evolutionary than revolutionary.

I have not touched on the Scottish articles in this Foreword. These, I have been firmly instructed, are within the remit of Professor James Crawford, who, I have learnt for the first time in the course of preparation of this article, is called 'the Godfather'. But no one has yet explained to me why...

³⁰ B Dickson, 'Creativity in the Supreme Court 2011-12' (2013) 2(1) *CJICL* 33, 33.

LORD RODGER: JURIST THEN JUDGE

Hector MacQueen *

The title of this lecture plays a little with the title of the book—*Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*—the publication of which we are gathered here to celebrate.¹ At one level my title describes a chronological fact: that Alan Rodger's career began in the groves of academe before he moved to the realms of gold that led ultimately to the bench. I will try to explain why he made that transition, drawing on letters that he wrote at the time: not only the ones to his family much quoted in *Judge and Jurist*, but also some to his erstwhile doctoral supervisor David Daube now preserved in the Daube archive in Aberdeen University Library.² The dating of the family letters, not always straightforward—in fact something of a paligenetic exercise—is, I think, significant. But I also want to discuss another point arising from one of the most striking features of *Judge and Jurist*: the contributions from the Supreme Court Justices on a range of aspects of Alan Rodger the judge.³ These are however only the beginnings, or so I want to suggest, of a full study of that subject. My observation is that the judge cannot be separated from the jurist. This is not just a matter of the use of Roman law in Alan's judgments.⁴ The intellectual discipline he developed as an academic researcher in Roman law informed the way he went about the business of judging. He himself told us as much, in a lecture he gave in Aberdeen in 2001,⁵ so I make no claims of a sudden, startling new insight; but I want to elaborate the nature of that intellectual discipline, and then illustrate his

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¹ A Burrows, D Johnston & R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013).

² Aberdeen University Library (AUL) Acc[essions] 60 (containing 253 boxes) and 115 (containing 97 boxes). Most of the letters from Alan to Daube are in Acc 60, 3/253.

³ Burrows, above n 1, part II (featuring contributions from all of Alan's contemporaries on the Supreme Court at the time of his death as well as Lord Hoffmann and Lord Reed). The Scottish Court of Session and High Court of Justiciary judge, Lord Pentland, also contributes a chapter on Lord Rodger and Scots criminal law (see below n 55).

⁴ For which see J Mance, 'Foreign laws and languages', in Burrows et al (eds) *Judge and Jurist*, above n 1, 85–97.

⁵ A Rodger, 'Law for all times: the work and contribution of David Daube' (2004) vol 2 *Roman Legal Tradition*, 3.

use of it as a judge, principally in the interpretation of contracts, but also with some glancing reference to the interpretation of statutes.

1 Glasgow Upbringing and Education

Alan Ferguson Rodger, born in Glasgow on 18 September 1944, was the second of the three children of Thomas Ferguson Rodger and Jean Margaret Smith Chalmers. At the time of Alan's birth, his father, always known as Fergus Rodger to family and friends, was serving in the Royal Army Medical Corps as a consultant psychiatrist. Alan's mother, a primary school teacher in Glasgow before her marriage, was believed in the family to be related to Thomas Chalmers, the leading figure in the Church of Scotland schism of 1843 known as the Disruption. Alan would later write a book on this drama without ever mentioning the possibility of a family connection; probably because he doubted it.⁶ When the war ended, the Rodger family contemplated emigration to Canada, but stayed in Glasgow when Fergus was appointed, first, as Senior Commissioner for the forerunner body of the modern-day Mental Welfare Commission for Scotland; and then, in 1948, to a new Chair of Psychological Medicine in Glasgow University. Professor Rodger held the chair with great distinction until his retirement in 1973 following a serious illness. He retained links with the Army throughout his academic career, and played a significant role in establishing psychiatry as a tool in the selection of officers.⁷

Alan emerged from his Kelvinside Academy schooling as a classicist and linguist, in particular as an accomplished Latinist who spoke French fluently as well as reading and writing the language. He was also an avid book collector, especially of classical Latin authors.⁸ The gift of languages came from his mother rather than his father. His family's foreign holidays on the Continent helped trigger further interest in other languages, as may indeed have trips to Argyll and the Western Isles. Certainly it is a true story that, while at Glasgow University but during the summer vacation, he went to the University's Celtic Department

⁶ A Rodger, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (2008).

⁷ For Thomas Ferguson Rodger's career see the obituary by G Timbury, (1978) vol 2 *Bulletin of the Royal College of Psychiatrists*, 169; see also <http://en.wikipedia.org/wiki/Thomas_Ferguson_Rodger> [accessed 15 November 2013]. His papers are held in Glasgow University Archive (GUA). The Royal Psycho-Medical Association became the Royal College of Psychiatrists in 1971.

⁸ See K Baston & E Metzger, *The Roman Law Library of Alan Ferguson Rodger, Lord Rodger of Earlsferry, with a bibliography of his works* (2012), 169–85 (especially at nos 1143, 1149, 1159, 1168, 1235, 1239, 1247).

because he wanted to learn Gaelic; finding nobody in, however, he went next door to the Russian Department and spent his holiday studying that language instead.⁹ He had wanted to learn Gaelic because his mother's family had lived in Argyll, moving to Glasgow when she was about five years old. Thus, Alan's maternal grandmother was a Gaelic speaker—and so indeed was his mother—before the shift to Glasgow.

It seems clear, however, that Alan always had ambitions in the law. When quite young he told a neighbour that he wanted to be a Lord of Appeal in Ordinary. When Alan went up to Glasgow University in the autumn of 1961 it was to take an MA, but his application stated that his professional aspiration was to become an advocate.¹⁰ He graduated in summer 1964 with an ordinary MA in which his principal subjects had been Latin and French (in both of which he won medals and prizes galore). In the autumn of 1964 he entered the Faculty of Law at Glasgow University in order to take the LLB. Taking an MA and an LLB had long been the conventional academic path to becoming an advocate, but the LLB had just undergone major reform and from 1961 a student could take a new Honours degree in Law as a full-time first degree and then enter the Faculty of Advocates without a preceding MA. Alan in some ways gained the best of both old and new worlds, since he took Honours in Law despite it being his second degree, spent three rather than the traditional two years over that degree, and emerged in June 1967 with a first in Private Law and Civil Law—one of three students only to graduate from Glasgow that year with an Honours LLB, and the only one with a first.¹¹

Alan engaged, as an intending lawyer would, with all the relevant extra-curricular student activities available in Glasgow—debating competitively in its famous Union, and participating in the University's Dialectic and Alexandrian Societies as well as helping found (as Colin Mackay has told us in *Judge and Jurist*) the Glasgow University Royalist League.¹² He engaged in student journalism, re-

⁹ C MacKay, 'Tribute', in Burrows et al (eds) *Judge and Jurist*, above n 1, 3–5, 4. Alan's application for admission to the Glasgow Law Faculty, made in February 1964 (in GUA), reveals that he gained a Scottish Universities Entrance Board Higher in Russian in March that year.

¹⁰ All references to Alan's university applications and student record at Glasgow may be checked in GUA.

¹¹ Note that despite later professed distaste for legal theory he did very well in Jurisprudence (then taught in Glasgow by Professor Alexander Anton).

¹² MacKay, above n 9, 5; GUA records. See also G Warner, *Conquering by Degrees: Centenary History of the Glasgow University Union 1885–1985* (1985); R M Pinkerton, *Temperantes otio seria atque loco: Glasgow University Alexandrian Society, 1887–1987* (1987).

porting Union debates.¹³ He had already found his characteristic authorial voice: prose that offered its writer's sometimes severely critical thoughts with dry wit as well as a crisp clarity. He commented on a golden era in the history of the University Union, when it featured names that would become very famous in later decades for eloquence in careers combining politics and law to varying degrees: John Smith, Donald Dewar, Menzies Campbell and Neil MacCormick (son, incidentally, of Alan's father's close friend, John MacCormick, the leading figure in Scottish nationalist politics in the mid-twentieth century).¹⁴

Roman (or Civil) Law was (and remains) one of the subjects in which a pass is required for admission to the Faculty of Advocates. Alan took advantage of the subject's availability in the Faculty of Arts as well as Law to take the ordinary class in Civil Law in 1962-63, i.e. during his MA studies, gaining the prize for being the leading student in the subject that year. Later, he described his introduction to the subject in the teaching of the Douglas Professor of Civil Law, Tony Thomas: 'Then at the height of his powers, he was an exotic figure who captivated us by his wit, by his extraordinary ability to remember our names, and above all by his enthusiasm for the subject. Those lectures aroused my interest in Roman Law ...'¹⁵ Thomas, who had held his chair since 1957 and played an important role in the LLB revolution in Scotland, was 'a kenspeckle figure with horn-rimmed glasses and a bow tie ... learned, [with] high standards and a real love of Roman law.'¹⁶ Alan also wrote of him: 'He was besides an intensely human man interested, as every real lawyer is, in the gossip and personalities of the law.'¹⁷

But by the time Alan came to study Roman Law at Honours level in the Faculty of Law, Thomas had departed Glasgow for University College London, to be succeeded in the Douglas Chair in 1965 by Alan Watson. Another brilliant Romanist, Watson had been a doctoral student of David Daube, Regius Professor of Civil Law at Oxford, and remained in close personal and intellectual contact with his former supervisor. He was a vital link in enabling Alan in his turn to go on to doctoral work under Daube's supervision.¹⁸

¹³ A search on 'Alan Rodger' in the online *Glasgow University Guardian* gives his Debate reports: see and open the Full Size page to read search results.

¹⁴ See J M MacCormick, *The Flag in the Wind: The Story of the National Movement in Scotland* (1955, reprinted with an introduction by Neil MacCormick, 2008), 18 for a reference to Fergus Rodger.

¹⁵ 'Concealing a servitude', in P G Stein and A D E Lewis (eds), *Studies in Justinian's Institutes in memory of J A C Thomas* (1983), 134-50, 134.

¹⁶ D M Walker, *A History of the School of Law The University of Glasgow* (1990), 73.

¹⁷ A Rodger, 'Mrs Donoghue and Alfenus Varus' (1988) vol 41 *Current Legal Problems* 1 (the Third J A C Thomas Memorial Lecture at University College London), 2.

¹⁸ A Rodger, 'David Daube (8.2.1909-24.2.1999)' (2001) vol 118 *ZSS XIV*, XLVII.

There was a second string to Alan's Honours LLB bow: Private Law. In his first year he won the prize as the best student in Scottish Private Law.¹⁹ The principal teacher of private law was the Regius Professor of Law at Glasgow, David Walker.²⁰ Like Thomas, Walker had been a leading player in the LLB revolution finally accomplished in 1961, and was still in the middle of a career in which he was single-handedly creating a library for modern Scottish private law. His Honours courses in the subject had a Romanist structure—Persons and Domestic Relations, Obligations, Property—and there was also in the Civil Law part of the degree a 'Comparative Topic in Roman Law and Scots Law'.²¹ While Walker did not emphasise the Roman Law or Civilian dimensions of Scots law to anything like the extent of his Aberdeen and Edinburgh contemporary, Professor T B Smith, Alan's Glasgow studies must have brought out the question of the nature of that relationship. Alan later described how Smith's *Short Commentary on the Law of Scotland*, published in 1962, 'was placed on an *index librorum prohibitorum* by Professor David Walker... Inevitably this did little to reduce its potential attractions.'²² That Alan had become interested in Scottish legal history seems to be confirmed by his taking in his final year a course in the subject although it was not required for his Honours degree.²³ He won the class prize in this subject too. A contemporary in the Glasgow Law Faculty (Douglas Cusine) incidentally commented to me that Alan won prizes 'with monotonous regularity'.

2 Oxford and Daube

Alan's arrival in New College, Oxford in the autumn of 1967 to begin his doctoral research in Roman law was the key moment of his scholarly career. The extent

¹⁹ Records in GUA show that Alan also took the Cunninghame Bursary with the best aggregate from Scottish Private Law I and II, Scottish Legal System and Criminal Law, as well as winning prizes in Mercantile Law and Jurisprudence in session 1965–66.

²⁰ On Walker see G S Cowie, 'The "R.P."', in A Gamble (ed), *Obligations in Context: Essays in Honour of Professor D M Walker* (1990); James Chalmers, 'Resorting to Crime', Inaugural Lecture delivered in the University of Glasgow, 17 January 2013, accessible at <http://www.gla.ac.uk/media/media_257083_en.pdf> [accessed 16 November 2013].

²¹ Information from the contemporary Glasgow University Calendar (then an annual publication).

²² A Rodger, "'Say not the struggle naught availeth": the costs and benefits of mixed legal systems' (2003) vol 78 *Tulane LR* 419, 422 n 2. See Walker's savage review of the *Short Commentary* in (1963) vol 26 *Modern LR* 466, and Smith's forceful reply: *ibid*, 607.

²³ For an account by its teacher of that course and its accompanying social dimension, see I Smith, *Law, Life and Laughter: A Personal Verdict* (2011), 70–2.

of the intellectual debt he felt to his supervisor, David Daube, he himself made clear in many writings, especially after Daube's death in 1999.²⁴ An understanding of the nature of the source material upon which Roman law studies are built is necessary to appreciate what Alan took from his supervisor. The foremost sources are the writings of Roman jurists, most of which are known to us through the great sixth-century compilation of extracts ordered to be made under the Emperor Justinian and called the *Digesta* or Digest. The Justinianic compilers worked mainly with material that had already been transmitted in manuscript copies through at least some 300 years, selecting from that material (and actually omitting much the greater part of it all), and reworking it to bring it up to date or make it more internally consistent. The Digest thus enables study of the whole course of Roman legal history, but only if one goes behind the text as we now have it. In the late nineteenth century the great German Romanist Otto Lenel laid the basis for modern Roman law scholarship by restoring the context from which the Digest texts had been extracted, enabling one to see better what the jurist intended to say. Thus armed, the researcher could go on to show how perhaps the texts had been adjusted by the Justinianic compilers to bring them up-to-date (interpolations), and, more speculatively still, what the compilers had chosen to omit from their sources because it was no longer relevant. To describe their method of working with the Digest, Lenel and his followers adopted from philosophy, theology and biology the word 'palingenesis' (or 'palingenesia'), a term for rebirth or recreation also covering the identification of the stages through which an entity passes in its life-cycle.

Before the Nazis' rise to power compelled the Jewish David Daube to flee Germany in 1933, he had been a pupil of Lenel at Freiburg, and he remained a devoted admirer all his life.²⁵ While Alan must have encountered palingenetic methods at Glasgow in the teaching of Alan Watson, it was under Daube's influence that he developed the skills and approach which was to inform not only his thesis, but also almost all of his subsequently published work on Roman law—and, I will suggest, his judicial work as well. This may have been as much through Daube's palingenetic writings in the 1950s as through any direct

²⁴ Rodger, 'David Daube' above n 18; A Rodger, 'David Daube (1909–1999)', in J Beatson & R Zimmermann (eds), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (2004) 233–48; and Rodger 'Law for all times', above n 5.

²⁵ See further S Vogenauer, 'Lenel and Daube; a cross-border friendship', in Burrows et al (eds) *Judge and Jurist*, above n 1, 277–96. This article, an act of piety as well as homage, is based on research first carried out by Alan in the Daube archive at Aberdeen University Library.

instruction, since his own work had moved in other directions by 1967.²⁶ In a letter in January 1983 Alan told Daube that a 1959 paper, 'Zur Palingenesie einiger Klassikerfragmente', was 'my favourite of all your articles'.²⁷ Daube 'urged' Alan 'always to aim to write something which would have interested Lenel'.²⁸ Daube's near-worship of Lenel and his achievement was certainly transmitted to his pupil. Alan spent the very large sum of £104.19s to buy his first copy of Lenel's *Palingenesia* in Oxford in 1968.²⁹ He also followed his supervisor's example in possessing a photograph of Lenel, latterly on display in his office at the Supreme Court (alongside others of Daube and Daube's Cambridge supervisor, Buckland).

Palingenetic and linguistic approaches were almost perfectly suited to Alan's particular suite of intellectual abilities and interests in languages, history and the classical world. A lecture about Daube that he gave in Aberdeen in 2001 set out what was involved as the 'disciplined examination of texts' by way of 'a kind of back engineering':

Daube... admired in particular the way in which Lenel had done it: by looking at context, at inconsistencies, the emphasis given to particular words and phrases, and the order in which particular matters occurred in the texts. The identification of interpolations ... was also a vital part of the enterprise.... In all cases the crucial thing for Daube is to notice precisely what expressions are used. And then you have to ask yourself why. Why did the draughtsman or author use this word rather than another? Why does that item come at the end of the list rather than at the beginning? Does this text actually make sense or has it been modified and has something gone wrong in the process of modification?³⁰

This is precisely the approach to be found in the version of Alan's D. Phil. thesis

²⁶ See Rodger, 'David Daube', above n 18, XLV, for references.

²⁷ AUL Acc 60, 3/253. See D Daube, 'Zur Palingenesie einiger Klassikerfragmente' (1959) vol 76 ZSS 149.

²⁸ Rodger, 'David Daube', above n 18, XL.

²⁹ See further Baston & Metzger, *Roman Law Library*, above n 8, nos 603, 604, 605, 606, 607, 608, 611, 612 for Alan's copies of various editions and translations of Lenel's *Palingenesia* and *Das Edictum Perpetuum*; Vogenauer, 'Lenel and Daube', above n 25, 280, estimates the cost of Alan's 1968 purchase as about £1,500 in today's values. See too Rodger 'David Daube', above n 18, XL–XLII.

³⁰ Rodger, 'Law for all times', above n 5, 11–12.

published two years after the award of the degree in June 1970.³¹ By detailed back-engineering of the Digest texts the established wisdom, that classical Roman law left owners unlimited power over their property, especially an entitlement to build in such a way as to obscure their neighbour's light, is rejected. Alan clarified decisively the relationship in classical law between the servitudes *altius tollendi* (giving an entitlement to build so as to over-shadow one's neighbour) and *altius non tollendi* (preventing one's neighbour from building to over-shadow one's property).³² These, he argued, provided no evidence of an unrestricted freedom to build, because such a system would have left no need for the first of these servitudes. Further, it was simply not believable that an owner's freedom from light-excluding activity next door depended on his own foresight in obtaining a servitude *altius non tollendi* from the neighbour. The basic argument was buttressed by a demonstration of an owner's rights in classical law to light and to the prospect over certain valuable views even without a servitude *altius non tollendi* in place. The Justinianic compilers had reworked a statement of the classical jurist Ulpian to become one of a general freedom to build subject only to servitudes, whereas he had probably said there *was* an action against the blocking of light. Alan argued that it was the Justinianic compilers, not the classical jurists, who favoured freedom to build. 'What emerges ... is that the direction of the development of ancient thinking about the scope of ownership has been misrepresented in the literature: the classical has been mistaken for the Justinianic, the Justinianic for the classical.'³³

This brief summary of what in its published form is a slim but densely argued book shows why, in the words of its preface, student and supervisor 'fought every inch of the way' in 'skirmishes across the fireplace in [Daube's] rooms in All Souls.'³⁴ The younger man was putting forward some quite radical departures from orthodoxy in the Roman law scholarship of the previous century, but neglecting no text nor any of the modern interpreters in Germany, Italy or, indeed, the United Kingdom.³⁵ Alan's letters home to his family in Glasgow

³¹ *Owners and Neighbours in Roman Law* (1972). The thesis title was the slightly less commercial 'Servitudes of Light and Stillicide in Roman Law', DPhil thesis (Oxford, 1970).

³² '[A] servitude is: a right inseparably and permanently attached to one piece of land (the 'dominant' land) and exercisable against another (the 'servient' land). [...] [C]hanges in the ownership of the land make no difference to the existence of the servitude.' (D Johnston, *Roman Law in Context* (1999) 69).

³³ Rodger, *Owners and Neighbours*, above n 31, 36.

³⁴ *Ibid.*, vii. See also on the supervisions Rodger 'David Daube', above n 18, XLVII–XLIX.

³⁵ The footnotes are replete with references to the great Romanists from Lenel on: Beseler, Glück, Karlowa, Kaser, Levy, Nörr (Germany), Biondi, Bonfante, Grosso, Riccobono, Solazzi (Italy) and

suggest that the most intense struggles took place in his first year at Oxford, when he was developing his basic argument against an unrestricted right to build as the starting point of the classical law.³⁶ By 5 February 1968, however, he could dash off a triumphant note to his family:

Just returned from lunch and chat with the Knave, and at long last I think he is very visibly cracking. He claims to have misunderstood a very fundamental part of my idea. When I explained what I really meant, he changed his attitude completely. He now says (though with a little caution) that I am 'very probably correct' and he is revising his outlook entirely.³⁷

Later that month he wrote again:

The Knave has fallen completely, I think. I went to a session yesterday, and he now seems to be almost entirely convinced, and very enthusiastic. If he did indeed call my discovery a 'fundamental breakthrough' as reported in your letter last week, Prof Daube yesterday called it 'quite fundamental', with the stress on the 'quite' as it should be. He also said the case for it was 'formidable'. All of which is a relief because I thought at one point that he would never shift. Still that was the result of a misunderstanding on his part.³⁸

Letters like these also show incidentally that his admiration for his supervisor's scholarship and intellect did not entail absolute hero worship. From early 1968 at

Daube's supervisor Buckland for the UK. Alan must have been able to read, not only German, but also Italian from his knowledge of Latin and French, even if his spoken fluency in the language was limited (see Luigi Labruna, 'Lord Rodger: an Italian tribute', in Burrows et al (eds) *Judge and Jurist*, above n 1, 23–26, 23). Also much cited in *Owners and Neighbours*, although usually to be disagreed with, is A Watson, *The Law of Property in the Later Roman Republic* (1969). It is possible that Watson was already at work on this book when he taught Alan at Glasgow between 1965 and 1967; its chapter 8 deals with servitudes, but not with *altius non tollendi*. If reflected in Watson's Honours teaching, perhaps the project stirred Alan's interest in issues of ownership and servitudes in classical Roman law. But this is speculation only.

³⁶ These letters are in the custody of Dr Christine Rodger. I am grateful for the opportunity to study them which she generously granted.

³⁷ Letter dated only 'Monday, 3.15'; envelope franked 5 February 1968.

³⁸ Letter dated only 'Friday, 11.35 p.m.' but referring to the lifting of 'foot and mouth restrictions' in the Oxford area which, with the letter cited in the previous note, makes this one most probably late February 1968. It appears from the quoted passage that Daube too was corresponding with the Rodger family by this time.

the latest, the letters give Daube the affectionate nickname of ‘the Knave’, which seems to be explained by his supervisor’s absenting himself from the university during term-time and his holding two other visiting chair appointments, one at Berkeley in California, the other at Konstanz. ‘I’ve never heard of such an arrangement,’ wrote the Glasgow professor’s son. ‘I’d love to know if he gets his full Oxford salary. I expect he does.’³⁹

Daube’s absences left Alan space to progress with other work as well. He already had a close academic relationship with Tony Honoré, who was a Fellow in New College and who may indeed have formally introduced Alan to Daube at the outset of the former’s Oxford studies.⁴⁰ Alan began to collaborate with Tony in detailed paligenetic and statistical analysis of the Digest aimed at finding out precisely how the compilers carried out their task. The first of what became three joint articles appeared in 1970.⁴¹ Tony also played a role in relation to Alan’s continuing interest and activity in Scots private law, especially with regard to the Roman law or Civilian influence in its development. What Tony offered in this field was his own upbringing in and knowledge of South African law, where the Roman-Dutch system of private law had many substantive affinities with its Scottish counterpart and a far better developed tradition of academic and judicial scholarship on its Civilian dimension.⁴²

3 The switch to practice

Alan’s ongoing interest in Scots law (which included keeping up his subscriptions to the law reports as well as writing journal articles and commentaries on recent

³⁹ Letter dated only ‘Sunday’, referring however to the great storm that blew through Glasgow and the central belt of Scotland on Monday 15 January 1968 (in which 20 people were killed and there was extensive property damage) as a very recent event.

⁴⁰ AUL Acc 115, 5/97, contains a card signed ‘Tony’ introducing Alan to Daube. On the occasion of the lecture on which this paper is based Tony Honoré gave a short account of his academic relationship with Alan during the latter’s time at Oxford.

⁴¹ A M Honoré & A Rodger, ‘How the Digest Commissioners worked’ (1970) vol 87 ZSS 246; ‘The distribution of Digest texts into titles’ (1972) vol 89 ZSS 351; ‘Citations in the Edictal commentaries’ (1974) vol 42 *TvR* 57. Honoré’s tribute to Alan’s contribution, despite the latter’s protestations of being very much the junior partner, can be found in the preface to the former’s *Tribonian* (1978), xvii.

⁴² There is particular evidence of South African input in Alan’s article on third party rights in contract in Scots law, published in 1969: ‘Molina, Stair and the *jus quaesitum tertio*’ (1969) vol 14 *JR* 34, 128 (2 parts).

decisions in the Scottish courts)⁴³ also reflected the continuation of an ambition to go to the bar and practice as an advocate. As early as his first stay in Münster (where Daube sent him in summer 1968 for its Roman law library), Alan wrote home on 2 July to say: ‘... I really am, I think, more or less decided that I shall go to the Bar sooner or later. I haven’t, of course, told the Knave or anyone, but that’s how I feel—I don’t think Scots Law can really do without me.’⁴⁴ A little later that summer he wrote again: ‘I’m now absolutely certain that I want to practise. ... I think that the Bar needs me.’⁴⁵ It is clear from these letters that this meant joining the Faculty of Advocates in Edinburgh. One of the then Scottish judges, Lord Kissen, a family friend of the Rodgers, offered encouragement, as indeed did Daube when Alan finally sought his opinion.⁴⁶ (This was the occasion when, according to Alan, Daube said of Edinburgh: ‘a certain parochialism is no unmitigated evil.’) But it would be another four years before Alan finally took the plunge, and in the meantime he completed and published his thesis as well as taking up fellowships, first at Balliol in 1969 and then back at New College in 1970. It may well have been the publication of the thesis in 1972 that made him think that, at the age of almost 28, the time was ripe to make the long-contemplated move. In addition, his father became seriously ill in Glasgow, and he may well have felt a need to be closer to his family as a result.

Back in 1968 Alan had ruminated in another of his letters home from Münster:

⁴³ See letter from Münster dated ‘Sunday, 3 pm’, probably late summer 1968, for the law report subscriptions. An untitled case note on *Kemp v Robertson* 1967 SC 229, published in (1967) 12 *Judicial R* 268, was developed to become A Rodger, ‘The Praetor’s Edict and carriage by land in Scots law’ (1968) 3 *The Irish Jurist* 175. A sheriff court decision led to A Rodger, ‘Spuilzie in the modern world’ (1970) *SLT (News)* 33, which irritated a sheriff in a subsequent case sufficiently for him to say: ‘many may consider [the article] to be written in arrogant vein, coming as it does from the pen of one who is not (at least yet) qualified to represent another in a Scots court’: *Mercantile Credit Co Ltd v Townsley* 1971 *SLT (Sh Ct)* 37, 39. For Alan’s thoughts on this 40 years later, see ‘Judges and academics in the United Kingdom’ (2010) 29 *University of Queensland LJ* 29, 33. Another longer and still influential article on Scots law from his Oxford period is A Rodger, ‘Pledge of bills of lading in Scots law’ (1971) 16 *Judicial R* 193. The article refers *inter alia* to courts and writers mis-understanding Roman law, to South African case law, and to the fact that ‘in September 1870 [...] Lenel was enjoying the Franco-Prussian War and had not taken up the serious study of Roman law’ (at 206).

⁴⁴ Letter from Münster dated ‘Monday, 2.30’ but with an envelope franked ‘2/7/68’. Alan also stayed in Münster in the summer of 1969.

⁴⁵ Letter from Münster dated only ‘Sunday’, but probably not long after the one cited in the previous note.

⁴⁶ Letter from Münster dated only ‘Sunday, 4.10’, but from its content clearly following the ones already cited.

I also have this odd feeling a) that becoming a professor of Roman law would be too easy for words, and what would I do then, poor thing? and b) that I almost certainly have found at least the gist of the correct solution to the *ius altius tollendi*, the puzzle of Roman servitudes and a classic for Roman law. This means that I should almost certainly (999 times out of 1,000) never solve anything so important again in Roman law. It would be always a bit of an anti-climax and I couldn't stand that.⁴⁷

But it would be a mistake, I think, to see this as still the reason for his decision to leave academic life four years later. If in 1972 he surveyed those British chairs of Roman or Civil Law that might have attracted him, he would by then have seen them all occupied by men admittedly older than him, but each apparently with long careers still ahead—Honoré as Daube's successor in Oxford, Peter Stein in Cambridge, Tony Thomas at UCL, Bill Gordon in Glasgow, Alan Watson in Edinburgh and Geoffrey MacCormack in Aberdeen (Daube's former university).⁴⁸ Moreover Alan had already moved on to new issues in Roman law: on the compilation of the Digest itself with Honoré, as well as fresh original work emerging from his own thesis research. Roman law puzzles remained in abundance for him to explore, and he would indeed go on exploring them for the rest of his life. I see the decision of 1972 as primarily about pursuing the realisation of ambitions the formation of which had preceded his first exposure to Roman law ten years before, coupled with some frustration (evident in his letters) at having to teach relatively unfamiliar modern English law,⁴⁹ pressure within the Oxford Faculty generally to focus on the contemporary and 'relevant' in teaching, and, perhaps, a certain boredom with the more mundane aspects of academic life—disappointments with indifferent students, the tedium of examining, frequent meetings to debate non-academic issues, and all-pervasive bureaucracy.

In the autumn of 1972 Alan began a bar apprenticeship with Allan McDougall & Co, a leading Edinburgh court firm of solicitors. In January 1973 he told Daube:

⁴⁷ Another letter from Münster dated only 'Sunday' but taking its place in the sequence of letters on this subject in the summer of 1968.

⁴⁸ All the persons named in this sentence are still alive (if retired) at the time of writing, apart from Thomas, who died in 1981 at the age of 58, and Gordon, who was able to complete a contribution to Alan's *Gedächtnisschrift* before his own death in September 2012 ('Communis error facit ius', Burrows et al (eds) *Judge and Jurist*, above n 1, 447).

⁴⁹ Alan taught English family law at Oxford from 1969 on, as well as lecturing on Roman law.

‘The practice in which I am currently engaged is not v. high class but it is rather fun and has an element of variety which I found singularly lacking in the pleasant pastures of New College.’⁵⁰ It is worth noting that not long after Alan began there the firm (and the counsel it had retained for the case, Kemp Davidson QC and Hugh Morton) enjoyed a great triumph in the House of Lords, with an unexpected victory for the pursuer in the causation case of *McGhee v National Coal Board*.⁵¹ Over thirty years later Alan as a Lord of Appeal in Ordinary would do much to reinstate the authority of that decision.⁵²

The commitment to Scotland and Scots law apparently entailed in starting his apprenticeship was however not quite complete. An interest in perhaps eventually qualifying in England also emerges in the letter to Daube in January 1973, where Alan explains that he had ‘decided to go to the English Bar and am doing their exams when they permit me. This means in September last year, June or September this year and May next year.’⁵³ But so far as I have been able to ascertain, this latest adjustment to the life-plan was never brought to final fruition, probably because of pressure of time and the exams he also needed to sit to qualify for the Scottish Bar.

His office apprenticeship completed, Alan devilled in the Faculty of Advocates and was called on 12 July 1974. By now the practice of law had gripped him, as he explained in another letter to Daube: ‘[I]t is quite amazing the problems which occur. I think it is a leading heresy to teach undergraduates that when they go into practice they can burn their books because it is all a question of the facts. Legal points are forever raising their heads in my experience.’⁵⁴ But, apart from his first few years of practice as he established himself at the bar, Alan continued to make a significant contribution to the literature of Roman law throughout the period leading up to his taking silk in 1985. Acceleration in output after 1980 may have

⁵⁰ AUL, Acc 60, 3/253, letter dated 7/1/73. Something of the atmosphere of civil court practice in the early 1970s may be captured in Karen Bruce Lockhart, ‘Thoughts from nearly forty years ago’, in H L MacQueen (ed), *Miscellany Six* (2009), 321, with comment on Allan McDougall & Co at 332–3.

⁵¹ 1973 SC (HL) 37; [1973] 1 WLR 1 (HL). See further ‘Kemp Davidson’, *SLT News* (2008) 157–60, 158; D Hope, ‘James McGhee—a second Mrs Donoghue’ (2003) vol 62 *Cambridge LJ* 587.

⁵² See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; *Barker v Corus* [2006] 2 AC 572 (in which Alan dissented); and Compensation Act 2006, s 3 (reversing *Barker*). See further Lord Hoffmann, ‘*Fairchild* and after’, in Burrows et al (eds), *Judge and Jurist*, above n 1, 63. Kemp Davidson became a close friend of Alan (see n 51 above), while Hugh Morton would be one of his two devil-masters in the Faculty of Advocates (the other being George Penrose). All three men rose to the Court of Session bench.

⁵³ Above, n 50.

⁵⁴ AUL, Acc 60, 3/253, letter dated 23 April 1974.

been helped by the arrival of personal computers with word processors; Alan had learned to type when young and he typed much faster than he wrote. He remained in touch with the law faculties and the latest developments in Roman law, and most of my initial meetings with him were at the Edinburgh and London Roman Law discussion groups in the early 1980s.

4 Public Service: Prosecutor and Law Officer

When Alan became a silk, he had yet to take one step in the usual *cursus honorum* of Scots law: spending some time specialising in criminal prosecution. This was a necessary step for advocates with judicial ambitions, since much of a judge's time would be spent sitting in criminal trials. Thus it was that in 1985 Alan was appointed as an Advocate Depute. Scottish criminal prosecutions in the High Court of Justiciary are undertaken in the name of the Lord Advocate, but counsel who actually conduct most of the cases in court are his deputes. The role is essentially full-time, and involves working closely with the prosecution service, the Crown Office. The real surprise for those observing Alan's career from a distance, however, was first, how long he kept at it, and then his acceptance of appointment in 1989 as Solicitor-General for Scotland, the junior Law Officer under the Lord Advocate. Instead of the anticipated return to civil practice preceding appointment to the bench, the appointment entailed continuing full-time engagement with criminal prosecution and other government civil work. In 1992, Alan rose further, becoming the Lord Advocate; and he would hold this office until appointed to the Scottish Bench in 1995. By then, he had spent the greater part of a decade, when possibly at the height of his powers and appetite as an advocate, in public prosecution and wider governmental services.

In some ways, I think this further unexpected turn in his career resulted from something similar to the process that led him to give up academic life for legal practice. It was another fresh challenge, but one that he took up with gusto and success because he found so much of law and life in it.⁵⁵ And he could bring to bear upon the work something of the paligenetic techniques he used in the study of Roman law. This is most apparent in the lecture he gave to the Holdsworth Club in Birmingham in March 1998. There he considered the form and language of legislation, drawing heavily on his experiences as the government minister with responsibility for the Scottish parliamentary draftsmen, but also on, as he

⁵⁵ P Cullen, 'Lord Rodger and the criminal law', in Burrows et al (eds), *Judge and Jurist*, above n 1, 399, 401–2.

put it, ‘things which I have noted and which have puzzled me when looking at Roman Law texts.’⁵⁶ The argument was at least in part for recognition of the value of paligenetic techniques in understanding modern legislation: ‘studying not only *what* the text says but *how* it says it’.⁵⁷ It was a technique that later still he would deploy as a judge in the interpretation of difficult statutes. A most striking example is his dissenting judgment in a Supreme Court case on the division of devolved and reserved powers under the Scotland Act 1998, and the withering criticism of his colleagues’ failure to tackle all the relevant statutory wording.⁵⁸ In another, rather quirkier, paligenetic point, the Holdsworth lecture also highlighted the individuality of the parliamentary draftsman’s style. Although Alan made no mention of it, an example of this lurks in the Criminal Procedure (Scotland) Act 1995, in the preparation of which he was deeply involved as Lord Advocate. The initials used in the specimen criminal charges provided in Schedule 5 of the Act spell out, not only the name of the Lord Advocate but also those of the draftsman of the text (whose idea it was) and the Crown Agent, along with the initials of other Scottish parliamentary draftsmen at the time.⁵⁹

5 The Judge

It is also of interest to consider how Alan as a judge went about the interpretation of contracts. I well remember his personal and private response to Scottish Law Commission investigations of the rules of interpretation in contract, to the effect that it was absurd to suppose that the interpretation of texts could be the subject of legal rules. Reviewing some of his major judgments on the matter, I have come to the conclusion that he also did not agree with Lord Hoffmann’s ‘contextual’ approach to interpretation.⁶⁰ Alan was firmly textual. The leading

⁵⁶ *The Form and Language of Legislation* (1998), 1 (republished in a ‘lightly revised and slightly updated’ version in (1999) vol 18 *Rechtshistorisches Journal* 601). The lecture will be further reprinted in David Feldman (ed), *Law in Politics, Politics in Law* (forthcoming).

⁵⁷ *Ibid.*, 3.

⁵⁸ *Martin v HM Advocate* 2010 SC (UKSC) 40. See further R Walker, ‘Lord Rodger and statute law’, in Burrows et al (eds), *Judge and Jurist*, above n 1, 133; also S Brown, ‘Dissenting judgments’, in Burrows et al (eds), *Judge and Jurist*, above n 1, 29, 36; R Reed, ‘The form and language of Lord Rodger’s judgments’, in Burrows et al (eds), *Judge and Jurist*, above n 1, 121, 128–129.

⁵⁹ For the detail see Scots Law News (blog), 27 June 2011, comments, accessible at .

⁶⁰ See especially *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896. Note that Alan did not dissent from the limitations drawn upon Lord Hoffmann’s approach by the latter himself in *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101. But note too Alan’s observation in that case that “it seems to me that once you grasp the general structure of schedule

modern Scottish case on how to interpret contracts, *Bank of Scotland v Dunedin Property Investment Co Ltd*,⁶¹ was decided by a court over which he presided. The court should start with the words used while avoiding interpretations in conflict with business reality or producing an absurd result. In that process the court is entitled to have regard to the background circumstances, but ‘not in order to provide a gloss on the terms of the contract, but rather to establish the parties’ knowledge of the circumstances with reference to which they used the words in the contract.’⁶² The details of the case can be passed over here, but there were actually some significant differences in the approaches of the three judges of the First Division. The two others referred approvingly to Lord Hoffmann’s approach, finding it helpful to bring in the surrounding circumstances from the start of the interpretative exercise.⁶³ But Alan thought it best:

[To] begin ..., not by enquiring into the state of knowledge of the parties to the contract, but by asking myself what is the ordinary meaning of the words ...⁶⁴

Having reached a particular understanding of the words in issue on this basis, he then confirmed this interpretation by reference to the commercial background to the contract.

An even greater unwillingness to look outside the contract if it was not necessary to do so to interpret what it said is apparent in the *Piper Alpha* case decided in 2000,⁶⁵ where one of the many questions dealt with in the First Division was the meaning of the phrase ‘indirect or consequential losses’ as used in relation to an indemnity clause in a settlement agreement. At first instance the Lord Ordinary had taken this to be a reference to the law on remoteness of damage as it had evolved from *Hadley v Baxendale*,⁶⁶ and had accordingly explored the relevant case law in order to determine its scope. Alan, while recognising that parties might have adopted a phrase that had already been interpreted by the courts in a particular way, noted that the specific phrase in question had not once been the subject of any such authoritative ruling, and argued—convincingly—that

6 of the agreement, ... the appropriate interpretation becomes clear” (para 68). This is consistent with his general interpretive approach as outlined in the main text below.

⁶¹ 1998 SC 657.

⁶² *Ibid*, 665 per Lord President Rodger.

⁶³ *Ibid*, 670 per Lord Kirkwood and 676 per Lord Caplan.

⁶⁴ *Ibid*, 661.

⁶⁵ *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123.

⁶⁶ (1854) 9 Ex 341.

its intended meaning could instead be grasped from a careful consideration of the context provided by the contract itself. In that process, he placed as much emphasis upon what the contract did *not* say as upon what it did, and rejected arguments producing irrational—as distinct from absurd—results.

In *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*,⁶⁷ decided in the Supreme Court in 2010, there was a dispute about the basis for valuing land in a lease where the tenant was exercising an option to buy it. It was fairly clear that the clause in question had been copied from another lease without regard as to how it fitted with the rest of the contract, but the court was provided with no material at all on background circumstances. So there was no platform for judicial discussion of their possible relevance and use. But the parties were agreed in court that the land was to be valued as at the date of the purchaser's entry upon purchase as though it were in the state it was in when the lease began (i.e. agricultural land) rather than as it had been developed since by the tenant (i.e. as a golf course). Alan's point of departure in approaching this question was different from any of the other judges, although he reached the same end-result. He said that one should 'start with the parts whose meaning is clear and then [...] use those parts to unravel the meaning of the parts which are more difficult to understand'.⁶⁸ He therefore by-passed the parties' agreed starting-point. The contract required the landlord to take account of what the tenant had done to develop the golf course, meaning that the course had to be valued as such on the basis it was in good order and repair. But nothing in the contract required the landlord to ignore other factors in value, such as the land's continuing suitability for a possible housing development. To eliminate that element would lead to 'a highly unusual and artificial approach to valuation'.⁶⁹ An assumption for the purposes of valuation that the land would only be used as a golf course required clearer words than that. Accordingly the landlord was entitled to have regard to the housing development value in fixing the sale price of the land.

I do not want to say definitively that the modes of reasoning apparent in these cases were the result of Alan's intellectual upbringing in the study of Roman law texts. Nor do I wish to comment here on whether a legal historian in pursuit of the meaning of some piece of documentary evidence should exclude extrinsic material about what the words in that document mean. But I do propose that the hypothesis of the jurist shaping the judge should be tested further in the light

⁶⁷ 2011 SC (UKSC) 53, paras 19–23.

⁶⁸ *Ibid*, para 28.

⁶⁹ 2011 SC (UKSC) 53, para 36.

of what we know about Alan's academic interests and his own comments about what he took from them into his judicial work. In looking at Alan interpreting contracts by considering their structure and what they did not say, remember the discipline of 'back-engineering' texts:

[L]ooking at context [*meaning the context provided by the text itself, not the surrounding circumstances*], at inconsistencies, the emphasis given to particular words and phrases, and the order in which particular matters occurred in the texts. [...] In all cases [...] notice precisely what expressions are used. And then you have to ask yourself why.⁷⁰

Such study should not be limited to his decisions on the interpretation of statutes and contracts, however. His 2001 Aberdeen lecture gave an example from one of his most notable judgments developing 'diminished responsibility', an entirely judge-made aspect of Scots criminal law. A more complex example from late in Alan's short Supreme Court career is *Inveresk Paper Co Ltd v Tullis Russell Ltd*,⁷¹ where Alan explored and explained why the word 'retention' had come to have a variety of meanings in the Scots common law of contract, while seeking to provide it with a stable platform for the future. Here we can remember that from Daube (and, through him, Lenel) he learned to start with words and work his way to conclusions (or, at least, more general observations) from the bottom up.

The inquiry should also consider his interest in the form and language of judicial opinions.⁷² While at one level this was a purely practical concern—what form should be followed and what language used?—on another there were questions which brought into play once more the techniques and analytical skills which he had first honed in the study of Roman law. Daube had taught that literary forms are the products of their setting in life and that these forms can remain unchanged even when the setting changes. So Alan observed that judicial opinions had once been generally oral but became typically written and also reported in the nineteenth century. Although they retained something of their oral origins, they had been transformed by being directed to a much wider audience. Alan was of course a highly skilled participant in the form as well as a perceptive analyst and critic (not least of the judgment styles of many of his Court of Session colleagues, who perhaps still fail to realise that there is an audience

⁷⁰ See above, text accompanying note 31.

⁷¹ 2010 SC (UKSC) 106.

⁷² A Rodger, 'The form and language of judicial opinions' LQR 118 (2002) 226–47; 'Lord Macmillan's speech in *Donoghue v Stevenson*' LQR 108 (1992) 236.

outside the courtroom for what they write).⁷³ That makes his discussions of especial if not unique interest.

But any suggestion that all this makes Alan just another detached judge and jurist wholly absorbed by daunting intellectual work would be completely wide of the mark. His whole career can be seen as a series of moves from successfully meeting one challenge on to tackling another. But he was also a highly entertaining companion and correspondent who loved discussion, debate, wining and dining, and gossip with his friends. Friendships were strong, deeply felt, and moved by personality, not academic standing or popularity: witness the many illuminating and moving memoirs dedicated to those whom he encountered in all parts of his highly variegated career.⁷⁴ The same human sympathy is apparent in his interest in the lives of people he never knew, whether jurists like Otto Lenel, the lawyers involved in the Disruption cases, or litigants like May Donoghue. He was openly delighted if you brought him something that interested him. I remember worrying about him patiently chairing a crowded conference programme on the new subject of Internet law in Edinburgh one Saturday early in March 1997 and then my relief at his saying afterwards with genuine enthusiasm as we walked away together, ‘I never thought there would be so much law in it!’ His querulous tone if he thought he had caught you out in absurdity or irrationality (for example, by proposing a European contract code or becoming a Law Commissioner), was always pitched just so as to induce a smile (unless, perhaps, you were counsel appearing before him in court). His encouragement was inspiring and infectious—‘You must *do* it! You *must* do it!’—and the pleasure he could give by telling you that you had produced ‘the real thing’ was all the more intense for its rarity (at least in my case). The Ciceronian epigram quoted at the packed memorial service in Edinburgh—‘*non nobis solum nati sumus ortusque nostri partem patria vindicat, partem amici*’⁷⁵—was entirely apt. Brilliant, contrarian, serious, funny and above all engaged: Alan Rodger is deeply missed but all who knew him should be thankful that they did, and that so much of him is still here for us to cherish and debate as well as simply to admire.

⁷³ See ‘Civil justice: where next?’ (2008) 53 *Journal of the Law Society of Scotland*, 14–18. See also R Reed, ‘The form and language of Lord Rodger’s judgments’, in *Judge and Jurist*, above n 1.

⁷⁴ A comprehensive list of these can be found in the bibliography appended to Burrows et al (eds), *Judge and Jurist*, above n 1.

⁷⁵ Cicero, *De Officiis*, 1.22 (‘We are not born for ourselves alone; and our country, our friends claim a share in our being’).

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN THE 21ST CENTURY

Lord Neuberger of Abbotsbury*

1 Introduction

A prominent constitutional lawyer recently wrote that ‘nobody starting afresh would design a court that looks like the Judicial Committee of the Privy Council.’¹ Well, I’m not at all sure that I agree, and, even if I do, I’m not at all sure that it’s an adverse criticism.

The JCPC has developed on an *ad hoc* basis, reacting in a practical and principled way to changing needs and standards. An institution which matures in this way may well appear somewhat strange, but it has the enormous virtue of accommodating change without the need for revolution. In that, the JCPC is of a piece with the common law and the British constitution. The common law has been evolved over the centuries by the judges, and is based, as Oliver Wendell Holmes said, on experience not logic,² as compared to a civilian law system, which is based on a grand set of principles. The whole polity of the United Kingdom came about by evolution, through its unwritten constitution: a contradiction in terms, some might say, or, as Sam Goldwyn said of an oral contract, not worth the paper it’s written on. Nobody could have invented it from scratch, with its hereditary unelected head of state, its curious mixture of a hereditary and appointed House of Lords, its mixture of devolved powers, and its blend of statutory and common law. And yet it has stood the test of time: unlike almost any other major country in the world, the UK has had no revolutionary change for over 325 years, save perhaps the secession of Ireland in 1923.

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¹ A Le Sueur, *What is the future for the Judicial Committee of the Privy Council?*, 4 <<http://www.ucl.ac.uk/spp/publications/unit-publications/72.pdf>> [accessed 19 December 2013].

² O W Holmes Jr., *The Common Law* (1881) 1.

Yet there is always a risk that the consequences of historical development might impede today's public understanding of, and confidence in, institutions. It was largely for this reason that in 2005 the UK Parliament decided that, to use the words of the great 19th century constitutional thinker, Walter Bagehot, the country's highest court should no longer be 'hidden beneath the robes of the legislative assembly' in the House of Lords, but instead should become a 'conspicuous tribunal';³ hence the UK Supreme Court, which opened for business in October 2009.

Whilst that change has been well publicised, it is less well known that, aside from an inevitable decrease in the physical extent of its jurisdiction, the JCPC has also undergone significant changes over the past century, including a shift in its premises in 2009. In fact, the modern JCPC increasingly looks very much like any other appellate court. But this modernisation has not involved the loss of the best and most fundamental of its historic characteristics. In fact, someone starting afresh may well design a court like the modern JCPC.

Any discussion of the role of the JCPC runs the risk of focussing on the single question of whether or not it should exist as the final appellate court for jurisdictions outside the United Kingdom. That debate is not new: it dominated discussion about the JCPC throughout much of the 19th and 20th centuries,⁴ and explains, at least in part, why the JCPC is probably not the best-understood court. However, as we move further into the 21st century, it is important to move on from the single question, and to focus on the functioning of the modern JCPC and the changes that have been made to it.

2 The mystery of the JCPC

Let me start by making it clear that the 12 judges of the UK Supreme Court, who in practice comprise more than 95% of those who sit on the JCPC cases, are very happy to hear appeals from any jurisdiction which chooses to use our services. If a democratic country concludes, normally because of its small size, that it cannot justify having its own final appeal court, then we believe that the possibility of using the JCPC represents a valuable contribution to the rule of law in that country and indeed across the world. Speaking more selfishly, it is not only a compliment to be asked to act as a country's final appeal court, but it is a very enriching experience, both personally and legally, for judges to try cases

³ W Bagehot, *The English Constitution* (1867: ed P Smith 2001), 91.

⁴ D B Swinfen, *Imperial appeal: the debate on the appeal to the Privy Council, 1833-1986* (1987), 2.

from jurisdictions other than their own. Having said all that, it is only right to add that, if a country decides that it no longer wishes to use the JCPC, I accept, of course, that that is entirely a matter for that country.

An address delivered over 90 years ago provides useful fodder to understand the differences between the JCPC of yesteryear and the JCPC of today. In 1921, Viscount Haldane of Cloan (who was Lord Chancellor between 1912 and 1915, and again in 1924) spoke publicly⁵ about the work of the JCPC. He recognised at the outset of his address that those ‘who sit on the Judicial Committee have taken a tremendous oath not to disclose any of the secrets that come to the fore there.’⁶ He insisted that ‘[y]ou cannot learn much about [the JCPC] from documents’, because ‘[i]ts constitution is mainly unwritten, and its conventions are unwritten’, and therefore, ‘unless you have lived in it and in the atmosphere, you do not know what happens there.’⁷ Perhaps, in part, this was a rhetorical flourish to capture the attention of his audience. But when one delves deeper, it is fair to say that, apart from the single question debate, at the time of Viscount Haldane’s address, the JCPC was indeed shrouded in secrecy. Quite apart from any concern about open justice, this secrecy is all the more surprising when one recalls that, at that moment, the JCPC was the highest appellate court for around a quarter of the world’s population.⁸

Similar perceptions of the mystery of the JCPC are illustrated by remarks made by Mr Stanley Leighton MP in 1900 during a debate on the Commonwealth of Australia Bill in the House of Commons. Mr Leighton complained that:

[...] with the exception of some gentleman of the long robe, very few people knew what the [JCPC] was, of whom it was composed, what it did, and where it held its court. [He had] determined ten years ago to make a search and make quite sure that it not only had a name but a local habitation, and he enquired of all his friends ‘Where is the Privy Council?’ and no one knew. He asked judges and the like, and was referred to Whitaker and a little book entitled ‘Things not Generally Known’, from neither of which could he extract the desired information. He then conceived of the idea of starting at the top of Parliament Street and knocking at every door

⁵ Viscount Haldane of Cloan, speech to the Cambridge University Law Society, published as ‘The Work for the Empire of the Judicial Committee of the Privy Council’ (1923) 1 *CLJ* 143.

⁶ *Ibid.*, 143.

⁷ *Ibid.*, 146.

⁸ F Safford and G Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), vii.

and enquiring if the Privy Council was at home, and in the course of his peregrinations he came to a door at which a policeman was standing who, in answer to his enquiries, directed him up a small back staircase, and upon entering a small room on the second floor he found himself in the presence of the august assembly.⁹

For most of the 19th century and all of the 20th century, the JCPC heard appeals in the Council Chamber at 9 Downing Street. As Viscount Haldane described, on arriving at Downing Street, a visitor would:

[...] come to a very dirty door inscribed “Judicial Office”; and he will think, unless he knows better, that this is some minor department of the Treasury, where it collects the fees from the County Court suitors. Do not let him be deterred. It is true that the door is in a very bad condition; I did my best when I was Lord Chancellor to get the Treasury to make it better, but that body always takes the view that the more obscure a door the better it will function in the Empire. Consequently, and very grudgingly, they agreed to give only £200 for the improvement of the doorway; but that was cut off when the war broke out, and the talk of economy began to arise. Well, do not be deterred by that door, but go in. You will not think that it looks like a Court, particularly as you will see one or two gloomy-looking officials glancing enquiringly at you. Brush them aside. This is the supreme tribunal of the Empire, and every subject of the King-Emperor is entitled to go in there. You will see on your right a rather dilapidated-looking red-covered stair. Go up it ... all sorts of people may be straying in there, and you will feel yourself in good Imperial company. When you get to the top, go forward till you come to a rather forbidding door, and when you have penetrated that you will find yourself in a really respectable and nice-looking courthouse panelled with oak, with a high ceiling—everything, in short, that a Court should be.¹⁰

Yet not everyone shared Viscount Haldane’s positive view of the courtroom in the Downing Street premises. Sir Courtenay Ilbert remarked that, “[a]most all the

⁹ Hansard, House of Commons Debates, 4th Ser. LXXXIII, 14 May 1900, 103–4, quoted in Swinfen, above n 4, 1.

¹⁰ Haldane, above n 5, 143–4.

laws and customs of the world...come up for discussion in that dingy, little room'.¹¹ And in 1929 a journalist described the JCPC premises as 'a pleasant looking room the size of a largish dining room in a country house and having the same smell of leather, English gentlemen, and old, old dust'.¹²

The Council Chamber had in fact been built in 1828 on the site of a former brewery and pub, and had been designed by Sir John Soane, the architect of the Bank of England, whose house in Lincoln's Inn Fields is a museum which, to use M. Michelin's expression, is *vaut le voyage*. I well remember after I became a Law Lord in 2007, how we travelled to 9 Downing Street from the House of Lords. The five Law Lords due to sit in the JCPC solemnly gathered in the Parliamentary courtyard, and then climbed into a very old black Austin Princess Limousine to take us the enormous distance of 200 yards. We must have looked like a deputation of senior funeral directors on their way to present a petition to the Prime Minister. Given the traffic in Parliament Square, it would have taken a third of the time to walk, and occasionally we had to do just that, when the ancient Austin temporarily gave up the ghost.

3 The JCPC's new home

Things have been very different since October 2009, with the new home of the JCPC in the renovated Middlesex Guildhall on Parliament Square, facing the Parliamentary courtyard from which we used to set off to Downing Street. When the UK Supreme Court opened for business there in October 2009, the JCPC found its place in the same building, with the same chief executive. It is obviously sensible for the JCPC to be co-located with the UK Supreme Court, given that the two courts share, to a significant extent, the same Justices and administrative functions.

Instead of the rather forbidding entrance in Downing Street, visitors come into a welcoming environment. Courtroom 3 is dedicated to JCPC hearings, which is a very pleasant space, with beautifully moulded timber beams, and tall perpendicular style windows bearing armorial stained glass. Occasionally, when a JCPC hearing is expected to draw large numbers, an appeal is heard in Courtroom 1, the largest of the three courtrooms in the Middlesex Guildhall.

¹¹ C Ilbert, 'The Work and Prospect of the Society' (1909) 9 *Journal of the Society of Comparative Legislation* 14, 23, quoted in G Rankin, 'The Judicial Committee of the Privy Council' (1939) 7 *CLJ* 2, 11.

¹² *Ibid.*

Such an appeal from the Isle of Man was heard there in 2010.¹³ Lord Haldane would be pleased to know that the doors are not dirty. And the courtroom staff are not gloomy-looking: well, at least when I happen to be present. As for ‘good Imperial company’, the mix of national visitors and international tourists who drop in on hearings might be enough to satisfy Lord Haldane.

4 A bit more history

Having dealt with the JCPC’s locational history, let me say a word about its jurisdictional history. From the time of the Norman Kings, the Privy Council was the cabinet through which the monarch governed England. Its jurisdiction to resolve legal disputes was based on the premise that ‘the King is the fountain of all justice throughout his dominions and exercises jurisdiction in his Council, which acts in an advisory capacity to the Crown.’¹⁴The JCPC had its origins in the procedure whereby a party aggrieved by a decision of the Courts of Jersey and Guernsey might petition the King in Council to exercise in his favour the sovereign’s royal prerogative as the fountain of justice.

With the founding of colonies in the 17th century, petitions began to be received from the West Indies asking for the King’s grace as a relief from the decisions of local courts. As a result, in 1681, by an Order in Council, certain members of the Privy Council were appointed to form a Standing Committee (the Plantation Committee) to deal with petitions from the plantations as well as hearing appeals from Jersey and Guernsey.

As the British Empire developed, so did the jurisdiction of the JCPC. In 1831 a petition for special leave to appeal from a decision of the East India Company came before the Privy Council. The petitioners were ‘certain hindoos of Calcutta complaining of a regulation of the Governor General of India in Council abolishing the practice of Suttee’. The petition was dismissed.

In 1833, Parliament enacted the Judicial Committee Act, which created the JCPC as a formal statutory body, and provided that all appeals which had previously been brought before His Majesty in Council would now be referred by His Majesty to the JCPC. Although the powers of the Committee were limited

¹³ *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

¹⁴ Safford and Wheeler, above n 8, 699-707 and for those with more curiosity than discrimination, see N Bentwich, *The Practice of the Privy Council in Judicial Matters in Appeals From Courts of Civil, Criminal, and Admiralty Jurisdiction and in Appeals From Ecclesiastical and Prize Courts, With the Statutes, with the statutes rules and forms of procedure (founded upon “Safford and Wheeler’s Practice of the Privy Council in Judicial Matters”)* (1912).

to making a report or recommendations to His Majesty in Council, Viscount Sankey said that ‘according to constitutional convention it was unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee who are thus in truth an appellate court of law’.¹⁵

5 Past imperialism and current internationalism

Unsurprisingly the JCPC’s past cases reflect the prevailing cultural and political concerns and values of the time, which were very different from current ones. A good example may be found in the *Case of the Army of the Deccan*.¹⁶ In 1817-18, British forces took part in the Pindaree and Mahratta war, after which, a dispute arose as to the proper distribution of valuable booty which had been captured. At the time, ‘[n]o proposition of law [was] more notorious than that all booty and prize belongs to the Crown, except in those specific cases in which, by some specific statutory enactment, some particular right has been vested in some particular description of captors.’¹⁷ There was no statute regulating the distribution of the booty from the Deccan, and it therefore rested with the King to decide on the distribution of the booty by virtue of his prerogative.

The Lords of the Treasury, as advisers to the Crown in matters of revenue and property, appointed trustees to ascertain and collect the booty and to prepare a scheme, which they did. However, some officers thought they had been short changed and presented memorials to the Privy Council appealing against the distribution scheme. Ultimately, the Committee to the King in Council (as the JCPC was then called) ducked the issue, reporting to the King (at great length) that it would be advisable to refer the memorials back to the Lords of the Treasury, which was the appropriate body to determine the dispute.¹⁸

That such disputes came before the JCPC might explain why the institution in the 19th and early 20th centuries had more than a whiff of cultural imperialism about it. In his address, Viscount Haldane described an apocryphal story of the JCPC,¹⁹ said to have been a favourite of 19th and early 20th century after-dinner speakers addressing legal gatherings. It went something like this:

¹⁵ *British Coal Corporation v King* [1935] AC 500, 511; cited in *Seaga v Harper (No 2)* [2009] UKPC 26.

¹⁶ [1833] II Knapp 103.

¹⁷ *Ibid*, 141.

¹⁸ *Ibid*, 160.

¹⁹ Haldane, above n 5, 153.

When crossing India's Rajputana plateau, a nineteenth-century traveller noticed a group of villagers offering sacrifice to a far-off god, who had restored to them certain lands which had been seized by a predatory rajah. Inquiries about the deity they were worshipping drew the response: 'We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council.'²⁰

Such tones of moral paternalism and cultural superiority have no place in the JCPC of the 21st century (if ever they did). The JCPC sits not as a ghost of the colonial past, but as the highest appellate court in the jurisdiction from which the appeal in question is being brought. This is well illustrated by an initiative of the recently retired Deputy President of the UK Supreme Court, Lord Hope.

In 2008, the JCPC visited Mauritius for the first time—sitting in London has always been merely for practical convenience.²¹ When inspecting the courtroom, Lord Hope noticed a large Union Jack behind the judges' table. He directed its removal and replacement with the Flag of Mauritius, and the Mauritian State's Coat of Arms, which was duly done.

Following this, it was decided to have the flag of the relevant jurisdiction on the flagpole in the relevant courtroom, visible for all to see during JCPC hearings. So, when we hear an appeal from the Isle of Man, we see the evocative and unmistakable three armoured legs with golden spurs making up the ancient triskelion in the centre of the bright red flag.

This is important, because it reminds the judges that they are sitting as the highest appellate court of the jurisdiction to which that flag belongs, applying the laws of that jurisdiction. It sends the same message to the parties and their lawyers, who have often had a long journey to get to London. It is not unknown to see counsel having their picture taken alongside the flag before hearings start. Lady Hale, the new Deputy President of the Supreme Court, reminded me recently of a case we heard concerning alleged professional misconduct of a Jamaican attorney.²² Counsel noticed the Jamaican flag in the courtroom, and said that, while he was nervous to be appearing in London, the Jamaican flag reminded him that he was at home in the JCPC, and ought to feel so as well.

²⁰ P A Howell, *The Judicial Committee of the Privy Council 1833-1876* (1979), 1.

²¹ *Ibralebbe v The Queen* [1964] AC 900, 922.

²² *The General Legal Council v Haughton-Cardenas* [2009] UKPC 20.

The notion that the JCPC is applying the law of the state in question is not new. Eighty years ago, in *British Coal Corporation v King*,²³ Viscount Sankey said, quoting the Report of the 1926 Imperial Conference, that it was “it was no part of the policy of His Majesty’s Government in Great Britain that questions affecting judicial appeals...should be delivered otherwise than in accordance with the wishes of the part of the Empire primarily affected.”²⁴

On occasion, a judge from outside the UK will sit. Earlier this year, the Chief Justice of New Zealand, Dame Sian Elias, sat on what will probably have been the last appeal from New Zealand,²⁵ as well as on another appeal. She has a special place in the history of the JCPC, as she was the first female judge to sit in it in 2001—which is before the first female judge, Lady Hale, sat in the House of Lords in 2004.

The JCPC’s international quality was expressed in 1923 in a case concerned with the newly created Irish Free State:²⁶

The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body [...] I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law.

Overall, the legal influence of the JCPC was well described last year by Michael Kirby, a former Justice of the High Court of Australia, in these terms:²⁷

All of us were originally linked through the imperial court of the British Empire, the [JCPC,] a court of distinguished (mostly) English judges. They offered a little of their time to resolve legal problems in the far-away dominions and colonies. Their integrity, intelligence and efficiency set a very high standard for the performance of judicial duties by judges far from London. Sometimes, their

²³ Above, n 15.

²⁴ *Ibid*, 523.

²⁵ *Lundy v R* [2013] UKPC 28.

²⁶ *Alexander E Hall & Co v Mackenna* [1923] IR 402, 403–404 (Lord Haldane).

²⁷ M Kirby, Address to the Justices of the Supreme Court of Nigeria, 12 June 2012, 8 <<http://www.michaelkirby.com.au/images/stories/speeches/2000s/2012/2608%20-%20Speech%20-%20Supreme%20Court%20of%20Nigeria.pdf>> [accessed 27 December 2013].

Lordships did not have a full appreciation of the local conditions that made it difficult for them to reflect all of the factors necessary to a lawful and just resolution of the cases. Some critics suggested that they were occasionally unduly protective of British commercial interests in the Empire. For all this, the role of the Privy Council was mainly benign and highly useful.

6 The role of the sovereign

Another aspect of the JCPC concerns the role of the sovereign. In his 1921 address, Viscount Haldane described how at the bench there was ‘always a chair left vacant, for a very highly constitutional reason—the Sovereign is supposed to come and sit there, and dispense justice to the whole Empire’, although he noted that he could ‘not say that [he] ever observed him do so.’²⁸ Nowadays, you will be unsurprised to hear, there is not merely no monarch present, but no vacant chair.

Yet it is clear that some regarded there to be a real possibility that the sovereign could refuse to implement a decision of the JCPC. In 1891, Lord Selborne, who was Lord Chancellor between 1872 and 1874, and again from 1880 to 1885, made clear that he did not regard the JCPC as a court, on the basis that ‘the Sovereign is the Judge, and the Councillors his advisers. The Appeal is to the Sovereign, not to his Council, or to the Committee.’²⁹

This view may well be correct in constitutional theory, but it is rather hypothetical in practice. In the *British Coal* case,³⁰ the JCPC said that ‘it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law.’³¹ And in *Ibralebbe v The Queen*³² the JCPC said that the effect of the 1833 Act was ‘that the connection between the [Privy Council and the JCPC] was in future no more than nominal.’³³ In 2003, the recently retired Lord Walker, delivering the judgment of the JCPC, said that the 1833 Act showed that Parliament ‘must be taken to have intended to confer on the Board [as the JCPC often has referred to itself] all the powers necessary for the proper exercise of

²⁸ Haldane, above n 5, 145.

²⁹ R Palmer, *Judicial Procedure in the Privy Council* (1891) 44.

³⁰ Above, n 15.

³¹ *Ibid*, 511.

³² [1964] AC 900.

³³ *Ibid*, 919.

its appellate jurisdiction'.³⁴ Thus, in a very recent British Virgin Islands case, we held that the JCPC had power to extend terms for relief from forfeiture in an order made by Her Majesty.³⁵

Nonetheless, as I have been reminded today by the President of the Law Society, the role of the monarch is of real importance to many of the jurisdictions, including this one, which the JCPC has the honour to serve. The fact that the JCPC advises, and that it is the monarch who formally makes the decision, is of constitutional and symbolic significance, not least because it emphasises that the ultimate decision is that of the head of the territory concerned, here the Lord of Man. Accordingly, for the majority of the territories which we serve, the JCPC's final rulings are advices, not formal decisions. In some appeals, however, namely from Dominica, Kiribati, Mauritius, and Trinidad and Tobago the JCPC makes the final orders on appeals without any reference to the sovereign, because those jurisdictions, which are all now republics, appeal directly to the JCPC, rather than to Her Majesty in Council.

The JCPC is still faced with the occasional jurisdictional question concerning the role of the sovereign. Last year, the Chief Justice of the Cayman Islands sought to refer two matters to the JCPC for advice pursuant to section 4 of the 1833 Act,³⁶ namely the extension of a judge's appointment in the Grand Court for the Cayman Islands, and the publication of a judicial complaints procedure. A preliminary issue was whether it was open to the JCPC to decline to rule on issues raised in a petition referred to it by the monarch. We decided that it would be open to the JCPC to advise Her Majesty that it was inappropriate to provide substantive answers to issues she had referred to us. More particularly, we concluded that, if an issue could properly be determined in the courts of first instance in that jurisdiction, with an ultimate right (whether qualified or not) of appeal to the JCPC, it would be normally wrong for the JCPC to act as a court of first and last resort.³⁷

³⁴ *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize (Practice Note)* [2003] UKPC 63, para 33.

³⁵ *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 25, para 17.

³⁶ *Chief Justice of the Cayman Islands v The Governor and The Judicial and Legal Services Commission* [2012] UKPC 39

³⁷ *Ibid*, para 33.

7 Single and multiple judgments

Those familiar with recent decisions of the JCPC will not be unaccustomed to seeing the occasional dissent, some mild, and others more strident, in nature. This was not always possible. Until 1966, the opinions of the decisions of the JCPC were expressed in a single judgment. Where there had been dissent, that fact, occasionally with the names of the dissentients, was included in the judgment, but no dissenting judgments were given.

In 1938, Sir George Rankin gave a lecture in which he explained:

[I]f in any case the Board is not unanimous, the only advice tendered is that of the majority. His Majesty is not to be troubled with conflicting advice and it is contrary to the duty—and to the oath—of the Privy Councillors that what takes place at the Board should be disclosed, otherwise than in accordance with the practice [...] [which is] in marked contrast to the individual speeches in the House of Lords where even the judges who agree as to the result of an appeal may vary in their reasons, with the result that the Courts below may get uncertain guidance.³⁸

This may be seen as implying some sort of inferiority on the part of the courts of the countries served by the JCPC, as against the UK courts,³⁹ and it led to some pressure for dissenting judgments to be permitted. It was from Australia that real agitation emerged in relation to the single judgment issue, and the pressure eventually became too much. So, in 1966, the Judicial Committee (Dissenting Opinions) Order was issued, since which time the expressing of dissenting opinions has been permissible, and, where appropriate, is now commonplace.

The logic of this is there should also be the possibility of reasoned concurring judgments as well, and, albeit more recently, there have been cases where there have been such judgments. The earliest example is apparently a Mauritian case in 2008⁴⁰ in which Lord Scott and Lord Mance gave one judgment allowing an appeal, Lord Walker and Lord Rodger gave another, and I agreed with both.

³⁸ Rankin, above n 11, 18.

³⁹ Swinfen, above n 4, 22.

⁴⁰ *The Raphael Fishing Company Ltd v The State of Mauritius* [2008] UKPC 43.

8 The JCPC and the Isle of Man

I now turn to the relationship between the JCPC and the Isle of Man. In a 1716 case,⁴¹ the Privy Council asserted the right of the Crown to hear appeals from the courts of the Isle of Man. In approving of this decision, the great work on the Isle of Man and the JCPC by Safford and Wheeler states that it:

[P]oints to the conclusion that the Sovereign's right to hear appeals exercised by the Sovereign in Council is of feudal origin, and confirms the view that the appeal to the Sovereign owes its origin and may be traced back to the appeal to the Duke of Normandy.⁴²

The issues raised by appeals heard in the JCPC from the Isle of Man have been varied, ranging from the issue as to whether the Crown is entitled to the clay and sand in the customary estates of inheritance in the Isle of Man (it was held that it was not),⁴³ to whether the long standing rule that pre-nuptial agreements are contrary to public policy and thus not valid and binding in the contractual sense could be reversed by the JCPC (which it could not, because it was more appropriate that any such policy change should be made by legislation rather than by judicial development).⁴⁴

One case heard in the JCPC in 1872 must have caused quite a stir among the Isle's inhabitants.⁴⁵ A Bill had been introduced into the House of Keys, which, if passed, would have vested additional ecclesiastical patronage in the Bishop of Sodor and Man. At a public meeting, which the law report describes as having been 'of a somewhat excited character',⁴⁶ against the Bill, Alfred Laughton, a Manx barrister, spoke so effectively that he was retained as counsel to oppose the Bill. In addressing the House of Keys, he did not hold back, describing the Bishop 'under the cloak of anxiety for the public welfare and cure of souls, in reality [seeking] only increased patronage for himself, [and] attempt[ing] "to take by violence the property of his neighbour"'. Mr Laughton ended by saying that the Bishop 'came here in 1854, and has ..., by act after act, till the whole Island

⁴¹ *Christian v Coren* (1716) 1 P Williams 329.

⁴² Safford and Wheeler, above n 8, 257–258.

⁴³ *Her Majesty's Attorney-General for the Isle of Man v Thomas Mylchreest* [1879] HL vol. IV, 294.

⁴⁴ *MacLeod v MacLeod* [2008] UKPC 64.

⁴⁵ *Laughton v The Honourable and Right Reverend The Lord Bishop of Sodor and Man* (1872) LR 4 PC 495.

⁴⁶ *Ibid.*, 503.

has echoed and re-echoed with cries of 'shame!' brought a foul stain and scandal upon the Church'.⁴⁷

The House of Keys duly threw out the Bill. On Whit Thursday 1868, the Bishop read a charge to his Clergy and sent a copy of the charge to the editor of the *Manx Sun* newspaper. In it, he described Mr Laughton 'as employing arguments and language not ordinarily used by any man of high professional repute when pleading before a common jury or a Parish vestry; ... of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbour'.⁴⁸

Depending on your viewpoint, Mr Laughton couldn't be expected to stand by idly, or he was not prepared to get as good as he had given. He brought an action for libel against the Bishop. The Deemster directed the jury that, as the alleged libel was uttered on a privileged occasion, the claim could only succeed if there was express malice on the part of the Bishop. The jury must have concluded that there was such malice, and awarded Mr Laughton £400 damages. The Staff of Government Division set aside the verdict, on the ground that there was no evidence of express malice. The JCPC agreed, holding that, while some expressions used by the Bishop 'undoubtedly [went] beyond what was necessary for self-defence',⁴⁹ they did not amount to evidence of malice for a jury.

Appeals which have reached the JCPC from the Isle of Man in recent years often involve international commercial issues, demonstrating the increasing worldwide prominence of the Isle of Man in the field of business, and the value which is added to its legal system through retaining the JCPC as its highest appellate court. Let me give a few very brief examples over the past ten years to make that claim good.

The decision in the *Barlow Clowes* case⁵⁰ importantly put the common law back on track on the important issue of dishonesty which an earlier decision of the House of Lords had thrown into confusion. In the *Cambridge Gas* case,⁵¹ the JCPC held that rules of private international law concerning the recognition and enforcement of foreign judgments did not apply to the US bankruptcy proceedings, and that the underlying common law principle that fairness as between creditors required bankruptcy proceedings to have

⁴⁷ *Ibid*, 503–504.

⁴⁸ *Ibid*, 498.

⁴⁹ *Ibid*, 508.

⁵⁰ *Barlow Clowes International and others v Eurotrust International* [2005] UKPC 37.

⁵¹ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26.

universal application, meant that the court would recognise the person who was empowered under the foreign bankruptcy law to act on behalf of the insolvent company. This case has subsequently been doubted by the Supreme Court.⁵² *Pattni v Ali*⁵³ is an important decision on the effect of submitting to the jurisdiction of a particular court (the Kenyan courts in that case) in the context of an international commercial contract. *Altimo Holdings v Kyrgyz Mobil Tel Ltd*⁵⁴ represents something of a landmark decision on the issue of when and whether a party can establish that it should be entitled to have its case heard in an otherwise inappropriate court on the ground that the more natural court would not give it a fair hearing. A Manx company engaged in litigation with a Kyrgyz company and Russian companies submitted that it would not be able to obtain justice from the courts of Kyrgyzstan, and that the Manx court should therefore exercise its discretion in favour of service out. The Manx court obliged, and when the case came before the JCPC, it agreed with the decision.

9 Conclusion

In his 1923 address, Viscount Haldane said that ‘the real work of the [JCPC] is that of assisting in holding the Empire together ... [I]t is a disappearing body, but ... it will be a long time before it will disappear altogether.’⁵⁵ As, I hope, I have demonstrated, the work of the modern JCPC has nothing to do with any imperial aim. It is an appellate court which serves to support and develop the rule of law. While the JCPC’s reach is far less than it was at the height of the Empire, in many ways, it has strengthened itself over the past century, through modernising its functions, so that today it is a fully-fledged appellate court, with a unique international character. In that respect, whilst some of the functions of the JCPC have disappeared, others have taken their place.

We try also to be forward looking, and to make it clear by actions as well as words that we are genuinely anxious to support the rule of law and the role of the courts in the jurisdictions which we serve. In a valuable talk given to a conference on the JCPC arranged by University College London last year, the First Deemster identified six improvements which he would like to see.

⁵² *Rubin v Eurofinance SA* [2012] UKSC 46.

⁵³ [2006] UKPC 51.

⁵⁴ *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*, above n 13.

⁵⁵ Haldane, above n 5, 154.

First, the recruitment of more senior judges from countries with the JCPC as their court of final appeal. This is obviously highly desirable, and has always occurred. Sir Shadi Lal, after serving as Chief Justice of Lahore for fourteen years, was a JCPC member between 1934 and 1938, and his portrait hangs outside Courtroom 3. And, as already mentioned in relation to Dame Sian Elias, this still happens. But to sit on the JCPC, a judge must be a Privy Counsellor. Through our Chief Executive, Jenny Rowe, we are seeing what can be done.

Secondly, Deemster Doyle suggested reducing the number of judges from five to three in smaller cases to deal with the workload. That solution appeals to me, but many of the judges we have consulted feel that an appeal from three judges should be considered by five judges. The third suggestion was more sittings of the JCPC in the jurisdiction from which the appeal originates. Sitting in the relevant jurisdiction is a very attractive idea and we would be happy, indeed keen, to do this. The JCPC has sat more than once in The Bahamas and in Mauritius. I would be very happy to arrange a sitting in the Isle of Man, if the money and logistics permit.

Deemster Doyle's fourth suggestion was more visits by the members of the JCPC to those jurisdictions. Visits do occur, as today shows, and I agree that they are desirable, but Supreme Court Justices cannot spend too much time away from work. The fifth suggestion was for there to be live internet coverage of all proceedings before the JCPC. This already occurs in some cases, but at the moment we only cover one hearing at any one time. Some JCPC hearings are covered live, but the UK Supreme Court inevitably has the lion's share of the coverage. However, a JCPC judgment of general significance should be formally handed down, and such a handing down is broadcast. Finally, there is the suggestion of media summaries of JCPC decisions. We now do this for any JCPC appeals of significance. I question the value of media summaries for small appeals which raise no point of general principle.

I am of course open to any other suggestions for improvement, particularly from the judiciary of the jurisdictions which we serve. And I hope the next time you happen to be in London, you visit the JCPC to see it in action for yourself, without having the ordeal of entering through that old very dirty door inscribed 'Judicial Office'.

INSTITUTIONAL JUDICIAL INDEPENDENCE AND THE PRIVY COUNCIL

Daniel Clarry*

1 Introduction

At the outset, I wish to acknowledge Lord Neuberger's valuable contribution in the early pages of this Review.¹ Insights from the Bench are incredibly useful for the collective learning of all those who are fascinated by the functioning of the highest appellate courts, especially one as complex as the Judicial Committee of the Privy Council ('the Committee' and 'the JCPC', interchangeably). Such insights give a unique look into what Roscoe Pound, in the *American Law Review* in 1910, described as law in action, not law in books.² Thus, in Pound's words:

[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.³

This is especially true of the Committee, the inner-machinations of which were, at one time, largely unknown. In 1921, Viscount Haldane remarked,

You cannot learn much about [the JCPC] from documents. I read books about the Privy Council which are founded upon the study of

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¹ Lord Neuberger, 'The Judicial Committee of the Privy Council in the 21st Century' (2014) 3(1) *CJICL* 30.

² R Pound, 'Law in Books and Law in Action' (1910) 44 *American LR* 12.

³ *Ibid*, 15.

the documents, but you cannot learn it that way. Its constitution is mainly unwritten, and its conventions are unwritten; so that, unless you have lived in it and in the atmosphere, you do not know what happens there.⁴

The sentiment expressed in Viscount Haldane's remark is less apt now than it was in 1921, as the JCPC continues to emerge as a fully-functional court, with all the publicity and transparency expected of an independent judicial institution in modernity. It is that evolutionary process of realising institutional judicial independence that is the subject of this article. 'Institutional judicial independence' is concerned with the detachment of an institution that performs a judicial function from other branches of government—that is, the executive and the legislature in a British constitutional framework—and the organs of State, including the Head of State in a constitutional monarchy, and advisory bodies associated with that office. Whereas, 'personal judicial independence' concentrates on the independence and impartiality of the individual judges that hold offices in particular judicial institutions. Both institutional and personal judicial independence are motivated by similar public policy concerns in ensuring the integrity of judicial decision-making free from external influences. However, institutional judicial independence is especially important as it is concerned with the autonomous functioning of judicial bodies at a higher, institutional level, thus providing the framework for personal judicial independence, in furtherance of the modern British conception of the separation of powers and the rule of law.⁵

The first substantive section of this article sketches out the sources of the Committee's jurisdiction and then traces the diminution of the JCPC over the last century (accelerating over the past 60 years). In the second substantive section, the article considers the adaptation of the Committee to respond to that diminution, especially the willingness shown toward allowing the services of the JCPC to be utilised by judicial branches of government in smaller jurisdictions, with arguably less advanced judiciaries. In this respect, the Committee assists various countries on the path to realising their own institutional judicial independence

⁴ R Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1922) 1 *Cambridge LJ* 143, 146—this article was given as a speech to the Cambridge University Law Society on 18 November 1921.

⁵ L Neudorf, 'The Supreme Court and the New Judicial Independence' (2012) 1(2) *CJICL* 43; Lord Phillips, 'Judicial Independence', speech delivered at the UCL Constitution Unit's Judicial Independence Research Project launch event, 8 February 2011 <<http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>> [accessed 4 April 2014].

apart from the British Crown. In the third substantive section, the article goes on to analyse the Committee itself as being an institution that is on the path to institutional judicial independence. Although the JCPC continues to reveal its historical proximity to the British Crown in its advising Her Majesty, Queen Elizabeth II, on the appropriate orders to be made in Council in matters brought before the JCPC as a matter of course, the Committee nevertheless continues to emerge as a functionally distinct judicial institution. Various procedural and substantive aspects of the JCPC, including the Committee's ability to hear appeals from intermediate appellate courts, the deliberations of the members of the Committee that are reflected in its judgments, and certain institutional features of the JCPC, buttress the conclusion that, despite certain stylistic anachronisms having been maintained without formal reform, the JCPC functions as an independent judicial institution, on similar terms to the Supreme Court of the United Kingdom ('UKSC'), albeit without extensive constitutional reform.⁶ The UKSC is a good comparator for this study on judicial independence and the JCPC, given that both institutions have been housed in the same premises at Middlesex Guildhall since the beginning of the 2009/10 judicial year and mostly staffed by the same judges.

2 The Diminution of the JCPC

At the turn of the 20th century, Safford and Wheeler remarked that 'the peoples to whom the appeal to the Sovereign in Council is a birthright, number one-fourth of the entire population of the world.'⁷ In 1912, Bentwich observed that '[the JCPC's] jurisdiction is more extensive, whether measured by area, population, variety of nations, creeds, languages, laws or customs than that hitherto enjoyed by any court known to civilisation.'⁸ Lord Neuberger also refers to the enormity of the Committee's jurisdictional reach in the early 20th century and those remarks are again repeated on the JCPC's website.⁹ While there remains some truth to those statements in a geographical sense, the evolution of the Committee's jurisdiction into the 21st century tells a different story in terms of the international scope of the JCPC's jurisdiction relative to the world's population. In order to place the size of the Committee's jurisdiction in a meaningful context, it is necessary to categorize, in broad terms, the sources of jurisdiction of the

⁶ See generally Constitutional Reform Act 2005 (UK, c. 4) and especially Part 3 of that Act.

⁷ F Safford & G Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), vii.

⁸ N Bentwich, *The Practice of the Privy Council in Judicial Matters* (1912), viii.

⁹ Neuberger, above n 1, 32; 'Jurisdiction', *JCPC*, <<http://jcpc.uk/about/jurisdiction.html>> [accessed 4 April 2014].

JCPC, which can be split into six parts (ranked in ascending order having regard to the volume of judgments since the JCPC was relocated to Middlesex Guildhall in Michaelmas term 2009—the statistical data is annexed in tabular format).

First, civil appeals may be heard by special agreement between a Head of State—notably, His Majesty the Sultan of Brunei and Yang Di-Pertuan Negara Brunei Darussalam (‘the Sultan of Brunei’) and Her Majesty, Queen Elizabeth II, with a subsequent referral being made to the Committee for the hearing of such appeals and a direct report being given by the Board to the Sultan of Brunei, rather than to Her Majesty.¹⁰ There have been no such appeals from the Court of Appeal of Brunei in the past four and a half years—indeed, the last case from Brunei Darussalam culminated with a pair of judgments in Michaelmas term 2007 (i.e. the 2007/08 judicial year), in which the Board reported to the Sultan of Brunei that the appeal of His Royal Highness Prince Jefri Bolkiah and his family against the decision of the Court of Appeal of Brunei Darussalam on both the procedural and substantive issues should be dismissed with costs.¹¹

Secondly, there are appeals, arising from within the UK, founded on miscellaneous statutory enactments that confer jurisdiction on the Committee, notably from professional bodies responsible for providing regulatory oversight of doctors, dentists and vets.¹² In recent years, this jurisdiction has rarely been enlivened. Indeed, since the beginning of the 2009 judicial year, only one appeal has been heard from a professional body founded on this jurisdiction.¹³ In that case, Mr Holmes appealed to Her Majesty in Council against a direction given by the disciplinary committee of the Council of the Royal College of Veterinary Surgeons that his name be removed from the register of veterinary surgeons. The Board humbly advised Her Majesty that the appeal ought to be dismissed.¹⁴ The JCPC’s jurisdiction to determine the professional status of such individuals, and miscellaneous sources of domestic jurisdiction, is a historical anomaly.

Thirdly, there is a statutory jurisdiction for Her Majesty to refer specific matters to the Committee for ‘consideration and report’.¹⁵ Again, this has been

¹⁰ Practice Direction 1 (JCPC) s 2.3.

¹¹ *Bolkiah v Brunei Darussalam* [2007] UKPC 62 (on the procedural issue) per Lord Bingham (with whom Lord Hope, Lord Scott, Lord Mance and Lord Neuberger agreed); *Bolkiah v Brunei Darussalam* [2007] UKPC 63 (on the substantive issue) per Lord Scott (with whom Lord Bingham, Lord Hope and Lord Neuberger agreed (Lord Mance ‘fully concur[red] with the result, as well as with almost the entirety of the reasoning’ but wrote a separate opinion).

¹² Practice Direction 1 (JCPC) ss 2.6 and 2.7.

¹³ *Holmes v Royal College of Veterinary Surgeons* [2011] UKPC 48.

¹⁴ *Ibid*, per Lord Wilson (with whom Lady Hale and Lord Kerr agreed).

¹⁵ Judicial Committee Act 1833 (UK) s 4.

largely dormant in recent years, with only two references being heard by the JCPC since the beginning of the 2009/10 judicial year. In both of those references, which occurred in the 2009/10 judicial year, the Committee was asked to advise whether certain judges—that is, the Chief Justice of Gibraltar and a Judge of the Grand Court of the Cayman Islands—should be removed from office for misbehaviour. In both cases, the Committee advised Her Majesty that the relevant persons should be removed from their judicial offices.¹⁶

Fourthly, there are appeals arising from the three remaining British Crown Dependencies—Guernsey, Jersey and the Isle of Man.¹⁷ Again, the appellate work arising from the Dependencies is relatively small with only nine appeals coming from those jurisdictions since the 2009/10 judicial year, accounting for 5% of the overall case-load of the JCPC in the past four judicial years.¹⁸

Fifthly, there are appeals from 10 British Overseas and two Sovereign Base Territories.¹⁹ Although no appeals have originated from the Sovereign Bases since the 2009/10 judicial year, a moderate portion of the Committee's workload came from British Overseas Territories (i.e. 19%). Only one judgment was delivered in an appeal from Anguilla in the past four years, but a fairly even distribution of judgments were delivered in appeals from Bermuda (eight), the British Virgin Islands (six), the Cayman Islands (seven), Gibraltar (five) and Turks & Caicos (five).

Sixthly, there are appeals from 14 jurisdictions within the Commonwealth that have retained the JCPC as their final court of appeal, some of which are considered to be independent states or entities proximate to states (e.g. the Cook Islands and Niue).²⁰ Appeals from these jurisdictions make up the bulk of the

¹⁶ *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43 (Lord Phillips, Lord Brown, Lord Judge and Lord Clarke (majority), with Lord Hope, Lord Rodger and Lady Hale (dissenting)); *Report of The Tribunal to The Governor of The Cayman Islands-Madam Justice Levers (Judge of The Grand Court of The Cayman Islands)* [2010] UKPC 24 per Lord Philips (for the Board of the JCPC).

¹⁷ Practice Direction 1 (JCPC) ss 2.1 and 2.2.

¹⁸ Out of 173 judgments that have been given by the JCPC since Michaelmas term 2009, three judgments have been delivered in Guernsey appeals, two judgments in Manx appeals and four judgments in Jersey appeals.

¹⁹ Practice Direction 1 (JCPC) ss 2.1 and 2.2 (The Overseas Territories are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn Islands, St. Helena (and dependencies), and Turks & Caicos Islands. The two sovereign bases in Cyprus are Akrotiri and Dhekelia); British Overseas Territories Act (2002 c. 8)

²⁰ Practice Direction 1 JCPC s 2.1 and 2.2 (the Commonwealth jurisdictions are Antigua & Barbuda; the Bahamas; the British Indian Ocean Territory; the Cook Islands & Niue; Dominica; Grenada; Jamaica; Kiribati; Mauritius; St. Kitts & Nevis; St. Lucia; St. Vincent & The Grenadines; Trinidad & Tobago; and Tuvalu). On the creation of states in international law, see J Crawford, *Creation of*

work of the Committee in terms of overall judgments delivered, with 75% of decisions being delivered in appeals arising out of these jurisdictions. Interestingly, since the 2009/10 judicial year, more than half of the Commonwealth appeals, and 40% of all judgments, have originated from two independent states within the Commonwealth—Mauritius and Trinidad & Tobago. Notably, as well, Belize, from which 6% of the Committee’s judgments originated in the three judicial years from 2009/10, cut ties with the JCPC in the 2010/11 judicial year, with the final appeal from Belize being heard by the Committee in July 2011 and the Caribbean Court of Justice becoming its final court of appeal thereafter.

Taken as a whole, the JCPC now acts as the highest appellate court for just 0.1% of the world’s population.²¹ The international scope of the Committee’s jurisdiction has, therefore, receded considerably over the past century from the high water mark of the early 20th century when the JCPC was the highest appellate court for a quarter of the world’s population.²² A cluster of key Commonwealth jurisdictions left the JCPC’s hierarchy soon after the Second World War and, by the mid-1950s, just over half of the members of the Commonwealth of Nations continued to recognise the Committee as their final court of appeal.²³ There has been a continued decline, thereafter. That decline is tracked below by reference to five large Commonwealth jurisdictions.

First, in 1949, Canada ended appeals to the JCPC.²⁴ The departure of Canada and its provinces from the Committee was a laboured affair beginning in the late 19th century. Following the 1926 case of *Nadan v R*, in which the Committee reported that Canada could not unilaterally foreclose appeals to it due to the persistence of the Royal prerogative, the Statute of Westminster 1931 was enacted, enabling British dominions to abolish appeals to the JCPC.²⁵ Canada did not, however, amend its Supreme Court Act to close further appeals to the Committee until 1949. The Supreme Court Act 1985 (RSC) currently provides,

States in International Law (2nd edn, 2005), app 2.

²¹ According to the latest World Bank’s estimates of total population for 2012-2013, the collective population of the British Crown Dependencies, the British Overseas Territories and the British Commonwealth jurisdictions that have retained the JCPC as their highest appellate court is 7,024,835. The world’s population is 7,022,945,578: <<http://data.worldbank.org/indicator/SP.POP.TOTL/countries>>.

²² Safford & Wheeler, above n 7, and accompanying text.

²³ See E Campbell, ‘The Decline of the Jurisdiction of the Privy Council’ (1959) 33 *Australian LJ* 196, 196.

²⁴ Compare Criminal Procedure Amendment Act 1888 (RSC) s 1; *Cushing v Dupuy* (1880) 5 App Cas 409 (Quebec).

²⁵ *Nadan v The King* [1926] AC 482 (Alberta); Statute of Westminster 1931 (UK).

‘[t]he [Supreme] Court [of Canada] shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive.’²⁶

Secondly, in late 1949, India passed an enactment abolishing the jurisdiction of the JCPC, the Preamble of which declared that it was simply ‘expedient’ for appeals from India to the Committee to end and to confer a ‘corresponding jurisdiction’ on the Federal Court of India—that jurisdiction was subsequently transferred to the Supreme Court of India once that court was established.²⁷

Thirdly, in 1950, South Africa effected a fairly clean break away from the JCPC, with the passage of legislation that amended the relevant provision of the South Africa Act 1909 (RSA) to read in the plainest of terms: ‘There shall be no appeal to the King-in-Council—(a) from any judgment or order of the Appellate Division of the Supreme Court of South Africa given on an appeal from any court in the Union or the territory of South-West Africa; or (b) from any judgment or order of any court in the Union or the said territory, other than such Appellate Division.’²⁸ Like elsewhere, calls for the abolition of the JCPC in South Africa were largely founded on political, rather than jurisprudential, grounds and tied to the realisation of national independence for South Africa.²⁹

Fourthly, in 1986, Australia effectively abolished appeals to the JCPC.³⁰ Australia took a somewhat different approach to that taken elsewhere in not choosing to abolish appeals to the Committee entirely but reserving a very narrow scope for appeals subject to certification by the High Court of Australia. As such, there is a ‘theoretical possibility’ that appeals could still be taken to Her Majesty in Council as to the limits *inter se* of the Constitutional powers of the Commonwealth of Australia and the constituent States, with the certification of

²⁶ Supreme Court Act 1985 (RSC) s 52.

²⁷ Abolition of Privy Council Jurisdiction Act 1949 (India) Preamble and s 2 (‘As from the appointed day [i.e. 10 October 1949], the jurisdiction of His Majesty in Council to entertain, and save as hereinafter provided to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court or tribunal (other than the Federal Court) within the territory of India, including appeals and petitions in respect of criminal matters, whether such jurisdiction is exercisable by virtue of His Majesty’s prerogative or otherwise, shall cease.’).

²⁸ Privy Council Appeals Act 1950 (RSA) s 1, amending the South Africa Act 1909 (RSA), s 106.

²⁹ D Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986* (1987), 12; B Ibhawoh, *Imperial Justice: Africans in Empire’s Court* (2013), 160.

³⁰ Australia Act 1986 (Cth) s 11. Previous enactments had restricted the Committee’s appellate jurisdiction: Privy Council (Appeals from the High Court) Act 1975 (Cth) s 3; Privy Council (Limitation of Appeals) Act 1968 (Cth) ss 3 and 4. For early considerations of, and drafting for, the abolition of appeals to the JCPC in framing the Australian Constitution at the turn of the 20th century, see J Symon, ‘Australia and the Privy Council’ (1922) *J Comp Leg & Int L* 137.

the High Court of Australia. However, a plurality of the High Court of Australia has since held that the limited purpose of that provision has ‘long since been spent’ and ‘[t]he march of events and the legislative changes that have been effected—to say nothing of national sentiment—have made the jurisdiction obsolete.’³¹

Fifthly, in 2003, New Zealand established its own Supreme Court ‘as the court of final appeal for New Zealand.’³² But appeals are still being heard, with judgment being given in one appeal from New Zealand on 7 October 2013.³³ On 30 January 2014, the Committee granted permission to appeal in another high-profile case from New Zealand to be heard later this year in London.³⁴ Such delays in disposing of final appeals to the JCPC are not uncommon—judgment in the last appeal from Canada, as in *Lundy v The Queen*,³⁵ was given some 10 years after Canada finally abolished appeals to the Committee in 1949.³⁶

The abolition of the JCPC’s jurisdiction in those five major Commonwealth jurisdictions demonstrates that the Committee no longer regulates ‘the course of justice all over the Empire outside the United Kingdom,’³⁷ even though it still acts as a final court of appeal in many jurisdictions that are geographically dispersed. Thus, it can no longer be said that ‘the real work of the [JCPC] is that of assisting in holding the Empire together.’³⁸ That may well have been an early, subsidiary function of the JCPC, but the Committee’s role has changed over the last century with the focus shifting to smaller jurisdictions and the adaptation of the JCPC to decolonialization. Viscount Haldane’s remarks over 93 years ago have proven apt at predicting the evolution of the Committee into the 21st century:

[The JCPC] is a disappearing body, but it will be a long time before it will disappear altogether. By degrees, as each dominion develops its own Constitution, as India, Canada, and Australia (which has in a very large measure completed the development of its Constitution),

³¹ *Kirimani v Captain Cook Cruises Pty Ltd (No. 2)* (1985) 159 CLR 461, 465, para 5 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; Commonwealth of Australia Constitution Act 1901 (Cth), s 74. Cf *Attorney-General v Finch (No.2)* (1984) 58 ALJR 378, 380, para 9 per Gibbs CJ, Mason, Wilson and Dawson JJ.

³² Supreme Court Act 2003 (NZ) s 6.

³³ *Lundy v The Queen* [2013] UKPC 28.

³⁴ See ‘*Pora v The Queen*’, JCPC, 30 January 2014, <<http://www.jcpc.uk/news/pora-v-the-queen-permission-to-appeal.html>> [accessed 4 April 2014].

³⁵ *Lundy v The Queen* [2013] UKPC 28.

³⁶ See *Ponoka-Calmar Oils Ltd v Earl F. Wakefield Co* [1960] AC 18 (PC).

³⁷ Haldane, above n 4, 145.

³⁸ *Ibid*, 154.

there will be less and less work for the Judicial Committee to do for these dominions. But there is always growing up a great deal of fresh work from the Crown Colonies, which are only in course of development. There will come a time when the Judicial Committee will become effete, but at present we have constant indications that we are a useful body in vast regions where it is not always easy to get a common point of view. Our function is not to claim any fresh rights to interfere, but to act as statesmen should, being willing to help if called in, but not pressing assistance where assistance is not desired.³⁹

Lord Neuberger echoes these sentiments in the earlier pages of this Review, where his Lordship describes the decrease in the international scope of the Committee's jurisdiction as 'inevitable'.⁴⁰ Lord Neuberger also describes the role played by the JCPC in the 21st century by reference to 'small' states that cannot justify having their own court of final appeal, whilst also accepting that it is 'entirely a matter for a [particular] country', if they choose to establish their own court of final appeal, rather than make use of the Committee's services.⁴¹ In those remarks, there is a distinct continuity in terms of the role played by the JCPC over the past century and into the future—a continuation of the 'statesmanlike' qualities outlined by Viscount Haldane in 1922.

3 The Adaptation of the JCPC

The diminution of the JCPC over the past century is tied to the disintegration of the British Empire over the same period. But that does not fully explain the late departure of advanced jurisdictions, such as Australia and New Zealand, and the role played by the JCPC in the 21st century. Despite a spike in the diminution of the JCPC soon after the Second World War, there has been a gradual decline of the Committee's jurisdiction since that time as key Commonwealth jurisdictions parted ways with the Committee over a prolonged period. In turn, the JCPC has adapted to that diminution by being responsive to those jurisdictions that wish to retain its services. Although early departures from the JCPC were

³⁹ Ibid.

⁴⁰ Neuberger, above n 1, 31. See, too, W Normand, 'The Judicial Committee of the Privy Council' (1950) 3 *Current Legal Problems* 1, 1-13.

⁴¹ Neuberger, above n 1, 31-32.

more politically motivated,⁴² later separations tend to arise when a jurisdiction reaches a certain level of sophistication and independence that judicial oversight by a body located in another country is no longer warranted. Even in those jurisdictions that remain part of the Commonwealth, it would be quite strange for the JCPC to remain the highest appellate court, given the development of distinct streams of jurisprudence in Australia, Canada and New Zealand.⁴³ This underscores the role of the JCPC in the 21st century in enabling developing jurisdictions to advance their own judiciaries until such time as they choose to strike out on their own. The national identity of each of those states is tied to the establishment of an independent and self-sufficient judiciary. This was highlighted during New Zealand's withdrawal from the JCPC's jurisdiction, in which the relevant statute abolishing appeals to the Committee provides:

The purpose of this Act is—

(a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—

(i) to recognise that New Zealand is an independent nation with its own history and traditions; and

(ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and

(iii) to improve access to justice; and

[...]

(c) to end appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts.⁴⁴

The establishment of a self-sufficient judiciary is a natural stage in the evolution of an independent state. So, too, is the establishment of a court of final appeal that is staffed by judges appointed from the citizenry of the particular state who will invariably bring an understanding of the culture, history and traditions of that country. Access to justice is also improved where the court of final appeal

⁴² See above n 29 and accompanying text.

⁴³ See Sir D Baragwanath, 'Later Privy Council and a Distinctive New Zealand Jurisprudence: Curb or Spur?' (2012) 43 *Victoria U Wellington LR* 147.

⁴⁴ Supreme Court Act 2003 (NZ) s 3(1).

is not located on the other side of the world and parties are not required to travel to London in order to obtain the ultimate resolution of their matter. As the development of an independent judiciary is tied to the realisation of an independent state, the JCPC's jurisdiction will continue to decline, although there is scope for the Committee to continue to adapt to the changing landscape.⁴⁵

The seeds for the departure of key Commonwealth countries from the Committee's jurisdiction were sown before the Statue of Westminster 1931, as leave to appeal came to be granted less to larger jurisdictions with well-advanced judiciaries. On 18 November 1921, for example, the JCPC heard four applications for leave to appeal, of which three applications from the Dominions of Canada and Newfoundland were dismissed and the fourth application from the Crown Colony of the Gold Coast was granted.⁴⁶ Later that day, the presiding Privy Councillor stated extra-judicially that a material factor in refusing leave to appeal in the first three applications was that '[Canada and Newfoundland] had got their own fully organized Courts, and their own sense of development, and their own feeling that it is their right to dispose of their own litigation', whereas leave to appeal was granted from the Gold Coast 'where the tribunal is not developed in the same way, and the Privy Council sits as the guardian Justice to take care to see that justice is done.'⁴⁷ The Committee was not a court of final appeal that purported to exercise general jurisdiction over intermediate appellate courts, but one that concentrated on assisting in the development of law in smaller jurisdictions with less-advanced judicial institutions. That supportive role of the JCPC has undergone further development into the 21st century, as the JCPC has continued to adapt to decolonization. Thus, the Committee continues to offer sophisticated judicial services to less developed jurisdictions that do not yet have the resources to house their own court of final appeal or, for some other reason, see advantage in retaining the Committee as their highest appellate court.

Historically, the JCPC's supportive role was seen in a number of jurisdictions, where the Committee remained the court of final appeal after a dominion had attained independence from the British Crown. For example, in 1947, both

⁴⁵ Compare Symon, above n 30, 141-42 (draft provisions in the Australian Constitution abolishing appeals to the JCPC were founded on the argument that 'if Australia was fit to enact her own laws she was fit to interpret them', which was reinforced by 'raising aloft the banner of nationhood, contending that the first duty of a nation was to administer final justice to its people...'. Symon went on to argue against that premise in order to explain the removal of those draft provisions from the Australian Constitution and justify the continuation of appeals to the JCPC).

⁴⁶ The appeal was ultimately dismissed: *Ex-Omanhene Ofori Kuma II v Acting Omanhene Yao Boaf IV* [1922] UKPC 69 (Gold Coast Colony).

⁴⁷ Haldane, above n 4, 153.

Ceylon and India had gained their independence, but the Committee retained its position as the highest appellate court in those jurisdictions until their own courts of final appeal were created.⁴⁸ In more recent times, that supportive role is also evident from the Committee continuing to act as the court of final appeal in a number of independent republics throughout the Commonwealth. The supportive role of the JCPC is also seen in its consideration of appeals from the Court of Appeal of Brunei Darussalam pursuant to the procedure outline above.⁴⁹ It is unique that the services of a judicial body, especially a court of final appeal, can be outsourced by agreement between two Heads of State. But again this reveals the supportive role of the Committee in responding to the needs of jurisdictions that wish to outsource the resolution of certain disputes to a judicial body beyond their physical borders. The *ad hoc* arrangement of referring certain matters to the JCPC maintains a tie between Brunei and the United Kingdom, which is diplomatically and strategically important despite the low level of matters actually being determined. As noted previously, the Committee does not often hear appeals from the Court of Appeal of Brunei Darussalam, with judgments in the last such appeal being delivered in Michaelmas term 2007. However, the value of such jurisprudence may be profound. In *Royal Brunei Airlines v Tan*, the Committee reported its advice directly to the Sultan of Brunei in an important case concerning the degree of knowledge required to impose personal liability for dishonest assistance in breach of a fiduciary obligation, which has proven to be a significant development in England and elsewhere.⁵⁰

The supportive role of the Committee is also observable when a particular state leaves the JCPC's hierarchy. In addition to the New Zealand example previously given,⁵¹ that role was neatly observed when the final appeal from Belize was heard by the Committee in July 2011.⁵² Since Belize gained independence in 1981, the JCPC had continued to serve as its court of final appeal for some 30 years. In a letter addressed to the JCPC dated 5 July 2011, the President of the Bar Association of Belize, Jacqueline Marshalleck, thanked the Committee for the 'immense collection of judgments handed down by the [JCPC]', which established 'the foundation for the development of the jurisprudence of Belize and which continue to

⁴⁸ *Ibralebbe v The Queen* [1964] AC 900 (Ceylon); see also n 27 and accompanying text (India).

⁴⁹ See above n 10 and accompanying text.

⁵⁰ *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 393 per Lord Nicholls (with whom Lord Goff, Lord Ackner, Lord Steyn and Sir John May agreed). See below n 106 and accompanying text.

⁵¹ See above n 46 and accompanying text.

⁵² *Belize Bank Ltd v A-G of Belize* [2011] UKPC 36.

guide its legal practitioners in their study of the law.⁵³ The JCPC's judgments were said to have 'greatly helped to equip our leaders and our people with the skills and knowledge required to build an independent nation rooted in the principles of law, order and good governance.'⁵⁴ Although the Committee's 'services' were noted to be 'no less valuable today than when Belize first obtained its independence in 1981', Ms Marshalleck said, 'the time has come for Belize to fully accept its status as an independent nation and to fulfill its treaty obligations to the Caribbean Court of Justice (CCJ), which will now serve as the final appellate court for Belize.'⁵⁵ Responsively, on 6 July 2011, at the beginning of the hearing of that final appeal, Lord Phillips thanked the President of the Bar Association of Belize and said, '[w]e appreciate the trust that has been placed in this tribunal [...] We entirely understand that the time has come to cut the link with this jurisdiction and we extend our warmest good wishes to Belize, and to all who will practise and administer the law of Belize in the years to come.'⁵⁶ That final appeal from the Court of Appeal of Belize, which involved matters that had been 'the subject of intense media and political interest',⁵⁷ was dismissed, although it proved a difficult case, producing the only dissenting opinion that year.⁵⁸

Finally, the supportive role of the JCPC is also seen in the comments made in Lord Neuberger's article in which he expresses the Committee's willingness to travel to international locations to hear appeals from those jurisdictions.⁵⁹ The importance of doing so is beyond a mere symbolic gesture for the jurisdictions concerned and reflects a high degree of respect that the Committee pays to the different legal cultures falling within its jurisdiction. There is an often told tale of a traveller, who had found a tribe sacrificing to an unknown god in a remote part of Northern India, and asked who the god was that tribe was offering its sacrifice. 'We don't know, except that he is a very powerful god, because he interfered on

⁵³ 'Last Cases from Belize', *JCPC*, 6 July 2011, <<http://jcpc.uk/news/last-case-from-belize.html>> [accessed 4 April 2014].

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Belize Bank Ltd v A-G of Belize* [2011] UKPC 36, [1] per Lord Kerr (with whom Sir Patrick Coghlin agreed).

⁵⁸ *Ibid.* Lord Brown dissented alone. Although not writing a substantive judgment, Lord Phillips nevertheless communicated his initial ambivalence, *ibid* para 61 ('I have found this a difficult case. Initially I was in sympathy with the judgment of Lord Brown, but I have been persuaded by the judgment of the majority that it would not be right to differ from the conclusion of Conteh CJ.')

⁵⁹ The Caribbean Court of Justice is an itinerant court that moves between various locations within the Caribbean.

our behalf against the Indian Government, and gave us back our land which the Government had taken,' said the tribal leader, 'and the only other thing we know is that the name of the god is the Judicial Committee of the Privy Council!'⁶⁰ Such a jingoistic tale retains little currency today in terms of the accessibility and supportive role of the JCPC and, as Lord Neuberger observes, the willingness of the Committee to travel to hear appeals. The Committee's 'have gavel, will travel' approach to the hearing of appeals internationally marks a move away from the concentration of power of the British Empire, whereby parties from all over the world—from Burma, Ceylon and India—once passed through that dirty little door inscribed 'Judicial Office' off Downing Street in London to appeal for (final) justice.⁶¹ Access to justice and mutual respect is furthered by the Committee's willingness to travel to hear appeals, which highlights the adaptive nature and supportive role of the JCPC in the 21st century and ought to be encouraged.

4 The Autonomy of the JCPC

The JCPC was established as a statutory body under the Judicial Committee Act 1833. Whilst the provisions of that Act purported to confer judicial power on the members of the Committee and plainly intended that the JCPC would function as a court in many respects, a number of features threw a shadow over whether the Committee was truly functioning as an independent judicial institution. It is a feature of an independent judiciary that the other branches of government do not interfere in framing or pronouncing judicial orders.⁶² However, when we consider the ordinary function of the Committee, at least as a matter of form, the giving of advice is not exceptional. It happens as a matter of course in every judgment or report delivered by the JCPC, where the appropriate orders in a given case are not pronounced *per se* in the judgment, but are mediated through a quasi-executive procedure by which the Board humbly advises Her Majesty as to the appropriate orders to be made in Council. The transliteration of judicial orders in this way challenges the notion of an independent judiciary.⁶³ Even

⁶⁰ N Hoyles, 'The Origin and Present Position of the Privy Council' (1903) 10 *Queen's Quarterly* 403; Haldane, above n 4, 153; C Pierson, *Canada and the Privy Council* (1960), 5; P Howell, *The Judicial Committee of the Privy Council 1833-1876* (1979), 1.

⁶¹ Haldane, above n 4, 143-144.

⁶² See Neudorf, above n 4, 29.

⁶³ *Stroud's Judicial Dictionary* (3rd ed, 1953); *Halsbury's Laws of England* (3rd ed, 1953), vol 7, 331, para 714 ('Orders in Council' are defined as 'an order of the monarch acting by and with the advice of the Privy Council' with no distinction drawn between an Order in Council of a legislative

though the JCPC's decision must be acted upon when judgment is delivered, the Committee does not order judgments to be entered in the ordinary way.⁶⁴ It is, therefore, a curious kind of judicial order that is not pronounced by the court, but later promulgated by the Queen in Council through a quasi-legislative procedure. For this reason, the JCPC's decisions are sometimes regarded not technically as 'judgments' and it was that technical feature which justified the non-publication of dissenting opinions for the better part of one century until 1966.⁶⁵

One is not, however, hard-pressed to find innumerable examples of how the JCPC continues to emerge as an independent court in the fullest possible sense in the 21st century.⁶⁶ The rules and practice directions of the Committee evidence the functioning of the JCPC in a distinctly court-like manner. Indeed, Practice Direction 1 of the JCPC provides: 'The Judicial Committee of the Privy Council is *the court of final appeal* for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.'⁶⁷ But this is nothing new in terms of how the members themselves perceive the JCPC. In *Alex Hull & Co v M'Kenna*, Lord Haldane spoke of the 'longstanding constitutional

character and an Order in Council that is made after a report of the Committee upon the hearing of an appeal); J Law & E Martin, *A Dictionary of Law* (7th ed, 2009) ('Orders in Council' are defined as being '[g]overnment orders of a legislative character made by the Crown and members of the Privy Council either under statutory powers conferred on Her Majesty in Council or in exercise of the royal prerogative.') But see *Ibralebbe v The Queen* [1964] AC 900, 921 (Viscount Radcliffe stated in a Ceylon appeal on behalf of the Board of the Committee that '[t]heir Lordships take it to be clear... that the Order in Council, which gives effect to a Judicial Committee report, is a judicial order.').

⁶⁴ *Pitts v La Fontaine* (1880) 6 AC 482, 483 (Sir James Colville): 'when a decision of this Board has been reported to Her Majesty, and has been sanctioned and embodied in an Order of Council, it becomes the decree or order of the final Court of Appeal ... and ... it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.').; *In re Muir* (1839) 3 Moo PC 150. Compare Privy Council Act 1833 (UK) s 28.

⁶⁵ Law & Martin, above n 107 (in defining 'Judicial Committee of the Privy Council' it is said, '...The Committee's decisions are not technically judgments but merely advice to the Crown: they do not become final until incorporated into an Order in Council. For this reason also, until 1966 dissenting opinions were not disclosed...'. See Judicial Committee (Dissenting Opinions) Order (UK (SRO 13 of 1966, 4 March 1966)) s 3 ('Any member of the Judicial Committee of the Privy Council present at the hearing of any appeal, cause or matter who shall dissent from the opinion of the majority of the members present as to the nature of the report or recommendation to be made to Her Majesty thereon shall be at liberty to publish his or her dissent in open Court together with the reasons.)).

⁶⁶ See also Sir I Richardson, 'The Privy Council as the Final Court for the British Empire' (2012) 43 *Victoria U Wellington LR* 103.

⁶⁷ Practice Direction 1 (JCPC) (emphasis added).

anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit.⁶⁸ 'We are really judges,' he said, before adding:

...but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in printed form. It is a report as to what is proper to be done on the principles of justice, and it is acted upon by the Sovereign in full Privy Council; so that you see, in substance, what takes place is a strictly judicial proceeding.⁶⁹

A number of aspects of the functioning of the Committee reveal that, some 88 years after Lord Haldane's remarks, and despite some curious anomalies in the voting patterns of the Committee when compared to the UKSC and some stylistic anachronisms, the JCPC continues to emerge as a fully-functional and independent judicial institution.⁷⁰ Three of those matters are grouped together under the headings 'Access and Leave to Appeal', 'Deliberations and Judgments', and 'Institutional Features of the JCPC', and considered in turn below, with a view to demonstrating that the JCPC has made considerable progress on the path to achieving institutional judicial independence in the 21st century.

4.1 Access and Leave to Appeal

Historically, the Committee's power to grant special leave to appeal was founded on the Royal prerogative. Following the Privy Council Acts of 1833 and 1844, 'in form the appeal was still to the King in Council, [but] it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council.'⁷¹ Despite the JCPC being placed on a statutory footing, the Royal prerogative continued to survive in terms of the power to grant special leave to

⁶⁸ *Alex Hull & Co v M'Kenna* [1926] IR 402, 403 (Viscount Haldane).

⁶⁹ *Ibid.*

⁷⁰ The JCPC still possesses a quasi-executive character in its general and specific advisory functions and, on a review of the cases decided in the past four and a half years, there remains a strong bias toward unanimity of judgment and the lack of concurring and dissenting opinions in the Committee, relatively speaking, when compared with the statistical data of voting patterns over the same period in the UKSC, which will be explored another time and elsewhere.

⁷¹ *British Coal Corporation v The King* [1935] AC 500, 512 (Viscount Sankey LC).

appeal to the Committee. Thus, 'there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a residuum of the Royal prerogative of the sovereign as the fountain of justice.'⁷² For this reason, 'Her Majesty in Council was thus empowered to override a Colonial law limiting or excluding appeals to Her Majesty in Council from any colonial Court. In this way the functions of the Judicial Committee as a Court of law were established.'⁷³ In the 19th and early 20th century, British dominions could not oust the Royal prerogative to admit appeals.⁷⁴

The Statute of Westminster 1931 brought with it a marked change in the relationship between the British dominions and the Crown, as it became competent for the legislature of a British dominion to make legislation which ousted the jurisdiction of Her Majesty in Council.⁷⁵ The ability for British dominions to define the scope of the JCPC's appellate jurisdiction had the consequential effect of also distancing the Committee from the Crown in terms of its acting as an independent court of final of appeal, pursuant to legislation of the relevant dominion and quite apart from the Royal prerogative. Thus, in *Alex Hull & Co v McKenna*, Viscount Haldane remarked that '[the Committee is] not a body, strictly speaking, with any location.'⁷⁶ 'It is not,' he said, 'an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body.'⁷⁷ Nine years later, the Committee made similar remarks that the JCPC was not a 'British tribunal.'⁷⁸ And 29 years after that, in *Ibralebbe v*

⁷² Ibid, 511.

⁷³ Ibid.

⁷⁴ See eg *Falkland Islands Co v The Queen* (1863) 1 Moo PC NS 299; *Reg v Bertrand* (1867) LR 1 PC 520 (PC); *Nadan v The King* [1926] AC 482 (PC).

⁷⁵ *British Coal Corporation v. The King* [1935] AC 500, 519 (Viscount Sankey LC): ('No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment.'). Compare and see generally A B Keith, *The Constitutional Law of the British Dominions* (1933).

⁷⁶ *Alex Hull & Co v McKenna* [1926] IR 402, 404.

⁷⁷ Ibid.

⁷⁸ *British Coal Corporation v The King* [1935] AC 500, 521-22 per Viscount Sankey LC (with whom Lords Atkin, Tomlin, Macmillan and Wright agreed) ('so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.').

The Queen, Viscount Radcliffe similarly observed, '[i]t is not as if the Judicial Committee was, in essence, an English institution or an institution of the United Kingdom.'⁷⁹ Those statements track the early adaptation of the JCPC into a new, supportive role. The context in which the last statement was made is especially important. In *Ibralebbe v The Queen*, the Committee was required to advise on whether the relevant enactments founding the independence of Ceylon expressly or impliedly foreclosed appeals being taken to the Committee.⁸⁰ In finding that these enactments had not closed that avenue of appeal, Viscount Radcliffe said, '[i]f and when a territory having institutional power to do so, as Ceylon now has, decides to abrogate the appeal to the Judicial Committee from its local courts, what it does is to effect an amendment of its own judicial structure.'⁸¹ Responding to a remark by the Chief Justice of the Supreme Court of Ceylon (sitting as the President of the Court of Criminal Appeal) that the continuance of the JCPC's appellate jurisdiction was inherently inconsistent with Ceylon's status as an independent territory, Viscount Radcliffe said, 'if it is recognised, as it must be, that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its courts, true independence is not in any way compromised by the continuance of that appeal, unless and until the sovereign legislative body decides to end it.'⁸² The Board, therefore, acceded to the view that the Committee had an 'independent legal status,' quite apart from the British Crown, whereby the JCPC existed within the judicial hierarchy of an independent state.⁸³

The reconceptualization of the JCPC within the judicial hierarchy of its constituents, rather than as an imperial institution that oversaw the administration of justice throughout the British Empire, undermined the Royal prerogative, as it became accepted that it was an internal matter for a particular jurisdiction to define the scope of any appellate jurisdiction of the Committee. Thus, beginning with *British Coal Corporation v The King*, the JCPC chartered a different course that broke away from the Crown. In granting special leave to appeal in that case, Viscount Sankey L.C. said, 'appeals seem to be essentially matters of Canadian

⁷⁹ *Ibralebbe v The Queen* [1964] AC 900, 922 per Viscount Radcliffe (with whom Lord Dilhorne LC, Lord Morton, Lord Morris and Lord Guest agreed).

⁸⁰ Ceylon Independence Act 1947 (Ceylon); Ceylon (Constitution) Order in Council 1946 (Ceylon).

⁸¹ *Ibralebbe v The Queen* [1964] AC 900, 922 per Viscount Radcliffe (with whom Lord Dilhorne LC, Lord Morton, Lord Morris and Lord Guest agreed).

⁸² *Ibid*, 925 per Viscount Radcliffe (with whom Lord Dilhorne LC, Lord Morton, Lord Morris and Lord Guest agreed).

⁸³ *Ibid*, 919.

concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice.’⁸⁴ A submission was made that the appeal was ‘a matter external to Canada [with] emphasis... laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of law, but to the King in Council exercising a prerogative right outside and apart from any statute.’ Responsively, Sankey L.C. (for the Board) said:

...this latter proposition [that the appeal is made not to the JCPC as a Court of law, but to the King in Council] is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.⁸⁵

In that case, the Committee held that it was a matter for the dominion Parliament to restrict leave to appeal to the JCPC in criminal matters. Although that decision was confined to criminal appeals from Canada, that trend has continued into the 21st century, with the empowerment of the relevant states to define the scope of any appellate jurisdiction of the Committee, thereby diminishing the Royal prerogative. Indeed, recent decisions of the JCPC have abandoned the Royal prerogative altogether in favour of a reliance on the statutory provisions conferring power to grant leave to appeal, especially sections 1 and 3 of the Privy Council Acts of 1833 and 1844, respectively.⁸⁶ Although those statutory provisions are couched in broad terms,⁸⁷ a state may nevertheless enact legislation restricting the Committee’s appellate jurisdiction, expressly or by ‘necessary intendment’.⁸⁸ Thus, the

⁸⁴ *British Coal Corporation v The King* [1935] AC 500, 521 (Viscount Sankey LC).

⁸⁵ *Ibid*, 521-22. (Viscount Sankey).

⁸⁶ *Dany Sylvie Marie v The Electoral Commissioner* [2011] UKPC 45, paras 27 to 36 and the cases there cited, notably: *Campbell v The Queen (Jamaica)* [2011] 2 AC 79, para 6 and *Walker v The Queen* [1994] 2 AC 36, para 44.

⁸⁷ Privy Council Act 1844 (UK), s 1; Privy Council Act 1833 (UK) s 3.

⁸⁸ *Dany Sylvie Marie v The Electoral Commissioner* [2011] UK PC 45, para 31. As to ‘necessary intendment’, see *British Coal Corporation v The King* [1935] AC 500, 519 and 522; *De Morgan v Director-General of Social Welfare* [1998] AC 275, 284; *Grant v The Queen* [2004] 2 AC 550, paras 3, 4.

scope for the Committee and intermediate appellate courts to grant leave to appeal to the JCPC may be circumscribed by state legislation. And the Committee will defer to such legislation, rather than relying on the Royal prerogative to entertain appeals. In *Foxhill Prison and The Government of the United States of America v Kozeny*, for example, the Committee granted special leave to appeal from a decision of the Bahaman Court of Appeal, which had dismissed an appeal against the grant of a writ of *habeas corpus ad subjiciendum* by the Supreme Court of the Bahamas. The Bahaman Court of Appeal had made it clear that it had no jurisdiction to grant leave to appeal to the JCPC. Having already granted leave to appeal, the question of jurisdiction was subsequently heard with the substantive merits *de bene esse* and the Committee held that it had no jurisdiction to grant leave to appeal. Although the writ of *habeas corpus* had its origins in the Royal prerogative,⁸⁹ the Committee held that its jurisdiction ‘does not now depend upon the royal prerogative but upon those two statutes [i.e. the Privy Council Acts of 1833 and 1844].’⁹⁰ As no statute conferred jurisdiction on the Committee to hear appeals from a grant of *habeas corpus*, the appeal was dismissed for want of jurisdiction.

Although states can choose to circumscribe the JCPC’s appellate jurisdiction, specific grants of special leave to appeal, even where the court below has already refused such leave, point to the Committee’s willingness to entertain a general appellate jurisdiction. Traditionally, the Committee did not grant leave to appeal except where questions of major principle were involved. But occasionally the Committee departs from that general position, as demonstrated by the following two cases from the Channel Islands. In *Hindocha v Gheewala*, the Jersey Court of Appeal had overturned a decision of the Royal Court of Jersey granting a stay of the action on the ground of *forum non conveniens*.⁹¹ The decision was then appealed to the JCPC and, although it overturned the decision of the Jersey Court of Appeal and reinstated the decision at first instance, more than six years elapsed in a dispute as to whether the action should be heard in Jersey or in another jurisdiction (Kenya), which did not involve any major point of principle, but largely turned on the facts of the case.⁹² More recently, in *Spread Trustee Co Ltd v Hutcheson*, a preliminary issue arose as to whether gross negligence could be excluded by the terms of a trust instrument under Guernsey customary law prior to the enactment of a Guernsey statute that expressly prohibited such

⁸⁹ P D Halliday, *Habeas Corpus, from England to Empire* (2010), 3, 13-18.

⁹⁰ *Foxhill Prison and The Government of the United States of America v Kozeny* [2012] UKPC 10, para 36 (Lord Clarke and Lord Dyson).

⁹¹ *Gheewala v Compendium Trust Co Ltd* [1999] JLR 154.

⁹² *Hindocha v Gheewala* [2003] UKPC 77.

exclusion.⁹³ Both the Royal Court of Guernsey and the Guernsey Court of Appeal held that a trustee could not be exempted from liability for gross negligence under Guernsey customary law and that the relevant Guernsey statute was merely declaratory. Importantly, the Guernsey Court of Appeal refused to grant leave for the defendant-trustee to appeal to the JCPC because the law on trustee exemption clauses was clear, especially as it had been put on an explicit statutory footing for the previous 18 years, and the matter was not of ‘sufficient general importance to justify the attention of the Privy Council.’⁹⁴ Nevertheless, the Committee granted leave and allowed the appeal by a narrow margin (3:2).⁹⁵ Rights of appeal to the JCPC have also been afforded in Guernsey and Jersey if a certain monetary amount is in dispute, irrespective of major principle or sufficient general importance.⁹⁶ However, the Committee generally adheres to the traditional position, routinely stating when refusing permission to appeal that certain matters do not ‘raise an arguable point of law of general importance which ought to be considered by [the JCPC] at this time.’⁹⁷

4.2 Deliberation and Judgments

Aside from a number of formalities and stylistic curiosities, the evolution of the JCPC over the better part of the last two centuries has seen the Committee functioning increasingly as an independent judicial institution, which is evidenced by the actual work of the JCPC in hearing cases, adjudicating appeals and writing lengthy, well-reasoned judgments that include public concurrence and dissidence of the members of the Committee. Whilst successive Boards of the JCPC still advise Her Majesty on the appropriate orders to be made in Council, the Committee publishes ‘judgments’ before doing so, including dissenting opinions and even the occasional open oscillation by its members in difficult cases.⁹⁸ Executive statements and reports have given way to the open justice that is integral to the functioning of an independent judicial institution, thereby enabling auditing

⁹³ See D Clarry, ‘The Offshore Trustee *en bon père de famille*’ (2014) 17 *Jersey & Guernsey LR* 1, 22-31.

⁹⁴ *Spread Trustee Co Ltd v Hutcheson* (2009) 10 GLR 403, para 56 (Martin JA).

⁹⁵ *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194 (PC (Guernsey)); Clarry, above n 93.

⁹⁶ Court of Appeal (Guernsey) Law 1961, s. 16 (£500 limit); Court of Appeal (Jersey) Law 1961, art 14 (£10,000)—the latter provision has been repealed.

⁹⁷ See e.g. ‘Permission to Appeal results’, *JCPC*, November and December 2013, <<http://www.jcpc.uk/news/pora-v-the-queen-permission-to-appeal.html>> [accessed 4 April 2014].

⁹⁸ See for example *Belize Bank Ltd v A-G of Belize* [2011] JCPC 36, para 61(Lord Phillips); see also above n 58.

of proceedings by the parties and the public. Pursuant to long-standing tradition, there appears to be no active deliberation of what orders ought to be made by Her Majesty in Council, once the Board has delivered its judgment.⁹⁹ Thus, Viscount Sankey L.C. remarks in an appeal from the Court of King's Bench of Quebec still ring true: 'according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law...'¹⁰⁰ That position appears to have strengthened since then as the JCPC continues to develop as an independent judicial institution. Indeed, in some cases, the manner in which orders are crafted reflects the functioning of any other ordinary court, such as in the recent case of *Piganiol v Smegh (Île Maurice) Ltée*, where the judgment did not conclude with the usual advisory statement, but instead read:

The Board will allow P's appeal; will set aside that court's order dated 23 June 2011 (including the order for costs); in substitution for it, will provide for the dismissal, with costs, of the company's appeal against the order dated 13 October 2009; and will order the company to pay P's costs of and incidental to the appeal to the Privy Council.¹⁰¹

Given that other cases routinely use the old formulaic expression of 'humbly advising Her Majesty', the orders in that particular case do not evidence any trend away from the general advisory function of the Committee. Besides the similarity of the terms of the orders, the number of judgments delivered by the JCPC and UKSC does not differ all that much, aside from the last judicial year in which there was a drop in the number of JCPC decisions and a corresponding spike in the number of UKSC judgments—although there is insufficient data to analyse whether the volume of judgments in the JCPC and UKSC are inversely related, it is plausible that they could be to some extent, given that both institutions share a common pool of finite resources. The comparative figures are set-out below.

⁹⁹ Haldane, above n 4, 145, 146.

¹⁰⁰ *British Coal Corporation v The King* [1935] A.C. 500, 511 (Viscount Sankey LC).

¹⁰¹ *Piganiol v Smegh (Île Maurice) Ltée* [2014] UKPC 1, para 18 (Lord Wilson).

 JUDGMENTS DELIVERED

	2009–10	2010–11	2011–11	2012–13
JCPC	41	42	47	36
UKSC	52	58	57	94

The deliberation and reasoning expressed in the judgments of the JCPC do not often differ in substance with those of the UKSC. For example, in two cases from the Channel Islands in the 2010/11 and 2011/12 judicial years every member of the relevant Boards constituting the Committee in those cases wrote separate concurring opinions.¹⁰² And in two cases from the 2010/11 and 2012/13 judicial years every member of the Board wrote an opinion in which the Board was divided by the narrowest of margins (3:2).¹⁰³ Even though those were the only four cases that produced such separate concurrence and dissidence during that time, it reveals the willingness of the members of the Board to ventilate their opinions in at least a limited number of cases, bucking the general trend of unanimity that dominates the Committee's reports, even in the 21st century.

Although in the mid-19th century the JCPC's judgments were published in a special series of reports,¹⁰⁴ lengthy, well-reasoned judgments have been reported alongside those of the UK's top court in the Appeal Cases since the late 19th century. Common reporting in a single series of reports brings the jurisprudence of those courts in close proximity with one another. As the Committee's decisions often display the rigorous analysis of the judgments ordinarily delivered by the UK's top court, having often been penned by the same persons, its judgments are regarded as being of the highest persuasive value throughout the Commonwealth, even though they are not binding on any jurisdiction beyond that in any particular appeal.¹⁰⁵ As noted previously, the Committee's decision in *Royal Brunei Airlines v Tan* has had a profound influence on the test for establishing personal liability for dishonest assistance in breach of a fiduciary obligation.¹⁰⁶ But it is also interesting

¹⁰²*Simon v Helmot* [2012] UKPC 5 (Guernsey); *Warren v A-G (Jersey)* [2011] UKPC 10 (Jersey).

¹⁰³*Crawford Adjusters (Cayman) Ltd v Sagcor General Insurance (Cayman) Ltd* [2013] UKPC 17 (Cayman Islands) (Lord Neuberger and Lord Sumption dissenting); *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194 (PC (Guernsey)) (Lady Hale and Lord Kerr dissenting).

¹⁰⁴Reported by Moore (abbreviated as 'Moo PC' and 'Moo PC NS'—the latter being the 'New Series').

¹⁰⁵See *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777.

¹⁰⁶See above n 50 and accompanying text.

to track how that decision was adopted as a good statement of English law by the House of Lords in *Twinsectra v Yardley*, although the majority of the House of Lords appeared to depart from the JCPC by introducing a further subjective element into the test for establishing dishonesty, and then later re-aligned that view in a subsequent JCPC decision in *Barlow Clowes International Ltd v Eurotrust International Ltd* from the Isle of Man.¹⁰⁷ The evolution of those authorities shows how judges sitting in both the UK's top court and the JCPC develop and splice certain strands of jurisprudence together, albeit through a process of 'interpretation'. Other cases, such as the difference in approach between the JCPC in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* and the later decision of the UKSC in *Rubin v Eurofinance SA; New Cap Reinsurance Corporation v AE Grant*, show that the UKSC regards the JCPC's decisions with a certain degree of comity and in such a way that, before taking a different view on a point of principle, the UKSC will consider whether a decision of the JCPC was wrongly decided and ought not to be followed.¹⁰⁸ The persuasive quality of the JCPC's decisions, as well as the attachment of comity, is attributable to the tightly-reasoned manner in which such judgments are written, addressing issues that have broader importance to the international community, which is itself a testament to the quality of the Committee as a judicial institution. For example, *La Générale de Carrières des Mines v FG Hemisphere Associates LLC* provides one of the pithiest statements on when a state may be held responsible for the acts of a state-owned corporation in public international law.¹⁰⁹ Although the Committee is not bound to follow its

¹⁰⁷*Royal Brunei Airlines v Tan* [1995] AC 900, 387-89 per Lord Nicholls; *Twinsectra v Yardley* [2002] AC 164, 167 per Lord Slynn, 167 per Lord Steyn, 168 per Lord Hoffmann, 171 per Lord Hutton, 195ff per Lord Millett (dissenting from the majority on the correct test for establishing dishonesty and describing Lord Nicholl's opinion in *Royal Brunei Airlines v Tan* as 'majesterial'); *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, 1479-81 per Lord Hoffmann. Although the JCPC is unable to overrule the House of Lords as a matter of English law, the Committee's 'interpretation' of *Twinsectra v Yardley* has been approved in *obiter* by the English Court of Appeal in *Abou-Rahmah v Abacha* [2007] 1 All ER 827, 844-48 per Arden LJ.

¹⁰⁸Compare *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; *Rubin v Eurofinance SA, New Cap Reinsurance Corporation v AE Grant* [2012] UKSC 46, para 132 per Lord Collins (with whom Lord Walker and Lord Sumption agreed), paras 178-187 per Lord Mance (not deciding whether *Cambridge Gas* was wrongly decided and finding that '*Cambridge Gas* [was], on any view, distinguishable' (at para 178), paras 192-192 per Lord Clarke (dissenting from the majority that *Cambridge Gas* was wrongly decided and also finding that *Cambridge Gas* was 'distinguishable').

¹⁰⁹*La Générale de Carrières des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27. See also J Crawford, *State Responsibility: The General Part* (2013), 162-63.

previous decisions, it nevertheless develops a common stream of jurisprudence by taking a comparative and cross-jurisdictional approach to the development of principle that it then applies in appeals from various jurisdictions, taking into account local conditions, if need be.¹¹⁰

4.3 Institutional Features of the JCPC

In the 21st century, the JCPC functions in broadly similar terms to the UKSC. Since the beginning of the judicial year in Michaelmas Term 2009, the Committee has shared Middlesex Guildhall on Parliament Square with the UKSC, as two seamless halves. The JCPC usually sits in Court 3, while the UKSC typically sits in Court 1. In addition to the building and, for the most part, its judges, the JCPC and the UKSC share administrative facilities, including court lists giving notice of upcoming hearings. The judicial year for both the Committee and the Court is split into four terms—Michaelmas, Hilary, Easter and Trinity terms—with judgments ordinarily being delivered in those terms. Occasionally, the JCPC's judgments are delivered after the end of the judicial year when a number of judgments might be delivered on a single day before the commencement of the next judicial year. For example, on 9 August 2011, after Trinity term in the 2010/11 judicial year, the Committee delivered 12 judgments in appeals from Belize, Bermuda, Mauritius, Trinidad & Tobago and The Bahamas. And, on 16 August 2011, after Trinity term in the 2011/12 judicial year, the Committee delivered 6 judgments in appeals from Trinidad & Tobago, Turks & Caicos, Jamaica and Mauritius. Given its proximity to the UKSC, the outward appearance of the JCPC is of a court functioning in practically the same manner as the UK's top court.

¹¹⁰ *Gibson v United States of America* [2007] UKPC 52 (The Bahamas); *Cushing v Dupuy* (1880) 5 App Cas 409. To take the example of the Belize case previously discussed (*Belize Bank Ltd v A-G of Belize*, above n 52-58 and accompanying text), the Board there wrestled with the notion of apparent bias by reference, first, to English law (*Porter v Magill* [2002] 2 AC 357, [103] per Lord Hope of Craighead), then secondly to decisions of the JCPC from the Cayman Islands (*A-G (Cayman Islands) v Tibbetts* [2010] 3 All ER 95, para 3) and from Brunei (*Prince Jefri v The State of Brunei* [2007] UKPC 62, paras 15-16 per Lord Bingham of Cornhill (with whom Lord Hope of Craighead, Lord Scott of Foscote, Lord Mance and Lord Neuberger of Abbotsbury agreed)), where a similar cross-jurisdictional approach to the notion of apparent bias had been taken, and thirdly to Australia (*Johnson v Johnson* (2000) 201 CLR 488, 509 per Kirby J) and Scotland (*Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] 1 WLR 781; [2006] UKHL 2, para 17 per Lord Hope), before 'translating [those] principles to the circumstances of the present case' in order to determine the issue of apparent bias before the Board (*Belize Bank Ltd v AG (Belize)* [2011] JCPC 36, paras 34-41 per Lord Kerr (with whom Sir Patrick Coghlin agreed)).

In a more substantive sense, the Committee has many of the powers that facilitate the conduct of its proceedings in a distinctly court-like manner. Many of these powers were conferred on the JCPC when it was established, with the effect that it was almost invariably going to emerge as an independent judicial institution through the normal working of its processes and what it was designed to do. Of the *Privy Council Act 1833*, Dicey observed in the later 19th century:

Even those vestiges of the Council's ancient jurisdiction have been taken away by the [Privy Council Act 1833], for this measure transfers the judicial powers of the Council from the whole body; who, however, did not in fact exert them, to a special committee. This statute has produced the same effect on the Council's legal authority which custom has had in its political powers. In each the functions of the whole body have passed into the hands of a smaller amity, connected with the Privy Council by little more than its name.¹¹¹

The Committee was empowered to do many things like any other court, including the power to take evidence *viva voce* or upon written depositions and order witnesses to be examined or re-examined, and discretion to direct the payment and taxation of costs.¹¹² It may also refer certain matters to the Registrar to report in much the same way as matters are referred for a report to be returned by a Master in the Chancery jurisdiction.¹¹³ The attendance of witnesses and the production of documents are compellable by subpoena.¹¹⁴ And there are similar powers to enforce decrees, orders and judgments, including the power to punish for contempt.¹¹⁵ As such, Viscount Radcliffe's remark in *Ibralebbe v The Queen* was apt to describe the influence that the conferral of (judicial) powers on the Committee had at an early stage in providing the foundation for the JCPC to establish itself as an independent judicial institution:

The institution of the Judicial Committee by the Privy Council Appeals Act of 1833 (3 & 4 Will. 4) had a functional effect upon the judicial powers of the Privy Council itself. It did not take long

¹¹¹ AV Dicey, *The Privy Council* (1887) (awarded the Arnold Prize Essay in 1860), 144.

¹¹² See Privy Council Act 1833 (UK) ss 7, 8 and 15.

¹¹³ Privy Council Registrar Act 1853 (UK) s 1; Privy Council Act 1833 (UK) s 17.

¹¹⁴ Privy Council Act 1833 (UK) s 19.

¹¹⁵ *Ibid* s 28.

for commentators to observe that what had happened was that the judicial powers had been transferred from the Council to what was to be in substance an independent court of law and that the connection between the two bodies was in future no more than nominal.¹¹⁶

By convention, a single member of the Committee will not be both a judge and an active parliamentarian, so there is a certain distinctness kept between the Crown and the JCPC in terms of the day-to-day functioning of the Committee.¹¹⁷ As previously mentioned, successive Boards of the Committee that are convened to hear appeals are principally comprised of UKSC judges, although prominent, often retired, judges are invited to sit as Privy Councillors.¹¹⁸ It is not only the JCPC that employs the services of retired judges internationally. The Hong Kong Court of Final Appeal is a strong example of judges from the highest appellate courts from common law jurisdictions being invited to determine appeals to that court. The Committee ordinarily comprises five members for the hearing of appeals, although occasionally only three members will constitute a Board of the JCPC for certain matters. The Board will rarely comprise more than five members, although some particular matters might warrant the constitution of a larger number of Privy Councillors to hear certain kinds of matters, enlarging the number to seven members, especially in the case of references pursuant to s. 4 of the *Privy Council Act 1833*.¹¹⁹ All of these institutional features of the JCPC evidence that, structurally speaking, the Committee functions in a similar way to the UKSC in practical terms and has progressed a considerable way to realising its own institutional judicial independence apart from the British Crown.

5 Conclusion

Actions speak louder than words. The closer one comes to the administration of justice in any institution the truer that statement becomes. Words in the

¹¹⁶ *Ibralebbe v The Queen* [1964] AC 900, 919 (Viscount Radcliffe).

¹¹⁷ Compare Haldane, above n 4, 145, 146.

¹¹⁸ It is less common for non-UKSC judges who have not yet retired to sit on the Committee, but examples do arise—e.g. the Chief Justice of New Zealand, Dame Sian Elias, recently sat on the Committee hearing appeals from Bermuda and New Zealand (concurring in, but not writing, the unanimous judgment of the JCPC in both appeals): *Selassie v The Queen*; *Pearman v The Queen* [2013] UKPC 29 (joined appeals from the Court of Appeal of Bermuda); *Lundy v The Queen* [2013] UKPC 28 (on appeal from the Court of Appeal of New Zealand).

¹¹⁹ See above n 15 and accompanying text.

books take on a life of their own when put into action and collectively carried forward by those intimately familiar with the intricacies of any court. So, too, with the JCPC: one must be careful not to overstate the importance of formal and stylistic matters or to project on to a fully-functional and modern judicial institution anachronistic expressions that remain in the books and have long since been abandoned in the actual functioning of the institution itself. Although the JCPC should be understood in its proper historical context,¹²⁰ the Committee has adapted over time to reflect the strengthening of values concerning the transparent administration of justice and institutional judicial independence. Although the quasi-executive character of the Committee survives in the 21st century, including the general and specific advisory functions of the Committee and the formal intermediation by the Queen in Council of its orders, one cannot help but be struck by the similarity with which the functioning of the JCPC mirrors that of the UKSC in the past four and half years since those courts were relocated to share Middlesex Guildhall to share administrative facilities.

The JCPC has adapted to the disintegration of the British Empire and thereby assumed a supportive role, assisting many jurisdictions on the path to realising judicial independence by acting as their highest appellate court until such time as they wish to establish their own courts of final appeal domestically or wish to confer such powers on a regional court of final appeal.¹²¹ Should the Committee's 'have gavel, will travel' approach to hearing appeals internationally continue, the JCPC will continue to be regarded less as some 'far-off god',¹²² but as a judicial institution that is responsive to, and respectful of, those jurisdictions that retain the JCPC as a final court of appeal. This is the supportive role of an uniquely international court in action in the 21st century, which still carries with it many of the stylistic anachronisms of a bygone age of the British Empire. Lord Neuberger's article in the earlier pages of this Review demonstrates the commendable 'statesmanlike' qualities that Viscount Haldane championed in Cambridge over 90 years ago, which still serve to establish the Committee as an independent judicial institution of the highest order for those countries that wish to utilise its services until such time as they strike out on their own.

Supporting figures in Annexures A and B on the following three pages.

¹²⁰Dicey, above n 111, 147.

¹²¹ As is the case, for example, with the Caribbean Court of Justice.

¹²²C.f. Howell, above n 60, 1.

Annexure A

JURISDICTIONAL OVERVIEW

Judicial Year	The Disciplinary Committee of the Royal College of Veterinary Surgeons	British Crown Dependencies	Common-wealth*	Overseas Territories and Sovereign Base Territories**	Appeals via Requests to the Sultan of Brunei and Yang Di-Pertuan	Total No. of Reports (Judgments Delivered)
2009/10	0	2	28	11	0	41
2010/11	0	3	33	6	0	42
2011/12	1	2	41	3	0	47
2012/13	0	2	22	12	0	36
Total	1	9	124	32	0	166

*INDEPENDENT REPUBLICS WITHIN THE COMMONWEALTH

2009-10	2010-11	2011-12	2012-13	Total
15	20	25	7	67

****REFERRALS UNDER SECTION 4 OF THE JUDICIAL COMMITTEE ACT 1883**

2009-10	2010-11	2011-12	2012-13	Total
2	0	0	0	2

Annexure B

JURISDICTIONAL BREAK-DOWN

Judicial Year	Anguilla	Antigua & Barbuda	Bahamas	Belize	Bermuda	British Virgin Islands	Cayman Islands
2009/10	0	2	2	4	3	1	3
2010/11	1	0	6	2	2	0	2
2011/12	0	0	2	2	0	1	0
2012/13	0	2	4	0	3	4	2
Totals	1	4	14	8	8	6	7

JURISDICTIONAL BREAK-DOWN								
Judicial Year	Cook Islands and Nine	Gibraltar	Grenada	Guernsey	Isle of Man	Jamaica	Jersey	
2009/10	0	3	0	0	0	4	2	
2010/11	0	0	1	1	1	4	1	
2011/12	0	0	0	1	0	11	1	
2012/13	1	2	1	1	1	7	0	
Totals	1	5	2	3	2	26	4	
Judicial Year	Mauritius	St Christopher and Nevis	St Lucia	Trinidad & Tobago	Turks & Caicos Islands	United Kingdom (Disciplinary Committee of the Royal College of Veterinary Surgeons)		
2009/10	6	0	1	9	1	0		
2010/11	5	0	0	15	1	0		
2011/12	13	1	0	12	2	1		
2012/13	4	0	0	3	1	0		
Totals	28	1	1	39	5	1		

DECISION-MAKING IN THE UK'S TOP COURT

Alan Paterson*

1 Introduction

The topic for Lord Neuberger's first BAILII annual lecture last year was 'No Judgment—No Justice'.¹ In it he explored with characteristic lucidity the need for legal judgments to be accessible to the public—both in terms of understanding and of availability. Of course that is what BAILII is all about. It owes its existence to the sterling work of Graham Greenleaf and his colleagues in Australia who founded AUSTLII in 1995. Their motivation was the belief that access to the basic law (cases, statutes and delegated legislation) in a jurisdiction should be free to all as a fundamental constitutional entitlement. What price the rule of law—particularly in an era of legal aid cutbacks—if citizens cannot access the law governing their country without having to subscribe to the services of commercial providers? BAILII continues to perform its essential work despite these times of austerity, but without help of lawyers in general, and the judiciary in particular, it could not long survive. We need your support still.

2 Transparency and openness

The theme of transparency and openness will feature strongly in this article, for it lies not just at the heart of the BAILII project but also that of the Supreme Court. It is not difficult for commentators such as Richard Cornes to mount a compelling case that the Supreme Court has completely eclipsed the Appellate Committee of the House of Lords in this regard.² Welcoming visitors to the

* Professor of Law, University of Strathclyde. This text was originally delivered as the BAILII Lecture 2013. This lecture was also the launch event for A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) from which much of the text was taken. We are grateful to Hart Publishing and to BAILII for allowing it to be published here.

¹ Lord Neuberger, 'No Judgment—No Justice', delivered on 20 November 2012 <<http://www.bailii.org/bailii/lecture/01.html>> [accessed 26 December 2013].

² R Cornes, 'A constitutional disaster in the making? The communications challenge facing the United Kingdom's Supreme Court' [2013] *Public Law* 266.

new building in their thousands is a far cry from the quiet ways of the House of Lords. The very fact that it has a strong communications section on its staff, with a highly impressive website that far outstrips that of the Appellate Committee is a very clear declaration of intent by the Court that it wishes to engage in a dialogue with the public, which the Appellate Committee had largely neglected. Cornes enumerates a wide range of communications vehicles used by the Court to achieve its objective, ranging from Annual Reports to press releases and from Sky broadcasts of oral hearings to television documentaries illustrating how the Court goes about its business. None of these existed in the case of the Appellate Committee. The Justices believed that by embracing YouTube and Twitter for the delivery of their judgments they would give the Court a higher profile with the public than that of the Appellate Committee but without turning themselves into publicly recognised figures.

3 Dialogues and the Court

However, I am running ahead of myself. My central thrust is to argue, as I did 30 years ago,³ that decision-making in the UK's top court is a social and collective process. In short, that a key avenue for understanding how appellate judges decide cases is not through reductionist theories based on economics, power or attitudes, but by looking at dialogues in which the judges engage, with counsel, with other courts, with academics, with the other branches of the state and above all with themselves.

3.1 The dialogue with the public

As has been seen, the Supreme Court has begun to engage in another dialogue, namely that with the public. And they have achieved a very considerable measure of success. And yet as I will show at different stages in this article, it can be argued that in relation to transparency and the dialogue with the public there is more work to be done. As I have observed elsewhere,⁴ the new court, unlike the US Supreme Court has no register of the Justices' interests which, in the light of the Pinochet debacle can only be described in the words of Sir Humphrey as 'a brave decision'. Again, the system of appointment to the Supreme Court is still arguably

³ A Paterson, *The Law Lords* (1982).

⁴ A Paterson, *Lawyers and the Public Good* (2012); A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013).

lacking in sufficient transparency, given the large measure of influence exerted by the senior judiciary over it, through the system of consultations.⁵

The first big challenge for the Court in the eyes of the public—the ‘unfair bank charges’ case⁶—was also arguably an opportunity missed for the new Court. The public at large, the media, the Office of Fair Trading and the lower courts all thought that the case was about whether the bank charges for accidental overdrafts were unfair. The Supreme Court did not. Lord Phillips makes this abundantly clear in the first words of his broadcast delivery of the judgment: ‘This appeal was not about whether bank charges for those who overdraw on their current accounts are fair. It was about a much narrower issue: on what basis can the OFT investigate the fairness of those charges’. Assuming that the Supreme Court’s analysis of the law was correct on the narrow and determinative point, it does not account for the Court’s failure to explain to the waiting public that however penal the charges levied by the banks, the relevant consumer protection legislation in this country (as opposed to that of some other countries who had implemented the EU Directive) was not couched in a way that would protect them.

The correct answer to Lord Phillips’ introduction was that there was effectively no basis on which the OFT (or anyone else) could realistically challenge the fairness of the bank charges in terms of price. Some of the Justices (including Lord Phillips) sought to soften the blow by saying that there might be other avenues for challenging the fairness of the charges. Since the OFT had neither the finances nor the will to return to the fray and because in any event the ‘other avenues’ of challenge proved legally illusory, this palliative designed to show that the Court had not missed the point of the case served only to rub salt in the wounds. The Court had missed an opportunity to demonstrate that it had grappled as effectively as it could with the aspects of its first big case to touch the lives of millions of ordinary citizens. A bold challenge to Parliament and Executive to address the deficiency in our consumer protection laws might have been more apposite. Lord Walker’s brief but well intentioned suggestion along this line was too little, too late. So the dialogue with the public is work in progress.

3.2 The dialogue with counsel

With counsel on the other hand, the Court’s dialogue has become sharper and more focused. Less time for hearings has placed greater emphasis on the written

⁵ A Paterson and C Paterson, *Guarding the Guardians?* (Centre Forum and CPLS, 2012).

⁶ *Office of Fair Trading v Abbey National Plc* [2009] UKSC 6.

materials submitted before (and sometimes during and after) the oral arguments, despite oral advocacy inviting greater participation from the judges than written advocacy. Forty years ago the role of counsel as partners in the decision-making process was a very significant one. Then counsel could occasionally take advantage of the fact that none of the Law Lords read the written materials seriously in advance—now almost all of them do.⁷ Then, the expectation derived from the adversarial system was that decisions would only be based on arguments that counsel had had the chance to explore with the judges. Now, the strength of that expectation seems to have been somewhat eroded. It arose graphically in the *Assange* case,⁸ which concerned an attempt to extradite Julian Assange, the founder of Wikileaks, to Sweden and whether a Swedish public prosecutor could be a ‘judicial authority’ for the purposes of the Extradition Act 2003. When the decision against Assange was handed down, Assange’s legal team considered that the majority of the Supreme Court panel had decided the case on a point relating to the 1969 Vienna Convention on the Law of Treaties that had neither been argued by counsel nor put to them by the Justices. Dinah Rose QC was permitted to make a detailed submission to the Court on the point but the Supreme Court dismissed the submission within two days with five short paragraphs which asserted that Assange’s team had got it wrong, Lord Brown had put the point to Dinah Rose QC during the argument and accordingly her submission had been without merit.⁹ The actual exchange was revealing.¹⁰ Here are the key elements:

Dinah Rose QC: The next question is about events subsequent to the implementation of the Framework Decision and the [2003 Extradition] Act. The first point I make is, of course, one has to proceed with considerable caution because the task of this Court is to construe a provision in the 2003 Extradition Act in accordance with the obligations on the state pursuant to the Framework Decision and events subsequent to both the Framework Decision and 2003 Act are of questionable significance in relation to that task [...]

Lord Brown: But surely the Vienna Convention allows subsequent events, and the way it’s been interpreted and applied, to operate

⁷ In Lord Neuberger’s words the era of the impressionists has been replaced by that of the pre-Raphaelites.

⁸ *Assange v Swedish Prosecution Authority* [2012] UKSC 22.

⁹ *Assange v Swedish Prosecution Authority (no 2)* [2012] 3 WLR 1.

¹⁰ For the full exchange see Paterson, above n 4, Chapter 2.

in terms of [construing] the [...] Framework Decision. *But I'm not sure that then it can bear similarly on the interpretation of the 2003 Act.* (emphasis added).

Dinah Rose QC: Quite, my Lord.

Lord Brown: I'm not sure that isn't pulling oneself up by one's own bootstraps.

In fact, this proposition—that the Vienna Convention can be used to interpret the Extradition Act 2003, which as can be seen was somewhat tentatively made, was indeed the basis of the majority Justices' judgments in the *Assange* case. While it is true that counsel had had an opportunity to argue the point, it was a somewhat oblique invitation.

The incident, however, highlighted another aspect of the dialogues with the wider world that the Supreme Court has not been able to resolve. Although the US Supreme Court and the Australian High Court produce publicly available contemporaneous transcripts of the oral arguments in these courts, the House of Lords and the UK Supreme Court have never done so, on expenses grounds. Yet they do have video recordings of the hearings, taken from the Sky broadcasts. It might have been more satisfactory for all involved in the *Assange* case if the video recordings had been available to counsel and the Justices (not to mention the enthralled court watchers) in reviewing what turned out to be the key 10 minutes in the whole of the two day hearing. The argument that the videotapes of hearings should be more widely available, is one made recently by Adam Wagner,¹¹ and is, of course, ironically a plea for even greater transparency by the Supreme Court.

Reverting to the dialogue with counsel, both counsel and the judges continue to value the contribution that expert advocates can make to the decision-making process in their oral arguments. For counsel and their clients who are interested in playing for rules, as Galanter would put it,¹² a better outcome in terms of the law even if the case is lost can still justify the decision to fight on to the end. For the Justices, effective assistance to achieve better answers justifies the retention of extended hearings. Cost pressures will undoubtedly in time lead to a further reduction in the length of oral argumentation, yet few in the Court consider that more use of Judicial Assistants and written advocacy from counsel will be an adequate substitute for the flexibility of oral argumentation.

¹¹ 'Court of Appeal broadcasters must learn the Supreme Court lessons' UK Human Rights blog 31 October 2013, <<http://ukhumanrightsblog.com/2013/10/31/court-of-appeal-broadcasters-must-learn-the-supreme-court-lessons/>> [accessed 26 December 2013].

¹² Marc Galanter, 'Why the "Haves" Come Out Ahead' (1974) 9 *Law and Society Review* 96, 100.

4 The dialogue with themselves

The key dialogue in the UK's top court remains what it was under the House of Lords, namely, that between the Justices themselves. More discussion occurs before the hearing, and more after it, than was the case in the House of Lords, but as with the dialogue with counsel, there has been a shift in emphasis from oral to written discourse, especially when judgments are being circulated. Which Justices are sitting in a case influences the exchanges which occur in that case, although such variations can be attributed primarily to (1) the Justices' views on team-working, (2) their skills in small group leadership and (3) the links between them (in terms of physical and philosophical geography).

4.1 Team-working

One of the most significant developments in the Supreme Court has been the growth in team-working. This did not happen overnight but evolved over the first three years of the Court. However, most of today's Justices now perceive themselves as part of a team in a way that the Law Lords almost never did.¹³ Of course the 'team' metaphor should not be taken too far. The Justices do not go on team-building exercises; there is no manager, no opposing team, no team strips, no team mascot and no league table of supreme courts. However, 'coaching' sessions have been known to take place in the Court,¹⁴ and other team-related characteristics do exist such as team selection, team-work, team leaders, team-players and team spirit. This aspect of collective decision-making in appellate courts has attracted considerable commentary in the United States, where it appears under the sobriquet of 'Collegiality'.¹⁵ The term does not refer to how well the Court's members get on with each other, but to how much they work together as a team pursuing a common enterprise (the pursuit of the 'right answer in law' in the case) and how much they function as individuals. The English Court of Appeal is a highly collegial court in this sense:¹⁶ its members regularly sit on the same panel for several weeks, they meet before cases to discuss points on which they wish to hear argument, to allocate who will write and to express preliminary views on the case. There may be subsequent meetings when the opinion has been

¹³ B Dickson, 'The Processing of Appeals in the House of Lords' (2007) 123 *LQR* 571, 595.

¹⁴ T Nesterchuk, 'The View from Behind the Bench', in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013).

¹⁵ HT Edwards, 'The Effects of Collegiality on Judicial Decision-Making' (2003) 151 *University of Pennsylvania Law Review* 1639.

¹⁶ P Darbyshire, *Sitting in Judgment* (2011), ch 14.

circulated, especially if it is a composite judgment. The sheer pressure of business coupled with the need to play to the specialist strengths within each panel of judges only emphasise their inter-dependence and the necessity for team-playing. However, curiously, although the great majority of Law Lords were promoted from the Court of Appeal, the House of Lords relatively rarely operated in such a collegial fashion. It was not—at least in Lord Bingham's era—that the members of the Court did not get on with each other. It was more the ever changing panels of the appellate and appeal committees, the lack of pre-meetings and the scarcity of re-convened conferences, and Lord Bingham's support for multiple judgments in most cases, that entailed that the Law Lords were rarely required to work together as they had done in the Court of Appeal. In most situations therefore they did not see themselves as members of a team as opposed to a set of individuals.

Nonetheless, there were exceptions. Thus the two Scots judges seem very largely to have worked as a team in Scots appeals both in the final years of the House and now in the Supreme Court to the extent of sharing the burden of writing the lead judgment and rarely showing a disunited front in Scots cases.¹⁷ There is also evidence of small, ad hoc examples of team-working emerging. Justices with offices on the second floor, perhaps because of their slightly isolated location, have generally talked to each other about cases in which they are involved on a regular basis. Again, in the *Axa* case¹⁸ in 2011 three of the Justices would meet in the afternoons after the hearing to discuss where the case had got to. As one recalled, '[w]e wouldn't necessarily have the same ideas but it was very useful... just speaking out loud forces you to form your ideas in articulate language'.

An even more striking example of team-working in the early years of the Supreme Court was the relationship of Lords Brown and Rodger. Fast friends from towards the end of the Bingham era in the House of Lords, they shared a Judicial Assistant and in 2009–10 began the practice of 'coaching sessions' in which they debated the cases in which they were sitting together with their then shared Judicial Assistant.¹⁹ Working together certainly seems to have brought their thinking closer. The two judges voted together in 92 per cent of the cases that they sat with each other in the House of Lords and the Supreme Court (the

¹⁷ See Paterson, above n 4, ch 6. Lords Hope and Rodger only disagreed once on the outcome in a Scots case. Lords Hope and Reed never disagreed on the outcome of the 29 cases in which they sat together until Lord Hope retired at the end of June 2013.

¹⁸ *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46.

¹⁹ The description was Lord Rodger's and it was Lord Rodger's habit to treat the Judicial Assistant as 'the coach'. See Nesterchuk, above n 14.

overall norm for the two courts at that time was around 86 per cent). Indeed, they voted together a very impressive 97 per cent of the time in the 28 cases (23 times in the majority and five times in dissent²⁰) in which they sat together in the Supreme Court in the last year of Lord Rodger's time there (June 2010–May 2011).

4.2 *Single majority judgments*

However, the clearest illustration of the Court's commitment to team work is evidenced by their attitude to single majority judgments. In Bingham's era single judgments were only favoured in a smallish minority of cases, often criminal ones, entailing that fewer than 20 per cent of cases in his time ended with a single majority judgment. Today a majority of Justices favour having many more single majority judgments, which has led to a dramatic rise in single judgments. By mid-2013 single judgments were running at 55 per cent of the cases determined by the Supreme Court in that year, and that remains the pattern today. This is a level last attained in the mid-1990s, making it probably the most dramatic change from the House of Lords under Lord Bingham. Such a rate of single judgments has been achieved by greater exchanges between the Justices with multiple drafts of judgments being circulated, amended or withdrawn.

There is now a prevailing view amongst the Justices that concurrences should be curbed unless they are going to add something to the lead judgment. As one Justice put it:

If I wanted some comments added I would tend to go to the person that I was agreeing with and say, 'Can you see your way to adding these observations?' If he says, 'No' I would then think very carefully whether the comments were important enough to warrant a separate judgment, and the answer would probably be not.

As this quote reveals, suggestions for additions or amendments to the lead judgment were not unusual in the House of Lords: now they are commonplace as the team strives for a 'judgment of the court', albeit one that it is still published under the name of one or more of the Justices.²¹ Even in cases where the Justices

²⁰ On two of them they were joined by Lord Walker—a mutual friend.

²¹ See Paterson, above n 4, ch 3.

are fiercely divided there is now pressure, as in *Waya*,²² the *Bank Mellat* cases,²³ and in *Smith v Ministry of Defence*,²⁴ to narrow the disagreement, if possible, to one majority and one or two minority judgments. Such team-working requires a different skill set in the participants than was once required of Law Lords. The ability to negotiate, to compromise, to persuade whilst robustly defending a position of principle are skills which until a few years ago were more associated with a member of the Law Commission than a member of the final court, yet they are now being actively applied in the pursuit of more collaborative judgments.²⁵

Those who attended Lord Neuberger's BAILII lecture last year will recall that he called for fewer and shorter concurrences—although it was accompanied by a disavowal of any intention to move to a compulsory single judgment. This call seemed only likely to reinforce the trend to more single majority judgments in the Supreme Court, and so it has proved, as we have seen. Almost all of the Justices who regularly wrote concurrences have now retired. Lord Neuberger and Lady Hale are aware that there are dangers associated with too great a trend to single or single majority judgments,²⁶ but the trend continues.

Let me identify four of the dangers:

1) Single judgments have had a major impact on the length of judgments. Whilst the length of the Law Lords' opinions and judgments varied depending on whether they were dissenting or writing the lead or sole opinion or merely a concurrence, the average length of opinions per case in the House of Lords was 68 paragraphs. In the Supreme Court the average number of paragraphs per case had risen to 89 by March 2013. In short, whilst fewer judges are writing judgments in the Supreme Court as compared with the House of Lords, those that do write, are writing more.²⁷

2) Team-working and the pursuit of single judgments requires greater circulation of judgments and more second case conferences than was the case in Lord Bingham's era, and despite the president's efforts, such conferences have the potential to reinforce existing tensions rather than contribute to cohesiveness.

²² *R v Waya* [2012] UKSC 51.

²³ *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39.

²⁴ *Smith v Ministry of Defence* [2013] UKSC 41.

²⁵ It may be no coincidence that a third of the current Supreme Court are former members of law commissions.

²⁶ See Baroness Hale, 'Judgment writing in the Supreme Court' First anniversary seminar 30 September 2010.

²⁷ In fairness, some judges use shorter paragraphs than others, however, the difference between the two courts is a real one.

That may explain why the dissent rate in the Supreme Court is a little higher than it was in the House of Lords. That said, there are signs that the dissent rate has fallen since its peak in 2011 (when the Court was at its most divided)²⁸ in part perhaps because dissenting on ones' own seems to have become proportionately less common than in the House of Lords.

It may also be a sign that greater team-working and Lord Neuberger's plea for a self-denying ordinance in relation to dissents in last year's BAILII lecture is having an impact. Curiously, when the comparative rates of dissent are examined in the Supreme Courts of America and Canada and of the High Court in Australia it is clear that the dissent rate in the House of Lords and the Supreme Court are lower than theirs. Indeed even Lord Neuberger is probably surprised that between 19th June and 27th November 2013 there was not a single dissent in the Supreme Court—easily the longest patch of unanimity—and even then the dissents which broke this drought, in the Christian Bed and Breakfast owners' case,²⁹ were not over the outcome but only on reasoning.

3) Team-working potentially has another drawback—a loss of individualism in our Justices. The glory of the common law and its final court has included the individuality and idiosyncrasy of its top judges. The myth of judicial fungibility which sustains the arid judgment style of the European Court of Justice is not a feature that hitherto has attracted many supporters in the United Kingdom. Single judgments representing the outcome of the internal debates within the Supreme Court which are not publicly rehearsed, remove the humanity of individual difference and potentially undermine transparency.³⁰ For those who believe in the virtues of diversity (including diversity in thought) within the final court this is not necessarily a welcome development. Fewer dissents and concurrences in return for more single judgments mean more judgments devised by a committee and consequently more compromise. It is interesting that after years of lauding Earl Warren for so patiently crafting a unanimous decision in *Brown v Board of Education*³¹ with a view to ending segregation in the South,

²⁸ Nevertheless, the overall dissent rate in the Supreme Court at 24 per cent of all cases involving one or more dissents, remains slightly higher than in the House of Lords in its last 40 years. For a detailed discussion of dissents in the Supreme Court see Paterson, above n 4, chs 3–4.

²⁹ *Bull v Hall* [2013] UKSC 73.

³⁰ Lord Neuberger, while in the Court of Appeal considered that where single judgments are taken to extremes 'decisional independence and accountability is lost': 'Developing Equity—a View from the Court of Appeal' Chancery Bar Association conference 2012, London, 20 January 2012. <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf>> [accessed on 26 December 2013].

³¹ 347 US 483 (1954)

commentators have begun to suggest that the compromise that Warren had to make to achieve this—the phrase, ‘with all due speed’—which allowed the pace of desegregation to be glacial at times represented too high a price. Lord Rodger of Earlsferry, opposed such compromises. As he wrote:

If the powers that be have their way, and the new Supreme Court of the United Kingdom adopts more single judgments, then there will be less scope in future for humour or indeed for any other expressions of the judges’ individuality. By definition, the author of a composite³² judgment is not writing just as himself and will alter his voice accordingly [...] Indeed, not only humour, but any form of distinctive good writing, is even harder to bring off in a composite judgment than in an individual judgment [...] The much touted efficiency savings of a single judgment will be dearly bought if, as a result, we lose individual hallmark contributions of [the] quality [of Lords Macnaghten, Wilberforce and Bingham].³³

4) The pursuit of single judgments has one final consequence. The practice of the Court, as in the House of Lords under Lord Bingham, was for the presiding judge to allocate who was to write the lead or leading judgment setting out the facts. Today, with single judgments of the court running at 37 per cent of cases decided in the court from 2009 to July 2013, and 55 per cent in 2013 alone and concurring judgments no longer encouraged as they were under Lord Bingham, the opportunities for writing are becoming fewer. Already this has led in some cases to a competition to give the lead judgment, with one presider jokingly referring to the judges’ presentations at the first case conference as a beauty contest. It is known that Lords Phillips and Hope followed the example of Lord Bingham in choosing to write the lead judgment in many of the significant cases. Lord Neuberger has not followed the example of his predecessors in this regard; nevertheless, it is clear that despite the efforts of the presiding Justices to share the lead judgments more fairly, there are marked differences between the Justices in terms of the percentage of lead judgments given for cases sat in. In the US Supreme Court this problem is dealt with by the convention that each Justice gets around the same number of lead judgments to write a year.³⁴ Such a solution

³² By this term he means not simply the relatively rare composite or joint judgment where two or more Justices share the task of drafting the judgment equally, but also the now quite commonplace single judgment of the court.

³³ A Rodger, ‘Humour and the Law’ 2009 *SLT* (News) 202.

³⁴ Approximately eight majority judgments.

would not work so easily in the UK Supreme Court given its more specialist caseload,³⁵ because the UK Court does not sit *en banc* and, it would appear, because some Justices through their persuasiveness are more adept than others at moving the lead judgment away from the original lead writer. Nonetheless, if the problem is left unaddressed, and the pursuit of single judgments continues unabated, there is a danger that the impression may come to be given, however unfairly, that all Justices are equal but some are more equal than others.

4.3 Leadership skills

More than 50 years ago David Danelski argued that effective team-working in appellate courts³⁶ required two forms of leadership. 'Task leadership' which focused on persuading a majority on the court towards a particular outcome, and 'social leadership' which endeavoured to keep the court socially cohesive despite the inevitable conflicts which arose when important issues were at stake. Danelski showed that although it was possible for a Justice to perform both roles—and particularly the Chief Justice—more often the roles were played, if at all, by different Justices. My study of the House 40 years ago suggested that leadership analysis could fruitfully be applied to the House of Lords and it appears just as true of the last decade also. In part this is because of the overlap between task leadership, group-orientation and team-working. In practice, therefore, those who have exercised task-leadership effectively in the final appeal court have almost all regarded collective decision-making as a central element in their decision-making role either through group-orientation or being a tactician or lobbyist. Thus it is clear that Lords Reid, Wilberforce, Diplock, Bingham and Dyson, for example, all exercised task leadership effectively, although not in the same way.

After the first case conference the best opportunity for exercising task leadership is at the circulation of judgments stage. Lord Diplock thought nothing of writing his judgment before the oral hearing was over and Lord Hoffmann occasionally did likewise. Lord Bingham did not do that, but he was celebrated by his colleagues for writing as soon as the hearing was over. In fact, Lord Bingham produced his 30 manuscript pages a weekend, because that was how he liked to work—he wanted to get the thing off his desk before he was into another case. Although he recognised that it was sometimes a weakness he had a

³⁵ Which tends to mean that a Scots Justice will tend to write the lead judgment in a Scots case.

³⁶ D Danelski, 'The Influence of the Chief Justice in the Decisional Process' in W Murphy and C Pritchett (eds), *Courts, Judges and Politics: An Introduction to the Judicial Process* (1961) 497–508

great reluctance to revisit an opinion which he had circulated some time before.³⁷ If he was writing what he thought was to be the leading opinion he would entertain his colleagues' requests for tweaks here or dropping a phrase there. But if he was not, he was reluctant to comment on others' opinions even where he thought they were misconceived—because he considered judicial independence involved independence from one's colleagues. This was a clear limitation on Lord Bingham's willingness to exercise task leadership. His approach to collective decision-making was not that of a tactician such as Lord Diplock or Lord Hoffmann. Nor was he generally an intentional consensus builder. If he didn't win his colleagues over at the first conference or with the circulated opinion, that was largely it. In this respect he was not very far apart from Lords Reid and Radcliffe, or indeed Lord Phillips. Occasionally, this had its downside. As Lord Wilberforce in an earlier era had observed,

One learns to one's surprise that some people who are thought of as wonderful judges are lacking in the art of persuading their colleagues to adopt their point of view. Whereas others who are not much on the record in print are extremely good at directing a decision in a particular way.

One way to assess the efficacy or otherwise of Law Lords as task leaders or group decision-makers is to look at their records in 'close call' cases (cases in which two or more judges in the final court dissent from the majority outcome).³⁸ The Law Lords in the last decade of the House had widely contrasting records in such cases. However, amongst the more interesting judges are those, including Lords Brown, Hoffmann, Hope and Millett who were twice as likely to be on the majority side of close calls as on the minority side. All of these were collectively minded judges who would talk to their colleagues throughout case including the circulation of judgments stage. All of them may have exercised task leadership skills but other factors may have played a part e.g. the exercise of social leadership or a preference not to dissent if it served no useful purpose.

Turning to the Supreme Court, there were 34 'close calls' in its first four years. Lord Phillips presided in 15 of them and he was on the majority side in 11 of them. Since Lord Phillips was a 'group-oriented' judge, this could indicate that in these

³⁷ One case in which he did was *R v Rahman* [2008] UKHL 45, but he didn't change his position and as a result ended up in a 3:2 minority on a sub-issue in the case.

³⁸ Definition derived from B Dickson, 'Close Calls in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court* (2011), ch 13; see Paterson, above n 4, ch 1.

cases he exercised a considerable degree of task leadership. Closer examination of the cases does not entirely support this hypothesis. His support for a team or collective approach to decision-making was rarely of a tactical or lobbying kind. Indeed, he tended to keep an open mind in difficult cases far later than most of his colleagues, leading him in several of the close calls either to reject the majority's reasoning (but not their result)³⁹ or, it is thought, to change his position—if not his vote—relatively late in proceedings.⁴⁰

Lord Hope as Deputy President undoubtedly provided considerable leadership to the Court. He presided in more Supreme Court cases than any other Justice (109) and gave the lead or single judgment in 46 cases (33 per cent of the cases he sat in), ahead of his nearest rivals (Lord Phillips 32 per cent) and Lord Sumption (29 per cent). He, too was a collectively minded Justice but he was more of a tactician than Lord Phillips and he would negotiate changes in his own or others judgments with a view to achieving a desired outcome. Yet in close calls he was less successful than he had been in the Lords (where he was twice as likely to be on the majority side as on the minority side). In the Supreme Court he was on the majority side in only 11 of the 20 close calls in which he took part. On the other hand, he gave the lead judgment in four of these (36 per cent), he fought hard, and successfully in *Martin*⁴¹ to keep his majority, and it seems clear also that he wrote what was to have been the lead judgment in the *Jewish Free School* case,⁴² only to lose out to what seems to have been a switch of votes by Lord Phillips at a late stage.

Task leadership is not confined to the President and Deputy President. At least two other Justices played the role of task leader in the Court's first three years, with considerable success. First was Lord Collins. In the space of two years he took part in eight close calls and was in the majority in seven of them. Indeed in his 51 appearances in the court he only dissented on one occasion. His colleagues in turn rarely dissented against him. His contribution as an intellectual leader of the Court probably accounts for the fact that his mean agreement rate with his

³⁹ *Stone Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39; *Al Rawi and Others v The Security Service and Others* [2011] UKSC 34; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.

⁴⁰ *E v Governing Body of JFS* [2009] UKSC 15 (Jewish Free School case); *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; *Ministry of Defence v AB and others* [2012] UKSC 9.

⁴¹ *Martin v Her Majesty's Advocate* [2010] UKSC 10.

⁴² *Jewish Free School case* [2009] UKSC 15; not only does he have the fullest statement of the facts, he also deals with the issue of costs (with which his colleagues all agree) which is unusual in a dissenting judgment.

colleagues was 90 per cent—considerably higher than the average for the whole court of 86 per cent—and equal with Lord Dyson as the highest on the Court at the time. As will be seen, geography possibly played a part since his neighbours on the second floor were amongst his highest levels of agreement, namely Lord Kerr (94 per cent), Lord Rodger (91 per cent) and Lord Clarke (89 per cent). However, there can be little doubt that the most successful task leader in the Supreme Court in its first three years was Lord Dyson. His overall agreement rate with his colleagues (90 per cent) was equalled only by Lord Collins. Lord Dyson was the Justice with whom several of his colleagues had their highest levels of agreement,⁴³ namely, Lords Walker (97 per cent), Hope (95 per cent), Clarke (94 per cent) and Phillips (93 per cent). Indeed there were only two Justices whose agreement rate with him fell below the Court average. His high agreement rate with his colleagues stemmed partly from the fact that in all nine close calls in which he sat whilst a full-time member of the Court he was on the majority side and indeed in the 18 cases in which he sat as a full-timer which had any dissent in them, it was not his, since he did not dissent once in 64 appearances on the Court, until he returned as Master of the Rolls in the *Bank Mellat* cases.⁴⁴ It might be argued that such statistics are compatible both with being a task leader and with being a follower of others' leads. The latter is not Lord Dyson. Lord Dyson wasted few opportunities to tell his colleagues (senior and junior) in his judgments precisely where he did and did not agree with them. Moreover his lack of dissents was down to a very good reason. In four or possibly five cases he was in a minority at the first conference. Yet on each occasion his efforts to write a clear and persuasive dissent were so successful in winning round one or more colleagues, that they became the lead judgment.⁴⁵ In his two years on the Court no other Justice succeeded in bringing over so many votes to his side after the first conference. In all Lord Dyson gave 14 lead or single judgments (21 per cent of his cases) ranking him—whilst he was a full-time member of the Court—as the most prolific lead writer after Lords Phillips and Hope.

4.4 Vote switching

I have discussed changes of mind and vote with all of my judicial interviewees and detected no reluctance to discuss the topic, often in relation to specific cases. However as any oral historian could have told me it was unlikely

⁴³ See Paterson, above n 4, ch 5.

⁴⁴ *Bank Mellat v Her Majesty's Treasury (Nos 1 and 2)* [2013] UKSC 38; [2013] UKSC 39.

⁴⁵ See A Paterson, above n 4, ch 5.

that the interviewees would have a precise recall of how often such changes occur—especially in relation particular stages of a case—and so it proved.

That's very difficult to answer numerically. I haven't really thought of trying to analyse that numerically, but I would think that people are less certain during the oral hearing [...] Once they've expressed a provisional view the general tendency is for people to stick with that provisional view [...] (Lord Mance).

My main interest is the changes that take place after the first conference at the end of the hearing. Here, I am reminded (somewhat wickedly) of the first line of a judgment of the Court by Lady Hale earlier in the year: "The issue in this case is whether and in what circumstances a judge who has announced her decision is entitled to change her mind."⁴⁶ On such matters I was exceptionally fortunate to be the first scholar that I am aware of to be given the opportunity to scrutinise a sizeable proportion of the judicial notebooks of some Law Lords and Justices, notably Lords Reid and Bingham. These notebooks contain not just details of counsel's arguments but also the only extant records that exist of the first case conferences in the final Court. By comparing these notes with the final published judgments in a case it is sometimes possible to detect where there have been changes of vote between the first conference and the final judgment. Interestingly, the results from a significant sample of both these Law Lords' notebooks produce a similar figure. For Lord Reid it was 13 out of 70 cases and for Lord Bingham it was 15 out of 96 cases – suggesting that in around 16 per cent of cases in the House there was a change in vote on outcome between first conference and final judgment. Nothing in my studies of the Supreme Court suggests that the figure is much different for that court either. Amongst Lord Reid's cases where there seems to have been a late change of mind and vote include such famous cases as *Rookes v Barnard*,⁴⁷ *White and Carter (Councils) Ltd v McGregor*,⁴⁸ *Anisminic Ltd v Foreign Compensation Commission*,⁴⁹ *Home Office v Dorset Yacht Co*,⁵⁰ and *Cassell v Broome*.⁵¹

I am not going to discuss anything from the Bingham notebooks, however I will look briefly at two cases from that era which involved attempts at task

⁴⁶ In the matter of L and B (Children) [2013] UKSC 8, para 1 (Baroness Hale).

⁴⁷ [1964] AC 1129.

⁴⁸ [1961] UKHL 5.

⁴⁹ [1969] 2 AC 147.

⁵⁰ [1970] UKHL 2.

⁵¹ [1972] UKHL 3.

leadership and pragmatic decision-making. The first was *Twinsectra*.⁵² It was 4:1 at the first conference and 4:1 when the judgment was published 153 days later (twice the average gap between the hearing and the handing down of the final judgment in all cases in 2002). Yet it was a rather more lively affair than it appears. The delay was caused because of a sustained campaign by Lord Millett to win over Lord Hoffmann to dismiss the appeal. Lord Hoffmann and his colleagues were arguing that the test for 'dishonesty' in financial transactions was a combined test of subjective and objective elements. Lord Millett asserted that the test was purely objective:

The problem was Lennie because [...] he has such influence that I knew that in order to persuade the majority I had to persuade him. If I could persuade him the rest would fall into line, or most of them. But he was absolutely adamant and I went in to see him several times. I went into his room and we discussed it and we circulated, but he never budged. I offered everything. I said 'If you are sorry for the defendant I am quite prepared to write in a way which will let him off the hook on the facts so long as you give me the law'. 'No'. Then I went away and eventually I came back and I said 'I'm prepared to write *dishonesty* right out of the equation and go back to *knowledge* provided you define it as actual knowledge' and define it the way Donald Nicholls had. Because this *dishonesty* is going to be a trap and he said 'I thought you'd come round to that view, Peter, but I'm not prepared to change my mind'. So that was a failure and I think the last thing I did after I'd circulated, I went and I saw him and I said 'You know, Lennie that your view means that you are going to draw a distinction between procuring a breach of trust and procuring a breach of contract and that is nonsense, especially as in this case they could have pleaded it as procuring a breach of contract as the trust was contractual', and his response to that? 'Yes, Peter, that's your best point'. Now it's not a best point, actually it's a devastating point. (Lord Millett)

Lord Millett in a self-deprecating way blamed his ineffectualness at persuading his colleagues for this unfortunate case, however his success rate in 'close calls' was the same as Lord Hoffmann's. They were both twice as often on the

⁵² [2002] UKHL 12.

majority side as on the minority. Ironically, the Privy Council in *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd & Ors (Isle of Man)*⁵³ revisited the whole question three years later. As James Lee notes in a hard-hitting critique,⁵⁴ in giving the judgment of the Council, Lord Hoffmann effectively accepted that the position supported by Lord Millett in *Twinsectra* was right all long, but without admitting that he had changed his position.

Similar pragmatic tactics by Lord Hoffmann emerged in the famous causation cases in the Lords in the Bingham era, of which *Barker v Corus (UK) plc*⁵⁵ was the fourth and *Fairchild v Glenhaven Funeral Services Ltd*⁵⁶ the first. It seems that in *Barker*, Lords Hoffmann and Rodger, the only Law Lords left from the original panel in *Fairchild*, were at loggerheads from an early stage as to the interpretation to be given to the test developed in *Fairchild*. It is understood that Lord Rodger felt that he had a majority of the panel in *Barker* on his side, when he was struck by a bout of flu. By the time he returned Lord Hoffmann had persuaded them all that his arguments in *Fairchild* had been accepted by the majority of the panel, when it is far from clear from the judgments that this was so.⁵⁷ Lord Rodger is understood to have been unimpressed at this re-writing of the judgment in *Fairchild* and the stinging tone of his dissent (which his colleagues steadfastly avoid engaging with) shows this clearly. It is to be doubted that his irritation would have been in any way diminished by Lord Hoffmann's much later confession⁵⁸ that he had indeed been indulging in 'some judicious re-writing of history' in the case (as Lord Rodger had asserted in his dissent), with a view to some pragmatic damage limitation in relation to the anomalies created by *Fairchild*.⁵⁹

4.5 Social Leadership

So much for task leadership but almost as important for collegiality and team-working to flourish is social leadership. There is little doubt that for later years of the Bingham Court and the early years of the Supreme Court the pre-eminent

⁵³ [2005] UKPC 37.

⁵⁴ J Lee, 'Fidelity in Interpretation: Lord Hoffmann and *The Adventure of the Empty House*' (2008) 28 *Legal Studies*1.

⁵⁵ [2006] UKHL 20.

⁵⁶ [2002] UKHL 22.

⁵⁷ Lee, above n 54.

⁵⁸ Ironically in a volume of essays in tribute to Lord Rodger. See L Hoffmann, '*Fairchild* and After' in Burrows, above n 14.

⁵⁹ Whilst Lord Hoffmann is unrepentant about his role in *Barker* he does regret the *Fairchild* decision which he now feels is an example of a hard case making bad law: see *ibid*.

social leader was Lord Brown. Arguably, however, he was even more effective in this role in the House of Lords than he was in the Supreme Court. Part of the reason is a phenomenon which I believe has been unjustly neglected in the study of appellate judicial decision-making—namely Geography.

One of the curiosities of studying appellate judicial decision-making and the recent writings on the architecture of the courts,⁶⁰ is the complete neglect of the topic of the office location of the judges. In reality geography does make a difference to appellate judicial decision-making, since judges—like other social beings—tend to interact more frequently with their neighbours than those who are situated at some distance from them, or on another floor. In the House of Lords the Law Lords' rooms were located on a long corridor on the second floor of the House of Lords.⁶¹ Almost all of them were on one side of the corridor while the Secretaries' office and the coffee machine were located on the other side at one end of the corridor. Room allocation was largely based on seniority which entailed that in the main the more senior Law Lords were located adjacent to one another and closest to the Secretaries' office and the more junior Law Lords were to be found at the far end of the corridor,⁶² near the Library.⁶³ The main exceptions were Lord Saville (located at the end of the corridor, because he was elsewhere for much of the Bingham era,⁶⁴) and Lord Brown who had the office next to the Secretaries' office and the coffee machine. The key location of this office entailed that any Law Lord who visited the Secretaries or the coffee machine was likely to engage with Lord Brown in conversation. Frequently several Law Lords were to be found in his office. As Lord Phillips (whose office was directly opposite Lord Brown's) told me:

I tend to drop in on Simon Brown in particular because he always sits with his door open and you walk past [...] and if he's with me on a case when I come in in the morning I shall probably just exchange views with him, or even in advance, simply because of his geographical proximity, so we tend to know much more about

⁶⁰ J Resnik & D Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (2011).

⁶¹ Known as the 'Law Lords' Corridor'.

⁶² Which can only have heightened the perception of isolation which they felt, having been used to the camaraderie of the Court of Appeal.

⁶³ Lords Hope and Rodger who were in the middle of the corridor, had adjacent rooms, which assisted them when working together on Scots appeals.

⁶⁴ Conducting the 'Bloody Sunday' Inquiry.

the way we're looking at things than I will with people down the corridor, simply because I don't walk past their door.

In the Supreme Court the geographic layout is quite different. The original plan to locate all 12 Justices on the top floor had to be abandoned on space grounds, leading to a solution which placed four offices on the second floor and eight on the third floor situated on three sides of a hollow square, with the tea room and open plan space for the law reporters and Judicial Assistants on another side, near to the Secretaries. As before, the room allocation is largely by seniority, placing the President and Deputy President in adjacent rooms on the top floor and three of the more junior Justices on the second floor. As in the House, room location has a major influence on interactions. The junior Justices on the second floor often kept their doors open and will chat amongst themselves on almost a daily basis; however, their visits to their colleagues on the top floor are far less frequent. Similarly the Justices in the five contiguous offices on the top floor corridor tend to visit each other more frequently than their colleagues on the lower floor or even the President and Deputy President. As one of the juniors in the early days remarked, 'if you have to go upstairs, you don't know whether they are there. I suppose you could ring. Whereas with [Lord Kerr] I just walk a few paces along the corridor.'

As will be apparent from this description there is no *one* strategically located office which forms the focal centre of the Court as there used to be in the House of Lords. This has had an impact on information flows in the Court. Lord Brown continued to play the social leadership role but perhaps with less impact than in the House. However, as has already been seen the move to the new Court led to him team-working closely with Lord Rodger who was in a contiguous room which as was seen earlier led to them voting together in the majority and in dissent 93 per cent of the time in 2010/11. Once Lord Brown had retired however, several Justices remarked on the loss of fun that went with him. It is not clear who, if anyone, now performs this important role on the Court.

So much for the dialogue between the Justices—much the most significant of the dialogues. I have devoted most of this article to it, and the less observed elements of this dialogue in particular, because I disagree with those scholars who argue that judgments should be left to speak for themselves. That may be the legal position, but I believe that in a democracy it is appropriate for us to have an appreciation as to how judgments are made, how they change in the drafting, and how and why judges change their minds—a perfectly normal and healthy practice.

Space does not permit much by way of discussion of the other important dialogues in which the Court engages—but I shall essay a brief reference to three. The comparatively new discourse—that with Judicial Assistants has been transformed with the move across Parliament Square. From a Hogwarts style garret which few Law Lords visited the Judicial Assistants have doubled in number and now occupy a strategically placed open-plan setting between the Justices and their secretaries. Yes, geography has made a difference to them too.⁶⁵ Their influence has also grown.⁶⁶ That is very much the pattern with law clerks in the US Supreme Court—which may be a caution for us.

However, it is with respect to the other two arms of government, Parliament and the Executive, that the Supreme Court has arguably its most problematic dialogues. Lord Sumption's recent lecture on the *Limits of Law*⁶⁷ underlines the fact that the Supreme Court and Parliament are no nearer to attaining a mutual recognition of the institutional competencies of each institution when it comes to delimiting parliamentary sovereignty or judicial law-making.⁶⁸ Indeed, with regard to transparency in relation to judicial law making, I argue that there has been something of a retreat towards formalism and a down-playing of the creative role of the Court. As Lord Sumption has remarked elsewhere, 'the declaratory theory is back again in full force'.⁶⁹ Overt exercises of the power to depart from their own precedents are fewer than those that go under the radar. Some commentators consider that the Court has become more transparent in its approach to law making than the House of Lords was. My findings do not point in that direction.⁷⁰ Lords Devlin and Radcliffe would feel quite at home with the 'softly, softly' approach of today's treatment of precedent. True the Justices freely admit to making choices but for some of them this is indistinguishable from pursuing the better answer, even if there is no single right answer. Justices still

⁶⁵ The different geography of the House of Lords and the Supreme Court also impacted on the interaction between Judicial Assistants and the judges: see Paterson, above n 4, ch 6; Nesterchuk, 'above n 14.

⁶⁶ Paterson, above n 4, ch 6.

⁶⁷ J Sumption, 'The Limits of Law' (20th November 2013) *27th Sultan Azlan Shah Lecture, Kuala Lumpur*, <<http://www.supremecourt.gov.uk/docs/speech-131120.pdf>> [accessed 31 December 2013].

⁶⁸ What for example should the Supreme Court do if it was established that Parliament had passed a piece of legislation understanding it to mean one thing, based on ministerial assurances, and it subsequently emerges that Parliament had been misled: see Lord Mance's dissent in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22.

⁶⁹ Interview with the author, 2013.

⁷⁰ See Paterson, above n 4, ch 7.

give lectures on judicial law making but few that have the bold directness of Lord Reid's evisceration of the declaratory theory 40 years ago—'we do not believe in fairy tales.'⁷¹

With the Executive, channels of communication are also a work in progress. As is well known Lord Bingham declined to meet with the Home Secretary after the Belmarsh case, deeming it improper to provide him with guidance as to what the Court might say if a new set of reforms were introduced. Yet the courts are familiar with Attorney-General's References, and the Canadian Supreme Court has jurisdiction to entertain Government References where the Government seeks guidance on what are hypothetical issues.⁷² Perhaps this is a reform worth considering. The UK Supreme Court has remained as robust as the House under Lord Bingham in national security cases and contrary to Lord Bingham's expectations and—to a certain extent—Lord Phillips' remarks last year,⁷³ it has been even stronger than the House in challenging the Executive in immigration and asylum cases.⁷⁴ Lord Bingham was careful to avoid unnecessary strains in the relationship between the UK's top court and the Executive, which explains his deliberately low key judgment in the Belmarsh case.⁷⁵ Lord Neuberger shows all the signs of understanding the value of this example,⁷⁶ but he and Baroness Hale are to be commended for boldly attacking the recent cuts in legal aid and access to justice. There are signs then that in its dialogues with the Executive, the Court is conscious, as Lord Bingham was, of the importance of engaging appropriately with the public.

To sum up, it is clear to all that many significant and worthwhile changes have taken place in the transfer of the final judicial authority from the House of Lords to the newly independent UK Supreme Court. Various dialogues lie at the heart of understanding how appellate judicial decision-making works in the final court and whilst the Court has taken great strides in its dialogue with the public there is still some distance to go. Further, even though the dialogues with Parliament and the Executive are challenging, they are challenging in ways that have the potential

⁷¹ R Reid, 'The Judge as Law Maker' (1972) 12 *JSPTL* 22.

⁷² Supreme Court Act 1875, s 53, the Governor in Council may refer to the Supreme Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution and the constitutionality or interpretation of any federal or provincial legislation.

⁷³ N Phillips, 'The Birth and First Steps of the UK Supreme Court' (2012) 1 *CJICL* 9.

⁷⁴ See Paterson, above n 4, ch 7.

⁷⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁷⁶ See D Neuberger, 'Judges and Policy: A Delicate Balance', *Lecture to the Institute for Government, 18 June 2013* <<http://www.supremecourt.gov.uk/docs/speech-130618.pdf>> [accessed 31 December 2013].

to strengthen the unwritten constitution in the United Kingdom. Finally, the dialogue between the Justices is being transformed through a commitment to team- and collective-working. This has advantages in increasing certainty for the lower courts but it also has potential risks—including to transparency. In short, there is much to be admired. The architects and implementers of the transformation have done their jobs well. The debate will necessarily continue over whether all of the changes are for the better or not, or whether some have gone too far and others not far enough but those seem to be the proper questions that arise with respect to institutional change in an ever-changing world. That is surely healthy in a modern democracy.

WHO GUARDS THE GUARDIANS?

Baroness Hale of Richmond*

It is a truth universally acknowledged that judicial review is, in the Ministry of Justice's own words, 'a critical check on the power of the state, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful.'¹ The same is true of other public law remedies, such as statutory appeals and actions under the Human Rights Act, whereby the decisions, acts or omissions of public authorities may be challenged in the courts. This is a necessary component of the rule of law and, as famously pointed out by Lord Bingham in the *Belmarsh* case, the role of the judges in enforcing it is an essential part of the democratic process.² Indeed, in our Westminster-model democracy, Parliament cannot be sovereign without the judiciary to ensure that the executive and other public bodies stay within the law.

That is all very well, but judicial review can also be a confounded nuisance. When we were preparing for the move from the House of Lords to the Supreme Court, planning permission and listed building consent had been obtained for the conversion of the Middlesex Guildhall to suit our purposes, and the builders were ready to move in. However, SAVE Britain's Heritage launched a judicial review of Westminster City Council's decision.³ Fortunately for our purposes, they did not succeed and most of our visitors seem delighted with what we have done with the building. But should they have been able to do it at all?

The approach we adopt towards the standing required for people and organisations to bring claims for judicial review or other public law remedies is crucial to the constitutional purpose which they serve. The same is true of the approach we adopt to governmental and non-governmental bodies who want

* Deputy President of the Supreme Court of the United Kingdom. This article is based on Lady Hale's closing speech at the Public Law Project's 2013 London conference, which was entitled *Judicial Review Trends and Forecasts*.

¹ Ministry of Justice, *Judicial Review: Proposals for further reform*, 2013, Cm 8703, para 1, <<http://www.official-documents.gov.uk/document/cm87/8703/8703.pdf>> [accessed 4 December 2013]

² *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 42 (Lord Bingham).

³ *R (Save Britain's Heritage) v Westminster City Council* [2007] EWHC (Admin) 807.

to intervene in the proceedings to draw to our attention arguments or material which for whatever reason the parties may not have put before us.

Allowing, even encouraging, people to take an active part in the enforcement of the law, so as to encourage a ‘judge over the shoulder’ attitude on the part of government, must be a good thing. On the other hand, allowing any old busybody to bring proceedings which will delay or even prevent perfectly lawful governmental actions and decisions must be a bad thing, as must allowing them to interfere in other people’s proceedings. Distinguishing between busybodies and champions is almost as difficult as distinguishing between terrorists and freedom fighters. But too close a concentration on the particular interest which the claimant may be pursuing risks losing sight of what this is all about—fundamentally, as Mark Elliott has said, the issue is not about individual rights but about public wrongs.⁴ There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.

1 Standing

As you know, under section 31(3) of the Senior Courts Act 1981, the court shall not grant permission to bring a judicial review claim unless the claimant has ‘a sufficient interest in the matter to which the application relates’. Human rights claims can only be brought by people whom Strasbourg would regard as a ‘victim’ of the breach alleged.⁵ And in some statutory contexts there is a requirement that the claimant be a ‘person aggrieved’. The ‘sufficient interest’ test was selected by the Rules Committee when it devised the new Order 53 unified judicial review procedure in 1977, precisely in order to get away from the technicalities of the old law of the prerogative writs (which people as old as I remember having to try to teach) and to offer sufficient flexibility to recognise a proper interest when one saw one.⁶

The vast majority of judicial review claims are brought by people with a very direct interest in the outcome, especially those bringing asylum and immigration claims, but also the not inconsiderable number of vulnerable elderly and disabled people who challenge community care decisions, because no statutory procedure for doing so along similar lines to the homelessness procedure has yet been

⁴ M Elliott, *The Constitutional Foundations of Judicial Review* (2001).

⁵ Human Rights Act 1998 (UK) s 7.

⁶ *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, 656 (Lord Roskill).

devised. Only a small proportion of claims are brought by charities and NGOs and only a small proportion of those can properly be called campaigning organisations or pressure groups, rather than umbrella organisations for a group of people many of whom have a personal interest in the subject matter. I would not call Age UK a campaigning organisation: it provides services for and protects the interests of a section of the community some of whom are particularly vulnerable and disadvantaged. It made obvious sense for them to challenge the way in which the United Kingdom had implemented the EU Directive on Age Discrimination, rather than to find some individual involuntary retiree to back to do so.⁷

But a small proportion of claims are brought by organisations or people who might be called campaigners. My guess is that the great majority of these are in the environmental field. ClientEarth, for example, describe themselves as ‘activist lawyers committed to securing a healthy planet’. They brought judicial review proceedings in an attempt to challenge governmental inactivity over air quality in London and other centres of population and have at least succeeded in obtaining a declaration that the government is in breach of our obligations under article 13 of the Air Quality Directive and a reference to the CJEU over the consequences of this.⁸

Then there was Mr Walton, who claimed to be a ‘person aggrieved’ by the proposed scheme for a section of the Aberdeen bypass.⁹ The Inner House doubted whether he qualified either as a person aggrieved or as someone with standing to bring judicial review, as he did not live in the immediate vicinity of the proposed road and would not be directly affected by it. Scotland has traditionally taken a more restricted view of standing to invoke what they call the supervisory jurisdiction than we have of standing to bring judicial review. In *Axa General Insurance Ltd v HM Advocate* both Lord Hope and Lord Reed adopted a test of ‘sufficient interest’, meaning an interest sufficient to justify his bringing the application before the court.¹⁰ Lord Hope then said that the words ‘directly affected’ captured the essence of what was being looked for. But by saying this he did not mean only a personal interest; he included someone ‘acting in the public interest [who] can genuinely say that the issue directly affects the section of the public he seeks to represent.’¹¹ As Lord Reed explained in relation to Mr Walton:

⁷ *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2010] 1 CMLR 21.

⁸ *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25.

⁹ *Walton v Scottish Ministers* [2012] UKSC 44.

¹⁰ [2011] UKSC 46, para 62 (Lord Hope); *ibid*, para 170 (Lord Reed).

¹¹ *Ibid*, para 63 (Lord Hope).

a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter [...] A busybody is someone who interferes in something in which he has no legitimate concern. The circumstances which will justify the conclusion that a person is affected by the matter [...] or has a reasonable concern in it or is on the other hand interfering in a matter with which he has no legitimate concern will plainly differ from one case to another depending upon the particular context and the grounds of the application.¹²

Indeed, he went further:

There may also be cases in which an individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.¹³

Lord Hope (who is a well known bird-lover) would extend the protection of the rule of law to wildlife as well as people:

Take, for example, the risk that a route used by an osprey as it moved to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines [...] The osprey has no means of [challenging the proposed development] on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.¹⁴

He did say that normally one would look to bodies such as the Scottish Wildlife Trust and Scottish Natural Heritage if there were good reasons for an objection, but they could not do everything and so there had to be some room for individuals who were sufficiently concerned and sufficiently well-informed to do so too.¹⁵

¹² [2012] UKSC 44, para 92 (Lord Reed).

¹³ *Ibid*, para 94 (Lord Reed).

¹⁴ *Ibid*, para 152 (Lord Hope).

¹⁵ *Ibid*, para 153 (Lord Hope).

It is of course noteworthy that the bodies he mentioned were statutory bodies, as too are some of the claimants who are appealing to the Supreme Court in the matter of HS2.¹⁶ There are indeed many public bodies with a specific statutory role of protecting certain interests, ranging from wildlife, natural resources, the environment, to children, or disabled people and others with the characteristics protected from discrimination by the Equality Act 2010. One might have thought that, if it is within their powers, they should be free to fulfil that role even if the body which is threatening those interests is another public authority.

Let's think about it: these claimants, ranging from Mr Walton to ClientEarth to the local authorities of different political persuasions along the route of HS2, have all made challenges to the legality of government action which have been found sufficiently meritorious and serious to reach the highest court in the land. Can it really be suggested that they should not be allowed to do so? If they do not, how else is government action to be kept within the law?

2 Interventions

Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. Interventions have been provided for in the lower courts since the introduction of the Civil Procedure Rules. Our own rules provide that 'any person and in particular (a) any official body or non-governmental organisation seeking to make submissions in the public interest or (b) any person with an interest in proceedings by way of judicial review' may make written submissions in support of an application for permission to appeal.¹⁷ No particular formality is required and the invitation is a very open one, but not, I think, abused. I know of one case in which three different organisations wrote in support of the application, although it was ultimately unsuccessful.¹⁸ It is an open question whether we should allow people to write in *against* the application: usually we can rely on the respondent, in judicial review proceedings more often the government department or public authority involved than the claimant, to put in a notice of objection.

Once we have granted permission to appeal, or an appellant who already has or does not need permission has filed a notice of appeal, 'any person', and in

¹⁶ *R (HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3.

¹⁷ Supreme Court Rules 2009, rule 15(1); and see UKSC Practice Direction 3, *Applications for Permissions to Appeal*, para 3.3.17-18.

¹⁸ *R (Rudewicz) v Secretary of State for Justice* [2012] EWCA Civ 499.

particular those same persons plus anyone who was an intervener in the court below or whose written submissions were taken into account at our permission stage, may apply for permission to intervene.¹⁹ Formal applications are required at this stage²⁰ and, of course, a fee, although this can be waived for non-profit organisations acting in the public interest. We do expect applicants to consult the parties and their attitude is an important factor in whether we will give permission. Mostly they are quite relaxed about this, unless they perceive that their time estimates for the hearing will be put at risk by oral interventions. Interveners like to be able to make oral as well as written submissions. No doubt they fear that written submissions will not be given the same weight as oral ones. But the main benefit is that they can see what is interesting or troubling the court and can react to that. The benefit for the court is that we can put our questions direct to the intervener rather than through the parties. There is an intermediate possibility, where interveners are given permission to make written submissions, but told that they are free to attend the hearing if they wish and in case the court has any questions for them. Views differ about the wisdom of this, and indeed about its fairness to the interveners, if they feel compelled to attend just in case. But I can think of at least two cases in which interveners who had made written submissions in fact turned up at the hearing. In one case they filed helpful additional written submissions as a result of listening to the debate: this was the Coram Children's Legal Centre in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa*²¹ (the case about the interests of children whose parents face extradition). In another they made brief additional oral submissions: this was in *Preddy v Bull* (the case about Christian hotel keepers who refused to let double-bedded rooms to unmarried couples).²² Unfortunately, they don't get the credit they deserve in the law reports if they only make written submissions.

Whether they make only written or both written and oral submissions, the intervener's role was made crystal clear by Lord Hoffmann in *E (A Child) v Chief Constable of the Royal Ulster Constabulary*.²³ He began by saying that permission is given 'in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain'.²⁴ I think that sums up the point perfectly. But he went on to

¹⁹ Supreme Court Rules, above n 17, rule 26.

²⁰ See UKSC Practice Direction 7, *Applications, Documents, Forms and Orders*.

²¹ [2012] UKSC 25.

²² *Bull v Hall* [2013] UKSC 73.

²³ [2009] 1 AC 536.

²⁴ *Ibid*, para 2 (Lord Hoffmann).

say that:

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention.²⁵

In that case he was directing his fire against the Northern Ireland Human Rights Commission, which did indeed repeat the points that had been made on behalf of the claimant—one of those little girls who had been subject to a barrage of intimidation and violence, met by almost equally scary police and army precautions, as they walked to school with their parents. Frankly, the claimant's counsel had been subjected to such a barrage of hostile questioning from the chair that I am not surprised that counsel for the Commission felt that she needed his help. Not for the first time, I felt it unfortunate that the child had not been separately represented, as so often 'there is a tendency to see confrontations such as this through adult eyes and forget that these are not the eyes of children who are simply the innocent victims of other people's quarrels.'²⁶ So I was glad that we had had some very helpful written submissions from the Children's Law Centre and Northern Ireland Commissioner for Children and Young People. We quoted some of the useful points they, and no-one else, had made about the special vulnerability of children in such circumstances.

Some public bodies, such as the Equality and Human Rights Commission, have an express power to institute or to intervene in legal proceedings which are relevant to a matter in which they have a function, but they may also act for an individual litigant. They tend to do the latter in private law discrimination claims which they regard as test cases and one can well see why. But from the point of view of the court it can sometimes be difficult to disentangle the private interests of the client from the broader public interests of the Commission. Intervention in another person's claim makes that distinction much clearer. We also had an interesting complaint from the appellants in *Preddy* that a public body such as the Commission ought to be neutral as between the different kinds of protected characteristics and should not so openly side with sexual orientation against religion and belief. NGOs such as Liberty may also either act for a party or seek to intervene and it must be an interesting question for them which strategy is likely to prove more effective.

²⁵ *Ibid*, para 3 (Lord Hoffmann).

²⁶ *Bull v Hall* [2013] UKSC 73.

But from our—or at least my—point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied. I believe, for example, that it was Liberty who supplied the killer argument in the *Belmarsh* case.²⁷ And Liberty and Justice intervened helpfully, for example, in the *habeas corpus* case of the man detained at Bagram air base since 2004: *Rahmatullah v Secretary of State for Defence*.²⁸

One thing that such interveners can do, which the parties may find it more difficult and more costly to do, is to draw our attention to international jurisprudence which may be relevant to the issue. By international jurisprudence, I mean two rather different things. First are the international human rights instruments and their interpretation by the bodies charged with monitoring compliance with them by states parties. Second is the jurisprudence of other states when dealing with similar problems. Unlike the Supreme Court of the United States, we have not—at least so far—encountered political objections to our looking outside the United Kingdom for help with the difficult problems we have to resolve. It stands to reason that we are going to look at how other countries interpret and apply international instruments to which we are also party. It also makes sense to look at how countries with similar legal and constitutional traditions resolve common problems. None of this is binding, in the way that the jurisprudence of the CJEU is binding, or even influential, in the way that the jurisprudence of the European Court of Human Rights is influential, but it is still helpful. We would be foolish not to look at it. The problem for us is finding out what it is, in a reliable way. In our adversarial system, we cannot always rely upon the parties to do this. They may not have the resources and, even if they do, they may tend to concentrate on the material which helps their case. Nor do we have the resources to do the necessary research ourselves.

I recently listened with awe to a Judge on the German Constitutional Court who told us that each Judge has four clerks who are themselves trained judges. They write a comprehensive treatise on each case. These treatises now commonly have a comparative chapter (according, as she delicately put it, to the Judge's preference and cast of mind). A Constitutional Court Judge from Colombia added that they had developed some implicit rules for looking at such material—in

²⁷ *A v Secretary of State for the Home Department* [2005] 2 AC 68.

²⁸ [2012] UKSC 48.

particular that they must not look at only one country but at contrasting ways in which the problem is understood in different countries and alternative solutions. We do not have that luxury and in our adversarial system there are sensitivities about judges relying too much upon their own researches. The obvious solution is for interveners to do this and share the products of their labours with us and the other parties. The United Nations High Commissioner for Refugees, who has a special mandate to supervise the implementation of the Geneva Convention on the Status of Refugees, frequently does so.

There is, some think unfortunately, no international court or committee with the power authoritatively to interpret the Convention and to ensure compliance. But the guidance given by the UNHCR carries great weight, as does any information he is able to give about the implementation of the Convention in other countries. A recent example is *Al-Sirri v Secretary of State for the Home Department*²⁹ which concerns the exclusion of a person from refugee status—even if he has a well-founded fear of persecution in his home country—if there are serious reasons for considering him guilty of acts contrary to the purposes and principles of the United Nations. It was, I think, much better that we heard from the UNHCR directly as an intervener than indirectly through the different prisms of each party's case. Another intervener which comes into this category is a much smaller NGO: the Centre for Advice on Individual Rights in Europe (AIRE). As specialists, they know more about European Union and Human Rights law than many litigants, and I fear that we may ignore their interventions at our peril. In *Patmalnicie v Secretary of State for Work and Pensions*³⁰ we decided that it was justifiable to deny state pension credit to EU citizens who did not have the right to reside in the UK. The European Commission is now taking action against the UK.

Other interveners are more concerned to protect the interests of a particular group of people who are affected by the litigation. So, for example, Freedom from Torture and MIND intervened in *SL v Westminster City Council* on the scope of local authorities' duties to accommodate failed asylum seekers with mental health needs;³¹ Age UK, having failed to defeat the regulations implementing the age discrimination directive, intervened in *Selden v Clarkson, Wright and Jakes* to argue about how the regulations ought to be interpreted and applied,³² in a claim brought by a retired solicitor against his former partners; Reunite,

²⁹ [2012] UKSC 54.

³⁰ [2011] UKSC 11.

³¹ [2013] UKSC 27.

³² [2012] UKSC 16.

the London Metropolitan University's Centre for Family Law and Practice and Families across Frontiers intervened in *A v A* on whether a baby who had never been here could nevertheless be held habitually resident here for jurisdiction purposes;³³ and the Council of Immigration Judges intervened in *Ministry of Justice v O'Brien* on whether fee-paid part time judges are entitled to pensions pro rata with salaried part time and full time judges.³⁴ In the last, of course, the interveners had a direct personal interest in the outcome, but the other interveners mentioned did not. They just wanted us to get things right as they saw it.

But an important class of interveners are the government departments themselves. They intervene principally in order to protect the legislation and policy for which they are responsible. A good example is again *Seldon v Clarkson, Wright and Jakes*: having successfully defended its age discrimination regulations in Luxembourg, the Secretary of State for Business, Innovation and Skills intervened in a private discrimination dispute in order to promote the department's view of how the legislation ought to work. A similar example is *X v Mid-Sussex Citizen's Advice Bureau*,³⁵ where the Secretary of State for Culture, Media and Sport intervened to safeguard the government's view that 'occupation' in anti-discrimination law did not include volunteering; the Christian Institute intervened to the same effect, and other third sector organisations wrote to support the CAB's case; while the Commission for Equality and Human Rights supported the claimant.

It should not be thought that the government's interventions go all one way. Sometimes they can surprise us. The best example is *Yemshaw v Hounslow London Borough Council*,³⁶ on the meaning of 'violence' and 'domestic violence' in the homelessness legislation. The Court of Appeal had held that this was limited to direct physical contact, but the Secretary of State for Communities and Local Government intervened in support of a much wider definition. This intervention was backed up by a large amount of helpful national and international material and dovetailed quite neatly with the material on victims of domestic violence presented by the Women's Aid Federation of England. We could begin to feel quite sorry for Richard Drabble QC, for the local authority, confronted by the combined forces of Nathalie Lieven QC for the claimant, James Maurici for the government, and Stephen Knafler for the federation.

³³ [2013] UKSC 60.

³⁴ [2013] UKSC 6.

³⁵ [2012] UKSC 59.

³⁶ [2011] UKSC 3.

I think it does sometimes trouble us when it looks as if one side, usually the government, is having to fight on more than one front at once. But that is not usually the situation. The interveners are, or should be, there to provide us with evidence and arguments with which, for whatever reason, the parties are unlikely or unable to provide us, so that, as Lord Hoffmann said, we can get a more rounded picture of the problem. If we were the German Constitutional Court, with the resources fully to research that information for ourselves, things might be different. But even then, there are sometimes insights which we might never think of: we needed, for example, to hear from the clinicians who actually work in critical care units and struggle every day with the issues of withdrawing life sustaining treatment in the current *Aintree Hospitals* case.³⁷

3 Costs

Of course all this costs money. But it seems to me that the courts, and through them the law and the constitution, get a great deal of help from the people and organisations who bring proceedings or intervene in the public interest. Many of their lawyers are acting pro bono or for very limited fees. There are circumstances in which organisations which bring proceedings should have the benefit of protective costs orders with a correlative cost-capping order.³⁸ As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own, unless they have effectively been operating as a principal party:³⁹ if they behave properly, the principle that costs follow the event should not apply to them. But of course there will be some additional costs caused by the parties having at least to read and think about what the interveners have to say, so responsible moderation is called for.

Dare I say it: if there is a problem, could it be that it is not the NGOs and public bodies who bring or intervene in public law proceedings in the public interest who are to blame, so much as private bodies and individuals who do either in vigorous pursuit, not of the public interest, but of their own private profit? If, of course, there is a problem at all!

³⁷ [2013] UKSC 67.

³⁸ R (*Corner House Research*) v *Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

³⁹ Supreme Court Rules, above n 17, rule 46.

‘TWO STEPS BACKWARD, ONE STEP FORWARD’—THE CAUTIONARY TALE OF *BANK MELLAT (NO 1)*

Christopher Sargeant*

1 Introduction

Since 27 November 2008, Part 6 of the Counter Terrorism Act 2008 (the ‘CTA’) has conferred new powers upon UK Courts (‘domestic Courts’).¹ In particular, subject only to the need to have its decisions properly reviewed,² a domestic Court determining financial restrictions proceedings or an appeal thereof,³ may in certain circumstances now require all or part of the relevant proceedings to take place in the absence of any party⁴ with the exception of Treasury Counsel.⁵ In addition, such Courts may also prevent the reasons for judicial decisions arising from such proceedings from being publicly disclosed.⁶

In short, Part 6 CTA defines the circumstances in which domestic Courts hearing qualifying cases may adopt a Closed Material Procedure (a ‘CMP’).⁷ Whilst such proceedings were previously open for restricted parties to attend, hear the case against them, bring counter-submissions and ultimately be judged in public, the introduction of the CMP means that this situation is no longer automatically the case.⁸ Should the Court consider it necessary to protect the public interest,⁹ the State may now argue all or part of its case entirely in private

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¹ Counter Terrorism Act 2008 s 100(2).

² *Ibid*, s 66(2)(a).

³ *Ibid*, s 63.

⁴ *Ibid*, s 66(4)(b).

⁵ *Ibid*, s 66(5).

⁶ *Ibid*, s 66(4)(a).

⁷ See e.g. *Al-Rawi v Security Services* [2011] UKSC 34 (‘*Al-Rawi*’).

⁸ See however *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA 65; see also Youth Justice and Criminal Evidence Act 1999.

⁹ Above n 1 s 66(2)(b).

with the restricted party being represented only by a special advocate,¹⁰ and also obtain judicial decisions based on such evidence in a ‘closed judgment’, a document which is entirely inaccessible to others.¹¹

On 21 March 2013, the full scope of this power was considered by the Supreme Court in the case of *Bank Mellat (No 1) v HM Treasury* (*Bank Mellat*).¹² In particular, the Court was asked to determine whether it could itself adopt a CMP despite the relevant provisions in Part 6 CTA explicitly conferring such a power on only the High Court, the Court of Appeal and the Court of Session.¹³ By a majority of 6 to 3, the Justices held that it could.¹⁴ This was not however due to Part 6 CTA, but instead a result of powers conferred upon the Court by the Constitutional Reform Act 2005 (the ‘CRA’) permitting it to hear ‘any’ appeal from a lower Court.¹⁵ It went on to hold, albeit now by a majority of 5 to 4, that it would exercise this power in this case.¹⁶ For the first time in its history therefore, the Supreme Court thereafter conducted a secret judicial hearing. *Bank Mellat*, its legal team and the public were all formally excluded from attending.¹⁷

Notwithstanding its notoriety,¹⁸ the decision of the Court that it could adopt a CMP is regarded as unsatisfactory. Having identified less than twelve months previously in *Al-Rawi v Security Services* that ‘the right to be confronted by one’s accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power’,¹⁹ it is difficult to justify the Supreme Court so easily debasing that same right using powers in the CRA which likely concern different issues. In any event, it is paradoxical that such general powers can be used to subvert the effect of specific provisions in Part 6 CTA which explicitly answer the question raised. As Lord Reed has argued, ‘If

¹⁰ A special advocate may take instructions from his client prior to viewing any secret evidence but may not do so afterward. For more information see House of Commons Constitutional Affairs Committee, ‘The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates’ (2004-05) HC 323-I, Ch 4.

¹¹ See e.g. *Al-Rawi*, above n 7, para 35 (Lord Dyson).

¹² *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38 (*Bank Mellat UKSC*).

¹³ Above n 1 s 73.

¹⁴ Lords Hope, Kerr and Reed dissenting.

¹⁵ *Bank Mellat UKSC*, above n 12, para 37 (Lord Neuberger); Constitutional Reform Act 2005 s 40(2).

¹⁶ Lords Hope, Kerr, Dyson and Reed dissenting.

¹⁷ See UKSC, ‘Further Update on Proceedings’ UKSC website, 21 March 2013, <<http://www.supreme-court.gov.uk/news/bank-mellat-v-hm-treasury.html>> [accessed 16 March 2014].

¹⁸ The decision must surely be included alongside decisions such as *A v Secretary of State for the Home Department* [2004] UKHL 56; *Pepper v Hart* [1993] AC 593; *R v Secretary of State for Transport: Ex Parte Factortame Ltd (No 2)* [1991] 1 AC 603 as amongst the most famous in English law.

¹⁹ Above n 7, para 35 (Lord Dyson). See also *R v Davis* [2008] UKHL 36.

Parliament had intended the same procedures [CMP] to be applied in this court, it would surely have said so.²⁰ The minority view, set out by Lords Hope, Kerr and Reed, is therefore identified as preferable.

Despite disagreeing with the decision itself however, the long-term impact of *Bank Mellat* may nonetheless be more positive than first appears. Given that the Justice and Security Act 2013 has since expressly amended Part 6 CTA to confer the power to adopt a CMP upon the Supreme Court²¹ and significantly expanded its potential use to include all civil hearings,²² the lasting legacy of the decision is instead more likely to be found in the rules set out by the Court concerning the future judicial use of CMP.²³ This guidance, undoubtedly reflecting wider judicial disquiet with the procedure as a whole,²⁴ is highly restrictive, both in terms of how the procedure is to operate in practice and when it should be adopted at all. Whilst legally therefore, the decision in *Bank Mellat* widens the categories of domestic Courts that can adopt a CMP, in practice it will inevitably lead to its reduced use by such Courts hereafter.

2 Bank Mellat–Background

2.1 Factual Overview

Bank Mellat was a large commercial bank with over 1800 branches and 20 million customers. Although it operated primarily in Iran, around 25 per cent of its business was in the UK.²⁵ In October 2009, following concerns that the Bank was involved in the financing of nuclear proliferation activities by the Iranian Government, the UK passed the Financial Restrictions (Iran) Order 2009.²⁶ This required that from 12 October 2009,²⁷ no relevant person, in particular any person operating in the financial sector,²⁸ could enter into, or continue to participate in, any transaction or business relationship with Bank Mellat or its representatives.²⁹ The effect of the Order was, in essence, to shut down the UK

²⁰ *Bank Mellat*, above n 12, para 134 (Lord Reed).

²¹ See Justice and Security Act 2013 s 6(1)(d).

²² *Ibid* s 6(1).

²³ Above n 12, paras 67–4 (Lord Neuberger), see also paras 89–97 (Lord Hope).

²⁴ *Ibid*, para 51 (Lord Neuberger).

²⁵ *Ibid*, para 12 (Lord Neuberger).

²⁶ Financial Restrictions (Iran) Order 2009/2725.

²⁷ *Ibid*, Art 1.

²⁸ *Ibid*, Art 2; Counter Terrorism Act 2008 Schedule 7 Paras 4 and 6.

²⁹ Financial Restrictions (Iran) Order 2009/2725, Art 4.

based operations of the Bank. It also ‘damaged the Bank’s reputation and goodwill both in this country and abroad.’³⁰

2.2 The case before the lower courts

2.2.1 *The High Court*

Given its impact upon its business activities, Bank Mellat immediately challenged the validity of the Order before the High Court.³¹ It submitted that the Order breached rules of natural justice as well as Article 6 and also Article 1 Protocol 1 ECHR.³² During the hearing, the Government argued that ‘some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives.’³³ Mitting J therefore adopted a CMP so as to allow such evidence to be adduced. The challenge to the Order was ultimately dismissed on all grounds. Whilst a closed judgment was produced, it was indicated that the evidence considered within the CMP had not been determinative,³⁴ with Mitting J referring to its contents at least twice in his open judgment.³⁵

2.2.2 *The Court of Appeal*

The case was subsequently appealed to the Court of Appeal and heard before Elias, Pitchford and Kay LJ.³⁶ Although largely conducted in open Court, a short closed hearing was again held, this time to enable the Court to consider the closed judgment of Mitting J.³⁷ The appeal was also dismissed on all grounds, albeit with Elias LJ dissenting in part. In contrast to the High Court however, the Court of Appeal did not issue a closed judgment. Kay LJ stated that although the Court had ‘held a brief closed hearing in the course of the appeal, [it was not] necessary to refer to it or to the closed judgment of Mitting J.’³⁸

³⁰ *Bank Mellat UKSC*, above n 12, para 12 (Lord Neuberger).

³¹ *Bank Mellat v HM Treasury* [2010] EWHC 1332 (*Bank Mellat EWHC*).

³² *European Convention on Human Rights and Fundamental Freedoms 1950*, opened for signature 4th November 1950, 213 UNTS 221, entered into force 3 September 1953.

³³ *Bank Mellat UKSC*, above n 12, para 13 (Lord Neuberger).

³⁴ *Ibid*, para 66 (Lord Neuberger).

³⁵ See *Bank Mellat EWHC*, above n 31, para 16 (Mitting J).

³⁶ *Bank Mellat v HM Treasury* [2011] EWCA 1 (*Bank Mellat EWCA*).

³⁷ *Bank Mellat UKSC*, above n 12, para 13 (Lord Neuberger).

³⁸ *Bank Mellat EWCA*, above n 36, para 83 (Kay LJ).

3 Bank Mellat before the Supreme Court—‘Two Steps Backward’

As a result of the failure of Bank Mellat to have the Order invalidated before the lower domestic Courts, the Bank finally appealed the case to the Supreme Court. Heard between 21 and 24 March 2013, the first day of argument was devoted exclusively to considering whether the Supreme Court could and if so, whether it should, adopt a CMP in order to consider the closed judgment of Mitting J. By a majority of 6 to 3, the Court determined that it could indeed adopt a CMP.³⁹ It thereafter went on to hold, albeit now only by a majority of 5 to 4, that it would in fact do so in this case.⁴⁰ The appeal against the Order was ultimately allowed. The Court was however clear that evidence considered during the CMP did not influence this outcome and it did not itself produce a closed judgment. As Lord Neuberger explained,

In my opinion there was no point in our seeing the closed judgment. There was nothing in it which could have affected our reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal.⁴¹

3.1 The majority approach—An appeal lies to the Court from ‘any’ order or judgment of the Court of Appeal

The majority judgment of the Supreme Court in this case was given by Lord Neuberger, with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath all agreed. In their view, the question of whether the Supreme Court could adopt a CMP could be decided simply on the basis that an ‘appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings.’⁴² Since the Court was also empowered to ‘determine any question necessary ... for the purposes of doing justice’⁴³ and to ensure that it was ‘accessible, fair and efficient’,⁴⁴ it followed that the Supreme Court must be able to adopt a CMP at least in cases in which it was required to consider closed

³⁹ Lords Hope, Kerr and Reed dissenting.

⁴⁰ Lords Hope, Kerr, Dyson and Reed dissenting.

⁴¹ Above n 12, para 66 (Lord Neuberger).

⁴² Constitutional Reform Act 2005 s 40(2).

⁴³ *Ibid* s 40(5).

⁴⁴ *Ibid* s 45(3).

judgments from lower Courts in order to adequately consider the information contained within.⁴⁵

3.2 The minority approach—If Parliament had intended the CMP to be adopted by the Supreme Court it would have said so

By contrast, three Justices, in particular Lords Hope, Kerr, and Reed, dissented. In their view, since a CMP clearly interfered with the right to a fair trial, explicit statutory authorisation was required to enable its adoption by the Supreme Court. Lord Kerr for example affirmed the approach of the Court in the recent decision in *Al-Rawi*, which had held that ‘the right to be confronted by one’s accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.’⁴⁶ Similarly, Lord Reed affirmed the general presumption that Parliament does not generally intend to abrogate fundamental rights.⁴⁷ Since Part 6 CTA did not contain provision for the Court to adopt a CMP and the CRA was passed without contemplation of CMP at all, such authorisation did not exist. As Lord Reed succinctly remarked, ‘If Parliament had intended the same procedures [CMP] to be applied in this court, it would surely have said so.’⁴⁸

3.3 Analysis

The majority approach in *Bank Mellat* is clearly built on ideas of pragmatism rather than of principle.⁴⁹ As Lord Neuberger was quick to note, ‘[t]he strength of [the majority approach] is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of a judgment) under a closed material procedure.’⁵⁰ In particular, four possibilities were considered. Firstly, the appeal could not be heard at all which would directly conflict with s40(2) CRA. Secondly, the appeal could be heard but entirely in open Court which would undermine the goal of Part 6 CTA. Thirdly, the appeal could be heard but in the absence of closed material which would be impossible in cases

⁴⁵ Above n 12, para 37 (Lord Neuberger).

⁴⁶ *Ibid*, paras 102–104 (Lord Kerr).

⁴⁷ *Ibid*, para 135 (Lord Reed).

⁴⁸ *Ibid*, para 134 (Lord Reed).

⁴⁹ K Hughes, ‘Judicial review and closed material procedure in the Supreme Court’ (2013) 72(3) *Cambridge Law Journal* 491, 493.

⁵⁰ *Bank Mellat*, above n 12, para 38 (Lord Neuberger).

in which most or all of a lower Court judgment was closed. Finally, the Court could be obliged to either automatically dismiss or to automatically allow the appeal without hearing argument. In the view of Lord Neuberger, each of these approaches was inherently unsatisfactory.⁵¹

Whilst it would at least arguably be odd as a matter of practice to adopt any of these courses, not least since CMP is clearly available in other domestic Courts, a number of distinct but inevitably inter-related factors mean that the minority approach is (at least) legally preferable. Most importantly, by simply providing that '[a]n appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings', it is difficult to see that s40(2) CRA contains the power the majority prescribe to it. At best, s40(2) CRA simply provides that it must be possible to hear an appellate case in the Supreme Court. It is by contrast silent (at least on face value) as to what form such a hearing should take.

Since no words expressly authorising the Court to adopt a CMP can be found in s40(2) CRA, any such power can only be conferred upon it as a result of judicial implication. As Lord Hutton has previously noted in *B v DPP*, in order for such a result to occur, such implication must be necessary and not merely reasonable.⁵² This threshold is a very difficult standard to satisfy. As Lord Hobhouse subsequently explained in *Morgan Grenfell*,

'A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.'⁵³

Two main reasons explain why no such implication should be understood as arising in this context. Firstly, the precise question of which Courts can make 'rules of Court' in order to adopt a CMP is specifically and explicitly set out in

⁵¹ *Ibid*, paras 39-42 (Lord Neuberger).

⁵² *B v Director of Public Prosecutions* [2000] 2 AC 428, 481 (Lord Hutton).

⁵³ *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, para 45 (Lord Hobhouse); see also *Al-Rawi v Security Services*, above n 7, para 35 (Lord Dyson); *R v Secretary of State, Ex p Simms* [2000] 2 AC 115, 132 (Lord Hoffmann).

detail in Part 6 CTA. In particular, such a power is explicitly stated to be available only to the High Court, the Court of Appeal and the Court of Session.⁵⁴ Since it is a general canon of statutory interpretation that specific law prevails over the general, it is difficult to see how the effect of a collection of what even Lord Neuberger concedes are ‘detailed procedures’⁵⁵ in Part 6 CTA concerning the very issue at hand can be impliedly subverted by a ‘general’⁵⁶ provision found in s40(2) CRA.

Nor can any assistance in this regard be derived from the Supreme Court Rules.⁵⁷ It is true, as Lord Neuberger argues, that at the time the CTA was being drafted its authors would ‘have known that the Supreme Court Rules had yet to be promulgated, and could have assumed that they would provide for a closed material procedure—as indeed they do in Supreme Court Rule 27(2).’⁵⁸ Despite this, as he also notes, ‘if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules.’⁵⁹ As Lord Hope argued therefore, ‘it was not open to the President in the exercise of his rule-making function to confer on the court a power that it did not have.’⁶⁰

Secondly, even if s40(2) CRA is *prima facie* capable of conferring the power suggested by the majority, it is difficult to see that it is capable of providing sufficient authorisation to override the fundamental right to confront one’s own accusers. To this end, it is important to consider the statutory gymnastics utilised in the majority approach. In particular, a ‘general’⁶¹ power to hear appeals from lower Courts in s40(2) CRA which is silent as to the form such appeals can take and likely did not even consider CMP when drafted must prevail over ‘a fundamental element of the common law right to a fair trial’⁶² and a ‘basic principle of justice.’⁶³ It is hard to see therefore how this can satisfy the ‘basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication.’⁶⁴

⁵⁴ Counter Terrorism Act 2008 s73.

⁵⁵ *Bank Mellat UKSC*, above n 12, para 58 (Lord Neuberger).

⁵⁶ *Ibid*, para 135 (Lord Reed).

⁵⁷ The Supreme Court Rules 2009/1603.

⁵⁸ *Bank Mellat UKSC*, above n 12, para 57 (Lord Neuberger).

⁵⁹ *Ibid*, para 45 (Lord Neuberger).

⁶⁰ *Ibid*, para 85 (Lord Hope).

⁶¹ *Ibid*, para 135 (Lord Reed).

⁶² *Al-Rawi*, above n 7, para 35 (Lord Dyson).

⁶³ *Bank Mellat UKSC*, above n 12, para 133 (Lord Reed).

⁶⁴ *Ibid*, para 55 (Lord Neuberger).

The correctness of this view is further clarified if it is considered that contrary to the approach adopted by the majority, there are in fact many ways in which the Supreme Court could hear and consider cases involving sensitive evidence without utilising CMP and therefore restrict the right to a fair trial in a less fundamental manner. As Lord Reed notes for example, this includes simply allowing the Court to ‘examine the material for itself, without its being canvassed during the hearing’⁶⁵ or determining the appeal based only on the publicly available material as it has done in previous cases of this kind.⁶⁶ Similarly, it also ignores that such information can in any event be adduced before any domestic Court with a significant degree of protection of both its sources and content utilising Public Interest immunity (‘PII’) and special measures procedures.⁶⁷ It can hardly be necessary therefore to imply such a power into s40(2) CRA.

4 Bank Mellat in the Future—‘One Step Forward’

Despite disagreeing with the decision itself, it is nonetheless argued that the long-term impact of the decision in *Bank Mellat* may be more positive than first appears. In particular, given that the Justice and Security Act 2013 has both amended Part 6 CTA to expressly include the Supreme Court in the list of domestic Courts upon which the power to adopt a CMP has been conferred⁶⁸ and expanded its potential use to all civil hearings,⁶⁹ its lasting legacy is instead more likely to be the guidelines set out by the Court on the future use of CMP.⁷⁰ This guidance, undoubtedly reflecting judicial disquiet over the power as a whole,⁷¹ is highly restrictive, both in terms how a CMP is to be conducted in practice and when it should be adopted at all. Accordingly, whilst legally the decision in *Bank Mellat* widens the categories of domestic Courts that can adopt a CMP, it will inevitably lead to its reduced use in practice hereafter.

⁶⁵ Ibid, para 137 (Lord Reed).

⁶⁶ *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

⁶⁷ See e.g. Youth Justice and Criminal Evidence Act 1999.

⁶⁸ See Justice and Security Act 2013 ss6(1)d.

⁶⁹ See Justice and Security Act 2013 ss6(1).

⁷⁰ *Bank Mellat UKSC*, above n 12, paras 67-74 (Lord Neuberger), see also paras 89-97 (Lord Hope).

⁷¹ Ibid, para 51 (Lord Neuberger).

4.1 Advice for Trial Courts

The first part of the guidance set out by the Supreme Court is aimed at Trial Courts, most notably their production of closed judgments. In essence, it requires that Trial Judges give as much information about the closed material as possible in their open judgment, documents which must clearly identify ‘every conclusion in that judgment which has been reached in whole or in part in the light of points made or evidence referred to in the closed judgment.’⁷² As Carnwath LJ stated in *AT v Home Secretary* for example, ‘[t]he open judgment must stand on its own merits. Where reliance is placed on closed material to determine an issue of significance, that needs to be made clear in the judgment, and the judge needs to satisfy himself that the subject has had adequate notice of the points against him.’⁷³

4.2 Advice for Appellate Courts

The second part of the guidance set out by the Supreme Court is aimed at Appellate Courts. In particular, it is made clear that although a closed hearing should occur ‘if it is strictly necessary to fairly determine the appeal’,⁷⁴ Courts are ‘under a duty to avoid a CMP if that can be achieved.’⁷⁵ In this regard, it is important to note that in the view of the Court ‘the onus [i]s on the Treasury to show that this [(i.e. the adoption of a CMP)] was necessary’⁷⁶ and that this burden represents ‘a high standard’⁷⁷ that will need to be specifically satisfied in each case.

4.3 Advice for parties and their legal representatives

The final part of the guidance set out by the Supreme Court is aimed at the parties in cases in which CMP’s are adopted, their legal representatives and any special advocate appointed to act on their behalf. In particular, counsel in such cases are reminded not to push for the adoption of a CMP unnecessarily and that the opinion of the special advocate will be given ‘close attention’⁷⁸ on this issue. Similarly, the points at issue in any CMP should be narrowed down as far

⁷² Ibid, para 68 (Lord Neuberger).

⁷³ *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42, para 51 (LJ Carnwath).

⁷⁴ *Bank Mellat UKSC*, above n 12, para 70 (Lord Neuberger).

⁷⁵ Ibid.

⁷⁶ Ibid, para 89 (Lord Hope).

⁷⁷ Ibid, para 90 (Lord Hope).

⁷⁸ Ibid, para 92 (Lord Hope).

as possible beforehand in order to reduce the amount of time the Court must spend in a secret hearing.⁷⁹ Finally, a basic gist of any evidence adduced (either in Court or in a closed judgment) should be provided to all restricted parties in so far as this is possible.⁸⁰

4.4 Analysis

The guidance set out by the Supreme Court in *Bank Mellat* is undoubtedly restrictive and will underpin the reduced adoption of a CMP by domestic Courts in the future. This will help to ensure that such cases are ‘exceptional [and not] ...routine’⁸¹ and permit a more effective protection of the right to a fair trial in the vast majority of cases. Where a CMP is in fact adopted, it will also likely lead to more careful consideration of which evidence is adduced before domestic Courts in such circumstances and which is placed by Judges in a closed but not an open judgment. As a consequence of this development, cases involving the adoption of a CMP will therefore inevitably be more open and transparent, with more proceedings ultimately heard and judged in front of both all the relevant parties and the public at large.

In addition, the guidance provided will also likely aid such values indirectly, most notably by allowing appellate Judges to determine whether or not ‘convincing reasons ... as to why closed material should be looked at’⁸² exist in the first place. In *Bank Mellat* for example, minimal information was provided to the Supreme Court concerning the contents or relevance of the closed judgment prior to a CMP actually being adopted. It was therefore virtually impossible for the Court to determine if such recourse was actually needed in the given case. As Lord Hope explained, ‘It seemed reasonable to ask how looking at the closed judgment would assist ... but the court was provided with no answer as to how it might do so.’⁸³ On any analysis, this situation is unsatisfactory. Its future reduction must therefore be a positive development.

The true effect of the guidance will of course ultimately turn, at least in part, based on its interpretation by the Judges and advocates in cases in which a CMP may potentially be adopted. Whilst to some extent this constitutes an unknown quantity, the general tone of the guidance suggests wider disquiet

⁷⁹ Ibid, para 72 (Lord Neuberger).

⁸⁰ Ibid.

⁸¹ Ibid, para 145 (Lord Dyson).

⁸² Ibid.

⁸³ Ibid, para 95 (Lord Hope).

with the procedure, as does wider comment on this issue by both Judges and advocates.⁸⁴ Taken together, this suggests that a CMP will in fact be adopted on a more restricted basis hereafter. At a judicial level, a clear example of this can be seen in the statement issued by the Supreme Court in *Bank Mellat* once it had decided that it would adopt a CMP in this specific case. It stated that;

‘No judge can face with equanimity the prospect of a hearing, or any part of a hearing, which is not only in private, but involves one of the parties not being present or represented at the hearing and not even knowing what is said either at the hearing or in a judgment in so far as it discusses what was said or produced by way of evidence at the closed hearing.’⁸⁵

A similar approach can also be seen amongst advocates. In response to the proposed expansion of the CMP by the (then) Justice and Security Bill for example, a collection of special advocates, the very persons who are pivotal to the actual use of CMP, forcefully argued that;

‘We remain of the view we expressed in our response to the consultation (and endorsed by the Joint Committee on Human Rights): that CMPs are inherently unfair and contrary to the common law tradition; that the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists.’⁸⁶

5 Conclusion

The majority approach in *Bank Mellat (No 1)* is undoubtedly understandable given the general circumstances of the case and the view of Lord Neuberger that no other way of hearing the case exists. Nonetheless, it is dubious whether the relevant statutory authorisation necessary is in fact present. The general language of s40(2) CRA likely concerns a different point to that at issue and in any event,

⁸⁴ See e.g. *Al-Rawi v Security Services* [2010] EWCA Civ 482, para 30 (Lord Neuberger).

⁸⁵ UKSC, ‘*Further Update on Proceedings*’ (2013) available at <http://www.supremecourt.gov.uk/news/bank-mellat-v-hm-treasury.html>.

⁸⁶ Joint Committee on Human Rights, ‘*Special Advocates Memorandum on the Justice and Security Bill*’ (2012), para 3.

the existence of an alternative specific and detailed statutory regime in Part 6 CTA which answers the precise question considered by the Court must be taken to provide at least the primary rules concerning the scope of the CMP. For this reason alone, the minority approach of Lords Hope, Kerr and Reed on this issue is undoubtedly to be preferred.

Even if s40(2) CRA is prima-facie capable of conferring such a power, the majority are also undoubtedly too quick to obviate 'a fundamental element of the common law right to a fair trial'⁸⁷ and a 'basic principle of justice'⁸⁸ on the basis of a 'general'⁸⁹ power to hear appeals from lower Courts which likely did not even consider CMP when being drafted on the basis of practical efficiency. This suggests an overly relaxed attitude within the Supreme Court to the protection of fundamental civil liberties, not least given the array of less intrusive possibilities available to hear cases of this kind, a number of which the Court has used previously. *Bank Mellat* must therefore be considered unsatisfactory. As Hughes has noted, the case sadly sets 'a deeply troubling precedent for construing a power to erode constitutional principles of openness in court proceedings from pragmatic need and statutory omission.'⁹⁰

Despite this, the long-term impact of the *Bank Mellat* case will nonetheless likely be more positive than first appears. In particular, given that the Justice and Security Act 2013 has both amended Part 6 CTA to expressly include the Supreme Court in the list of domestic Courts upon which the power to adopt a CMP has been conferred⁹¹ and expanded its potential use to all civil hearings,⁹² the lasting legacy of the decision is instead more likely to be the guidelines set out by the Court on CMP's future use.⁹³ This guidance, reflecting judicial disquiet over the procedure as a whole,⁹⁴ is highly restrictive, both in terms how a CMP is to be conducted in practice and when it should be adopted at all. Whilst legally therefore the decision widens the categories of domestic Courts that can adopt a CMP, in practice it will inevitably lead to a reduced use of the power by such Courts hereafter, undoubtedly a positive result for all.

⁸⁷ *Al-Rawi*, above n 7, para 35 (Lord Dyson).

⁸⁸ *Bank Mellat UKSC*, above n 12, para 133 (Lord Reed).

⁸⁹ *Ibid*, para 135 (Lord Reed).

⁹⁰ Hughes, above n 49, 493.

⁹¹ Justice and Security Act 2013 ss6(1)d.

⁹² Justice and Security Act 2013 ss6(l).

⁹³ *Bank Mellat UKSC*, above n 12, paras 67-74 (Lord Neuberger), see also paras 89-97 (Lord Hope).

⁹⁴ *Ibid*, para 51 (Lord Neuberger).

HOW FAR SHOULD JUDGES DEVELOP THE COMMON LAW?

*Lord Walker of Gestingthorpe**

In *Kleinwort Benson Ltd v Lincoln City Council*,¹ Lord Goff considered when it was right for the court (which means, almost always, the top appeal court) to make changes in the common law. Generally, he said, picking up an odd expression used by Justice Oliver Wendell Holmes,² the court changes the law only ‘interstitially’—that is, by filling up gaps, a modest form of development. But, he went on:

Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law.³

The whole speech, which occupies 25 pages of the law report, is well worth reading. Lord Goff was an eminent legal scholar as well as a distinguished judge, and as one of the founding fathers of the modern English law of unjust enrichment he had strong feelings about mistake of law. He regarded the traditional English rule on mistake of law as antiquated, irrational and out of step with Commonwealth authority. Nevertheless in his speech he carefully considered, not only the arguments in favour of change, but also a number of principled objections to significant changes in the common law being made by judges.

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¹ [1999] 2 AC 349, 378.

² *Southern Pacific Co v Jensen*, 244 US 205 (1917) 221.

³ *Kleinwort Benson Ltd v Lincoln City Council* above n 1, 378.

The range of objections to judges changing the common law—what is sometimes, perhaps a little tendentiously, called judicial legislation—is my subject in this article. Sometimes the objections have prevailed. Sometimes they have been overridden in order to avoid injustice, and to adapt the common law to social and economic change.

Some of you may be tempted to feel that the only clear message from the cases is that the court decides them according to its intuitive feeling (or sometimes the intuitive feeling of its majority, opposed by the contrary intuition of the minority) as to what are the proper limits of judicial lawmaking, and that the stated reasons are not much more than *ex post facto* rationalisation of a conclusion reached by intuition. I cannot argue that there may not be a grain or two of truth in that. But it would be unduly cynical to regard all the stated reasons as undeserving of serious analysis.

I start with three preliminary points about the content of the common law. First, I do not exclude the body of non-statutory law that we call equity. Two of the topics I shall be mentioning—our developing law of privacy, and the problem of beneficial ownership of the homes of unmarried cohabitants—are concerned with the doctrines of equity. It might be said that one of the largest questions as to the development of non-statutory law is whether it is possible and desirable to achieve (I hesitate to use the f-word) the fusion of common law and equity. That is a very complex and controversial subject,⁴ and you must forgive me if I do not even think of going there in this article.

The second point is that we can no longer refer, if we speak accurately, to *the* common law: we have the common law of Australia, the common law of (Anglophone) Canada, the common law of England, and so on. This was explicitly recognized in the *Invercargill* case⁵ in 1996, when New Zealand's court of last resort was still the Judicial Committee of the Privy Council. In an appeal relating to the tortious liability of official building inspectors for latent defects, the Judicial Committee recognised that it should apply the common law of New Zealand, although it had developed in a different direction from English law. The Judicial Committee said:

The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a

⁴ Not least in Australia: see for instance the preface to R P Meagher, W M C Gummow & J R F Leane, *Equity: Doctrines and Remedies* (4th edn, 2002).

⁵ *Invercargill City Council v Hamlin* [1996] AC 624.

weakness, but one of its great strengths.⁶

The third point is that I do not exclude areas (and they are some of the most difficult areas) in which some basic concept of the common law has been embodied into statute law with little or no redefinition of its content. Murder is one of the oldest and gravest of common law crimes. The fact that it is now referred to in many statutes, some substantive and some procedural, does not mean that euthanasia and assisted suicide are outside the scope of my subject. Similarly with marriage, one of the oldest and most fundamental of common law concepts. Marriage was in effect defined by statute, in that under the Matrimonial Causes Act 1973⁷ a marriage is void 'if the parties are not respectively male and female', but I shall not treat that as excluding the marriage of transsexuals from my subject-matter. Where human rights are in play the development of the common law marches in step with the case law on s 3 of the Human Rights Act 1998, under which all statutes are to be interpreted, so far as possible, compatibly with Convention rights. The speech of Lord Nicholls in *Bellinger v Bellinger*,⁸ a claim by a male-to-female transsexual that she was validly married to her male partner, addresses s 3 but has many valuable observations on judicial lawmaking generally. So does the speech of Lord Rodger in *Ghaidan v Godin-Mendoza*,⁹ with its well-known reference to whether an interpretation 'goes with the grain' of the legislation.

I began with Lord Goff in *Kleinwort Benson* in 1999. Let me go back a few years before that to what he said in *Woolwich Equitable*,¹⁰ another important milestone in the development of the law of unjust enrichment. Speaking of the boundary between judicial development of the law and judicial legislation, Lord Goff said (in what were for him quite jocular terms):

[...] although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number

⁶ Ibid, 640 (Lord Lloyd).

⁷ Section 11(c).

⁸ [2003] 2 AC 467.

⁹ [2004] 2 AC 557, paras 110–122; see also Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264, para 28.

¹⁰ *Woolwich Equitable Building Society v IRC* [1993] AC 70.

of leading cases in your Lordships' House would never have been decided the way they were.¹¹

He went on to instance *Donoghue v Stevenson*,¹² the development of the modern law of judicial review, and *Mareva* injunctions.¹³

This may provide some support for what might be called the school of pure intuition. Against that, a distinguished law lord from Northern Ireland, Lord Lowry, has provided what he called 'some aids to navigation across an uncertainly charted sea'. He did so in the remarkable case of *C (a minor) v DPP*.¹⁴ It was concerned with the rule that a child between the ages of 10 and 14 years is *doli incapax* (which means, in practice, that it must be proved affirmatively that the child knew that his or her actions were seriously wrong), a common law rule that has stood for centuries. It was remarkable in that the rule was overturned, not by the House of Lords, but by a Divisional Court of the Queen's Bench, in a judgment delivered by a puisne judge. It fell to the House of Lords to reinstate it. That was the background to Lord Lowry's navigational aids:

(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.¹⁵

This passage provides valuable guidance, but only the fourth point (fundamental doctrines not to be lightly set aside) calls for no further comment or qualification. And I would at once add a sixth point. When a statute changes the law, it can and usually does contain transitional provisions of a more or less elaborate character, in order to avoid disruption to established rights or uncompleted transactions. There is also the general presumption against statutes operating retrospectively. The court probably does not have that facility, although it has occasionally

¹¹ *Ibid*, 173.

¹² [1932] AC 562.

¹³ *Mareva SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

¹⁴ [1996] AC 1.

¹⁵ *Ibid*, 28.

been debated.¹⁶ The declaratory (or to be realistic, retrospective) character of judge-made changes in the law may cause hardship to large numbers of persons not parties to the litigation, especially in the fields of property, commerce and financial services.

If Lord Lowry's first point (judges should beware if the solution is doubtful) is taken as meaning that a top appeal court should change the common law only if it does so unanimously, then the guidance has not been followed consistently. Both *Woolwich Equitable* and *Kleinwort Benson* were decisions by a bare majority, 3-2, in favour of change. So was *Donoghue v Stevenson* itself. The House of Lords was also split 3-2 in the *Naomi Campbell* case,¹⁷ but largely as to whether the Court of Appeal was right to reverse the trial judge's evaluation of the facts; the House was unanimous about the principles of our developing law of personal privacy. It has developed from our non-statutory law of confidence, with the hothouse of the Human Rights Act promoting remarkably swift growth.

Jones v Kaney,¹⁸ the recent decision of the Supreme Court withdrawing witness immunity from expert witnesses, had a majority of 5-2 in favour of change. In *R (Prudential plc) v Special Commissioner of Income Tax*,¹⁹ its even more recent decision declining to extend legal advice privilege to chartered accountants advising on taxation matters, there was a similar majority against change. But some other important decisions, including *Bland*²⁰ on patients with catastrophic and untreatable brain damage (persistent vegetative state), and *Fairchild*²¹ on causation in mesothelioma cases, were unanimous decisions.

I am not sure, however, that Lord Lowry's first point was directed exclusively, or even perhaps mainly, to unanimity. I suspect that when he referred to the solution being doubtful he had in mind cases in which the court could not be confident that the solution which it had in mind would clearly, comprehensively and justly answer the problem—not simply the problem as it arose on the particular facts of the case before the court, but also in relation to other permutations of facts that would, or might, fall within the proposed new principle. Here Lord Lowry's first point may overlap with his fifth point, about the need to achieve finality and certainty. These points carried a lot of weight with

¹⁶ The fullest discussion is in the speech of Lord Nicholls in *Re Spectrum Plus Ltd* [2005] 2 AC 680, paras 12–43.

¹⁷ *Campbell v MGN Ltd* [2004] 2 AC 457.

¹⁸ [2011] UKSC 13.

¹⁹ [2013] UKSC 1.

²⁰ *Airedale NHS Trust v Bland* [1993] AC 789.

²¹ *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32.

Lord Hope and Lady Hale, the dissenters in *Jones v Kaney*. Lord Hope referred to the danger of unintended consequences.²²

There were also some serious misgivings already shown to be well-founded—about finality and certainty in the speeches of the House of Lords in *Fairchild*. That decision was, as you all know, intended to put right a serious injustice. The injustice was suffered by workmen who, in the course of a succession of jobs in heavy industry (especially shipbuilding) were exposed to asbestos dust in breach of their employers' duty of care. They contracted mesothelioma, a form of cancer with three characteristics: (i) it can be caused (according to the expert evidence before the court) by inhalation of a single fibre of asbestos (ii) it has a long latency period (a minimum period estimated at 15 years) and (iii) it is invariably fatal. Yet these workmen (or their widows) could not recover damages because they could not prove which tortious exposure, in a working life of 40 years or more, was causative of the fatal disease.

In *Fairchild* the House of Lords were at pains to try to define precisely the circumstances in which their new, less demanding principle of causation would apply. But Lord Rodger and others recognised that the further they went in that direction, the more the decision would resemble judicial legislation.²³ The House did make clear that the new principle will apply only so long as medical science cannot provide an answer to the causation problem. Recent authority in the High Court of Australia suggests that the science may already be changing.²⁴

Nevertheless *Fairchild* left one vital question unanswered, and the consequences have been unfortunate. The House of Lords was not asked to decide whether, as between different employers who were made defendants to a claim, the new principle imposed joint liability for the whole loss, or only several liability for an apportioned part of it. The question was not asked because in the three cases before the Lords there were insurers who had agreed in advance to apportionment, if liability was established. But the question was bound to arise sooner or later. When it did come before the Lords the majority decided in favour of several liability,²⁵ against Lord Rodger's vigorous dissent. Parliament then intervened to change the law, acting in a hurry and without any of the usual processes of consultation.²⁶ The end result appears from the last of the trio of cases,

²² [2011] UKSC 13, para 163.

²³ See above n 21, para 169.

²⁴ *Amaca Pty Ltd v Booth* (2011) 283 ALR 461, para 51 (French CJ).

²⁵ *Barker v Corus (UK) Ltd* [2006] 2 AC 572.

²⁶ Compensation Act 2006, s 3.

Sienkiewicz.²⁷ It is not conspicuously clear or conspicuously just—unintended consequences indeed.

The finality and certainty mentioned in Lord Lowry's fifth point are obviously commendable aspirations. But if they are to be regarded as absolute requirements they seem to set a high—even insurmountable—threshold. As Lord Goff said in *Woolwich Equitable*, a number of leading cases would on that test have been decided differently. Incremental development, which is the antithesis of finality and certainty, has been a striking feature of the three examples given by Lord Goff: *Donoghue v Stevenson*, the modern law of judicial review, and freezing orders.

Now I want to come to Lord Lowry's second point. Both parliamentary activity and parliamentary inactivity have been relied on from time to time as a reason for restraint in judicial development of the common law. In the recent decision of the Supreme Court in *Prudential* it was the determinative factor. All seven justices agreed (both among themselves, and with the lower courts) that in principle there is no good reason why one client instructing a lawyer to give legal advice on tax questions should be in a better position, as regards disclosure to the Revenue, than another client who instructs an accountant to give the same advice.

But the majority were persuaded that principle must yield to the fact that Parliament has repeatedly intervened in this area.²⁸ It has extended legal advice privilege to licensed conveyancers, patent attorneys and trade mark agents. In relation to tax accountants it has more than once made complicated amendments to the Taxes Management Act 1970 so as to confer limited rights, falling short of full legal advice privilege, to 'tax advisers' (a category separate from 'professional legal advisers'). Lord Sumption gave a powerful dissenting judgment, in effect urging the Supreme Court to rescue Parliament from its erroneous assumptions:

In a case like this, where the suggested development conflicts with some of the assumptions of Parliament but not with its intentions, the courts should be extremely wary before acceding to invitations to leave those assumptions uncorrected when their practical application has become anomalous or incoherent in the light of modern developments.²⁹

²⁷ *Sienkiewicz v Greif UK Ltd* [2011] UKSC 10.

²⁸ *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1: see Lord Neuberger's judgment, paras 35 and 36.

²⁹ *Ibid*, para 134.

Another example of parliamentary intervention foreclosing development of the common law is *Johnson v Unisys Ltd.*³⁰ Mr Johnson worked in the IT industry and had been dismissed with a month's salary in lieu of notice, without proper disciplinary procedure as required by the Employment Rights Act 1996. He claimed to have suffered severe psychological injury for which he sought large damages. The House of Lords declined to develop the common law by departing from *Addis v Gramophone Co Ltd.*³¹ Lord Hoffmann said:

For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be a remedy but that it should be limited in application and extent.³²

A well-known case on parliamentary inactivity is *British Railway Board v Herrington*.³³ A six year old boy was seriously injured when he climbed through a defective fence by the side of a railway and walked on to an electrified line. Although only a small child, he was a trespasser, and in enacting the Occupiers' Liability Act 1957 Parliament had left intact the stern common law rule which recognised no general occupier's duty towards trespassers. The Lords had to consider distinguishing or departing from the law as stated in *Addie's* case.³⁴ That was an unsuccessful claim after the death of a four year old boy who had gone through a gap in a hedge onto a colliery waste tip where there was unguarded machinery.

Lord Wilberforce saw his way to developing the common law, despite the comparatively recent law reform statute:

It was suggested that some difficulty arose from the passing of the Occupiers' Liability Act 1957 the argument being that, as Parliament deliberately changed the law about invitees and licensees but not that concerning trespassers, the House was bound hand and foot by *Addie's* case. I do not follow this. There might be force in an argument that for this House to depart from (ie overrule) *Addie's* case would, in effect, be to legislate when Parliament has abstained, but I can see no sense in supposing that when Parliament left the law

³⁰ [2003] 1 AC 518, para 58.

³¹ [1909] AC 488.

³² Above n 30, para 58.

³³ [1972] AC 877.

³⁴ *Robert Addie and Sons (Collieries) Ltd* [1929] AC 358.

alone as regards trespassers the intention was to freeze the law as it was in 1929.³⁵

It has to be said, however, that Lord Wilberforce seems to have been the only one of the Law Lords who thought that justice could be done in *Herrington* without overruling *Addie's* case.

Last but certainly not least, I come to Lord Lowry's third point, discouraging judicial intervention in disputed matters of social policy. There is a very clear exposition of this point in Lord Nicholls' speech in *Bellinger v Bellinger*.³⁶ He gave three separate reasons why it was 'peculiarly inappropriate' for the House of Lords to use s 3 of the Human Rights Act to fashion a new law permitting transsexual marriage. First there was uncertainty as to whether the new law should apply only to transsexuals whose gender reassignment had involved surgical intervention (and if so, how extensive). Second, the marriage issue was part of a much wider problem, and could not sensibly be dealt with in isolation. Third, the institution or relationship of marriage is 'deeply embedded in the religious and social culture of this country'.³⁷ For all these reasons a change in the law 'must be a matter for deliberation and decision by Parliament when the forthcoming Bill is introduced'.³⁸ The Bill became the Gender Recognition Act 2004, and the complexity of its provisions underlines that they could not have been a suitable subject for judicial legislation.

I have already referred to parliamentary inactivity. Such inactivity does not always mean that Parliament has carefully considered an issue and decided to leave well alone. The truth is that it may mean that Parliament is aware that all is not well, but that for the Government change is too difficult, too controversial, too disruptive of the legislative programme, too likely to lose votes rather than to win them. Assisted suicide has proved to be such a topic, as well as the issue of gay marriage. In such circumstances the court has to cope with social problems as best it can.

The problem of beneficial ownership of a house or flat occupied by unmarried cohabitants is a fairly mild example of this. It was and is a real social problem. A young couple live together in a stable relationship without getting married. They acquire a house or a flat, usually in their joint names, usually with a mortgage loan, but without any written agreement or declaration as to beneficial ownership.

³⁵ Above n 33, 921.

³⁶ [2003] 2 AC 467, paras 37–49.

³⁷ *Ibid.*, 46.

³⁸ *Ibid.*, 49.

They love and trust each other and contribute to the household expenses as they can, without any accounting. One may earn more than the other; the young woman may have children; either may lose their job, or become ill or incapacitated.

Then unfortunately the relationship comes to an end, and they may find themselves spending far too much of their limited resources on a legal dispute about entitlement to their former home. It is a common social problem, not limited to England. Several commonwealth countries have legislation giving the court a discretion to settle such disputes in a summary way in cases where the cohabitants have lived together for a minimum period (often two years, or less if they have a child). In England the Law Commission has considered and consulted on the problem at great length, but eventually concluded that there was no solution that it could recommend to Parliament. So Parliament has done nothing.

Meanwhile, these disputes keep on arising and judges have to decide them. There have been two recent cases, *Stack v Dowden*³⁹ in the House of Lords and *Jones v Kernott*⁴⁰ (not to be confused with *Jones v Kaney*) in the Supreme Court, in which Lady Hale and I, and others, tried to bring forward the development of trust law from where it got to about 40 years ago in *Pettitt v Pettitt*⁴¹ and *Gissing v Gissing*.⁴² Our efforts have had a mixed reception from legal scholars, to say the least. But for present purposes the point is that parliamentary inactivity may sometimes be a spur to judicial activity, if not activism.

There is one area, however, in which the court has recognised that it has no constitutional or ethical warrant for judicial lawmaking, even if Parliament remains inactive. That is in regard to grave and controversial decisions about ending human life.

The Hillsborough stadium disaster occurred on 15 April 1989 and it is almost exactly 20 years since the House of Lords gave judgment in the case about Tony Bland.⁴³ He was 17 years of age at the time of the tragedy. He suffered severe deprivation of oxygen which led to catastrophic and irreversible brain damage. He was in a persistent vegetative state, incapable of any sensation whatever. He received nutrition through a tube. But he was able to breathe without artificial aid (so that there was no question of switching off a ventilator). After several

³⁹ [2007] 2 AC 432.

⁴⁰ [2011] UKSC 53.

⁴¹ [1970] AC 777.

⁴² [1971] AC 886.

⁴³ *Airedale NHS Trust v Bland* [1993] AC 789 (Sir Stephen Brown P).

months the doctors formed the view that his case was absolutely hopeless and that nutrition should be withdrawn. This would bring about his death, to put it bluntly, by starvation. As the President of the Family Division said:

This would be unpleasant for those who had to observe it but Anthony Bland himself would be totally unaware of what was taking place.⁴⁴

The application for declaratory relief made by the hospital, with the support of the young man's parents, took some time in preparation, but once made it went through three levels of court within three months. Unsurprisingly they all found the issues difficult, as appears from this extract from the rather stilted headnote of the Lords' decision:

... the principle of the sanctity of life, which was not absolute, was not violated by ceasing to give medical treatment and care involving invasive manipulation of the patient's body, to which he had not consented and which conferred no benefit on him, to a PVS patient who had been in that state for over three years ...

All the judgments are well worth reading but that of Lord Mustill is particularly impressive. It covers many different aspects of the problem but I limit quotation to what he said about judicial law-making. Having referred to the possibility of 'a new common-law exception to the offence of murder' and the attractions of 'starting with a clean slate' he concluded:

It has however been rightly acknowledged by counsel that this is a step which the courts could not properly take. Any necessary changes would have to take account of the whole of this area of law and morals, including of course all the issues commonly grouped under the heading of euthanasia. The formulation of the necessary broad social and moral policy is an enterprise which the courts have neither the means nor in my opinion the right to perform. This can only be achieved by democratic process through the medium of Parliament.⁴⁵

Lord Mustill and others called for an urgent review by Parliament, but twenty years on little has happened apart from the rejection of a Bill which would have legalised assisted suicide, in limited and carefully regulated circumstances, and the enactment of the Mental Capacity Act 2005, which has made modest advances in a new statutory definition of an incapacitated person's best interests, with the possibility of taking account of a 'living will'.

The House of Lords in its judicial capacity has held the same line in two decisions about assisted suicide, the case of Mrs Pretty⁴⁶ in 2002 (her application

⁴⁴ Ibid, 796.

⁴⁵ Ibid, 890.

⁴⁶ *R (Pretty) v DPP* [2002] 1 AC 800; *Pretty v United Kingdom* (2002) 35 EHRR 1.

to the Strasbourg court was also unsuccessful) and that of Mrs Purdy⁴⁷ in 2009 (Mrs Purdy did however get a direction that the DPP should clarify his policy as to criminal prosecution in such cases). The latest case, that of Mr Nicklinson, would have amounted not to assisted suicide but to voluntary euthanasia, because of the extent of the applicant's physical incapacity. The Court of Appeal⁴⁸ was moved by his plight but obliged to refuse relief.

So sometimes the court, even in the most tragic and moving cases, has to say 'No'. It cannot say 'Pass', because the court's job is to decide justiciable disputes. As Lord Bingham MR said in another sad family law case:

That is what [the court] is there for. Its judgment may of course be wrong ... but once the jurisdiction of the court is invoked its clear duty is to reach and express the best judgment that it can.⁴⁹

⁴⁷ *R (Purdy) v DPP* [2010] 1 AC 345.

⁴⁸ *R (Nicklinson) v Ministry of Justice* (2012) [2012] EWHC 2381.

⁴⁹ *Re Z (a minor) (freedom of publication)* [1997] Fam 1.

FOREWORD: PERSPECTIVES ON THE SCOTTISH INDEPENDENCE REFERENDUM 2014

James Crawford*

The contributions in this symposium address what seems to the editors to be a dearth of discussion of the constitutional implications of a possible ‘yes’ vote in the Scottish independence referendum that is to take place on 18 September 2014. With the exception of some acknowledgement of the Opinion given by Professor Alan Boyle and I on the international law implications of Scottish independence,¹ the press has concentrated on the political drama, and the short-term political and policy consequences, rather than on the potential effect on the constitutional structure of the United Kingdom and its legal position in the world. Some aspects of Scottish independence have been discussed in academic works, a select bibliography of which was published by the library of the House of Commons in February 2014.² More have been discussed in online forums. But the discussion has been limited and largely short-term in its focus.

This symposium seeks to draw together several aspects of Scottish independence in order to provide a constitutional overview, covering the historical, political and legal implications of Scotland voting to leave the United Kingdom. It is, to my knowledge, the first and, in the event that a ‘no’ vote is cast in September, possibly the only one of its kind.

For the opening contribution, the symposium reproduces with permission Lord Sumption’s lecture to the Denning Society of November 2013, entitled ‘The Disunited Kingdom: England, Ireland and Scotland.’ Lord Sumption sets out the historical context to the Acts of Parliament that united England with first

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¹ J Crawford & A Boyle, *Opinion: Referendum on the independence of Scotland-international law aspects*, Annex A to *Scotland Analysis: Devolution and the implications of Scottish Independence*, Scotland Office, Cmd 8554, February 2013. This was the first in a series of briefing papers produced by Her Majesty’s Government: see <https://www.gov.uk/government/collections/scotland-analysis-papers-summary-leaflets> [accessed 14 April 2014].

² H Armstrong, *Scotland: Referendum and independence. A select bibliography* (House of Commons Library, 2014), <<http://www.parliament.uk/briefing-papers/SN06698.pdf>> [accessed 14 April 2014].

Scotland, in 1707, then Ireland in 1800. As Lord Sumption says, 'one union, that between England and Scotland [...] has lasted more than three centuries and was until recently remarkably successful, the other between England and Ireland [...] was a tragic failure from the outset and broke up in less than half that time'. He compares and contrasts the history of both relationships, and draws out those qualities of the union with Scotland that contributed to its success. As he observes, it is characteristic of the broadly cooperative character of the alliance between the two countries that the Westminster government has reacted to the prospect of separation of Scotland with relative equanimity. In the final analysis, it is hard to say whether this is down to the pragmatic character of the union, or to disbelief in the likelihood of a 'yes' vote—perhaps both in equal measure.

The two contributions that follow formed the inspiration for this symposium—talks on the political and legal perspectives of Scottish independence given at the Winfield Society of St John's College, Cambridge on 21 November 2013 by two alumni of the University, Lord Hennessy and Lord Justice Aikens. Lord Hennessy's speech on the political implications is reproduced verbatim, and draws attention both to the lack of political contingency planning and to the many questions that have not been asked, let alone answered, in the run-up to the referendum—not least, the question of the status of a Westminster government elected after a vote for Scottish independence, but before formal separation has taken place. Lord Justice Aikens continues with a consideration of international and domestic legal issues, most crucially those of the status in international law of the two new states that would be created, especially as regards the international treaties to which the United Kingdom is a party, and the decisions that would have to be made as to the applicability in Scotland of existing UK statutes. The debate between Lord Hennessy and Lord Justice Aikens was followed by a wide-ranging question and answer session with the audience: two of the editors who participated have attempted to give readers an insight into the nature and scope of that debate by assembling a selection of the questions, and the gist of the answers given, in a short piece that follows Lord Justice Aikens' contribution.

The final piece in this symposium, entitled 'An Independent Scotland in the EU', is contributed by Professor Kenneth Armstrong, who gave evidence to the House of Commons Scottish Affairs Committee regarding the accession of an independent Scotland to the European Union. Professor Armstrong provides a comprehensive analysis of the legal routes that might be followed in order for Scotland to become the 29th EU Member. He notes that the complexity of the arguments surrounding the Scottish referendum throws into relief academic debates about the relationship between international, EU and domestic law, and

concludes that, despite this challenging theoretical context, the search for a legal solution should not be abandoned in favour of a political 'quick fix'.

The editors are to be congratulated for their energy in the compilation of this symposium.

THE DISUNITED KINGDOM: ENGLAND, IRELAND AND SCOTLAND

*Lord Sumption**

I met Tom Denning in an earlier life. In the early 1970s, when I was the junior history fellow of Magdalen College Oxford, he was an honorary fellow. Most honorary fellows were content to smile benignly at the institution from a great distance, but Denning was different. He actually turned up and talked to people. One day we had an argument about some case that he had just decided, which had hit the front pages. I told him that I planned one day to go to the bar. He said: 'A big mistake. Stick to history.' I didn't take his advice. But this evening, I shall make amends, and stick to history.

I shall however start with a proposition of law, the only one that you will hear all evening. Article 1 of the Act of Union of 1707 provides that 'the two kingdoms of Scotland and England shall on the 1st of May and for ever after be united into one kingdom by the name of Great Britain.' These words marked the birth, three centuries ago, of Great Britain. The United Kingdom had longer to wait. A century after the Act of Union with Scotland, Article 1 of the Act of Union with Ireland in 1800 provided that the Kingdom should henceforth be known as the United Kingdom of Great Britain and Ireland. Uniquely among the nation-states of Europe, the British state was founded on two legislative unions, one between England and Scotland which has lasted more than three centuries and was until recently remarkably successful, the other between England and Ireland, which was a tragic failure from the outset and broke up in less than half that time.

It takes more than statutes to make a nation and more than statutes to unmake one. The history of Irish nationalism was already a very long one when the union with Ireland broke up in 1922. It dated back certainly to the sixteenth century and arguably beyond that. By comparison, Scottish nationalism has a much shorter history. As a serious political movement, it dates only from the 1960s. Yet today it commands a majority of the Scottish Parliament created in 1999. The rise of powerful internal nationalisms within the territory of ancient

* Justice of the Supreme Court of the United Kingdom. This text was originally given as a lecture to the Denning Society on 5th November 2013. It is reproduced in its original form.

states is a worldwide phenomenon. It raises some fundamental questions about the identity of nations.

Most states are composites, built out of territories that were once autonomous. Often, the component parts conserve their own distinctive ethnic, religious, cultural or political traditions. Italy and Germany are notable European examples. Beyond Europe, India combines highly diverse societies with distinct ethnic, linguistic and religious identities in a composite state with a strong sense of its own national identity and its place in the world. At the other extreme, five centuries after the union of the component kingdoms of Spain, separatist parties currently have a majority in the Catalan regional legislature, and in January of this year declared themselves to be entitled to secede unilaterally from Spain as soon as a referendum approved. Belgium, which in spite of its artificial origins and linguistic diversity, enjoyed a formidable cohesion for most of its history, is threatened with break-up by renascent linguistic nationalist parties. In Italy there is serious talk, although as yet no more than that, about the industrial north seceding from the state created 150 years ago by Garibaldi and Cavour. But perhaps the most remarkable example lies further east. Kiev was the first nucleus of the Russian nation, but after ten centuries in which the fortunes of Russia and Ukraine seemed indissolubly linked, it is now the capital of an independent state. It is clear that there is nothing predestined or immutable about the identity of nations.

In 1882, the French historian Ernest Renan delivered a famous lecture at the Sorbonne entitled 'What is a nation?' Writing at a time when national sentiment in Europe had never been stronger, Renan questioned all of the theories of national identity current in his own day, most of which were based on ethnic and linguistic solidarities. In his view the identity of a nation depended entirely on collective sentiment. It was therefore inherently changeable. Nations, he said, depended for their continued existence on a 'daily referendum' among its population. Once they ceased to feel like a nation, they would cease to be one. So far as existing national identities had any stability, this was due to the accumulated weight of historic myth. A nation, Renan wrote, was the culmination of a long history of collective effort, collective sacrifice and collective devotion. It depended on a consciousness of having done great things together in the past, and wanting to do more of them in future. The definition is pithier in French: 'avoir fait de grandes choses ensemble, vouloir en faire encore.' What were these great things in a nation's past that fixed its identity? The examples that Renan gave, heroism, glory, great men, were those that would probably have occurred to most nineteenth-century thinkers. Most of them were synonymous with war and conquest. Paraphrasing Renan, the Harvard political scientist Karl Deutsch

observed, in language that has often been misattributed to Renan himself, that a nation is 'a group of people united by a mistaken view of their past and a common hatred of their neighbours.' Renan thought that the major European nation-states of his own day would survive for centuries. Yet by his test even they were fragile constructs. Sentiments change. External threats recede, to expose the fault lines within historic nations. The memory of joint triumphs fade away, to be replaced by the more durable recollection of real or imagined oppression and antagonism.

England is and always has been the dominant member of the United Kingdom. This is the inevitable consequence of its greater size and population, its powerful public institutions and its central geographical position. The formation and survival of the United Kingdom is therefore essentially the story of England's relations with the other nations of the British Isles. Historically, three factors have been dominant: religious allegiance, defence against external enemies, and access to markets. What is missing from this catalogue is idealism. The unemotional origins of the United Kingdom differentiate it from European states that coalesced in a wave of patriotic emotion. Distinctive too has been the absence of any deliberate policy of assimilation by the British state, such as that which as energetically pursued by the governments of post-revolutionary France and post-Risorgimento Italy. The British have never consciously tried to mould a British nation. So far as a broader British identity emerged, it did so only after the unions and not before. In Ireland it never happened. In Scotland it did. The reasons for this divergence can tell us a lot about ourselves.

It is necessary to start with Ireland, whose shadow looms large over this issue. The partial separation of Ireland from the United Kingdom in 1922 marked Britain's greatest failure in the whole of its long history. It was also a conspicuous symptom of our lack of interest in creating a single nation out of the disparate but interdependent peoples of the British Isles. At the time of the Irish Act of Union, Ireland represented about a quarter of the population of the United Kingdom, a far higher proportion than Scotland. For six centuries, Ireland had been a lordship belonging to the Kings of England, but constitutionally separate from England. It had its own legislature, with separate houses of lords and commons, its own judiciary, and its own executive. All of these institutions were essentially miniatures of the equivalent institutions in England. For customs purposes, Ireland was another country separated by steep tariff barriers from its natural markets in England. Ireland's relationship with England was essentially colonial. It was partly colonised from England twice, in the twelfth century and again in the seventeenth. The twelfth-century colonisation was a superficial and ephemeral affair. The Anglo-Norman colonists were a numerically very small group whose

economic and military dependence on alliances with the Irish chiefs meant that they were largely assimilated by the indigenous Irish by the end of the middle ages. It is a common fate of conquerors to be absorbed by those that they conquer, unless there is a wholesale displacement of population.

The seventeenth-century colonisation was a far more thorough and brutal business, which not only did displace a large part of the population but also introduced into Ireland the corrosive religious divisions which are still with us. The reformed religion, initially a minority creed, was imposed on the great majority of the English population during the second half of the sixteenth century. This was possible in England because it was a highly centralised, intensively governed country, with an educated and influential elite that was already largely converted to one or other of the variant forms of Protestantism. None of these conditions obtained in Ireland. Protestantism made virtually no headway there. Religion rapidly superseded ethnic origin as the real badge of collective identity in Ireland. The continued Catholic allegiance of the mass of the Irish population was a serious problem for England at a time when her main external enemies, Spain in the sixteenth century and France in the seventeenth, were the leading Catholic powers of their time, and Catholicism was an important part of their public ideology. The French intrigued with the Gaelic chiefs in the 1520s. The Spanish did the same a decade later and remained the principal threat for the rest of the sixteenth century. Even in the eighteenth century, when the foreign policy of the great Continental powers lost its confessional colours, the existence of a predominantly Catholic population in Ireland was seen as a major strategic weakness, by both the English and their European enemies. As late as 1796, the French General Hoche, accompanied by Wolfe Tone, very nearly succeeded in landing an army of 15,000 men at Bantry Bay. Sir Roger Casement tried to do something similar with German support in 1916.

It was the abiding fear that Ireland would become a back door into England for her Continental enemies that had prompted the succession of brutal attempts at large-scale Protestant colonisation in the seventeenth century. It came in three main waves. At the beginning of the seventeenth century, the colonisation of the northern province of Ulster involved a massive displacement of the population in a very short period of time, transforming what had hitherto been the most intensely Gaelic region of Ireland into a largely Scottish and Presbyterian community. The reoccupation of Ireland by Oliver Cromwell in the 1650s, which marked the second wave, was even more brutal and geographically more extensive. It may have displaced or killed as much as a third of the indigenous population. The third wave was the invasion of the country by William of Orange

at the end of the seventeenth century in order to forestall the threat from the deposed Stuart King James II and his ally Louis XIV of France. The Williamite invasion was not particularly bloody. The annual commemoration of that event by the Apprentice Boys of Londonderry has unleashed far more bloodshed over the years. But it was the most damaging of all for England's future relation with Ireland, for it was followed by a series of draconian statutes against the Catholic majority, which prevented them from holding land or offices, from bearing arms, from observing their religion, from holding schools, in fact from participating in almost every aspect of civil society. Few of these disabilities were applied to Catholics in England itself. Eighteenth-century English Catholics could not vote in parliamentary elections or sit in Parliament or hold offices of state. But they could do almost everything else, including own land and practice their religion. In the eighteenth century, the serious persecution of Catholicism was confined to the one part of the British Isles where they constituted the overwhelming majority of the population. The result was to create a caste-based system in Ireland, in which a Protestant minority of mainly English origin held a monopoly of political office and all of the land. As William Pitt the Younger told the House of Commons in 1799, all the problems of Ireland were ultimately due to 'the hereditary feud between two nations on the same land.'

At the time when Pitt was speaking, the crunch moment for this unsustainable system had arrived. The French Revolution had an immense impact in Ireland, not only among Catholics but among radicalised Irish Protestants who saw in the unequal relationship with England the roots of Ireland's political and economic backwardness. The United Irishmen, founded by the Protestant Wolfe Tone and others in 1791, adopted an overtly republican policy, and after the outbreak of the revolutionary war in the following year they made alliance with revolutionary France the cornerstone of their policy. The Parliament in Dublin responded by embarking on a panic-stricken programme of concession and reform. Almost all of the statutory disabilities inflicted on Catholics since the end of the seventeenth century were repealed, apart from their exclusion from the Dublin Parliament itself.

These rapid measures of liberalisation failed to draw the poison, for two main reasons. The first was that it was too late. The French revolution had unleashed passions which could not easily be contained. The progressive expansion of the franchise from 1832 onward broke the political power of land, marginalised the Protestant elite everywhere in Ireland except Ulster and made it possible to organise a Home Rule movement on a national scale. The second reason was that the long-term consequences of the disabilities inflicted on Catholics for

more than a century proved to be more difficult to address than the disabilities themselves. The most serious of these was the land problem. As a result of the systematic exclusion of Catholics from the ownership of real property throughout the eighteenth century, by 1800 substantially all the land in Ireland was in the hands of a minority defined first by its religious allegiance and secondly by its political dependence on England. In a pastoral and agricultural society, where land was the main source of social status and the only source of capital, this was a disaster. It might perhaps have been addressed by a wholesale redistribution of land of the kind which has actually happened in Ireland since 1922. This would have required a transfer of resources on an even larger scale than, to take a modern example, the vast transfer from west to east which followed the unification of Germany two decades ago. There was never the slightest chance of its happening in Victorian Britain, with its profound attachment to the minimal state and to rights of property as the twin foundations of constitutional liberty.

In May 1798, there was a serious uprising in Ireland, accompanied by three attempts by French squadrons to land troops on the Irish coast. The rising was poorly organised and quickly suppressed. But 1798 left a poisonous legacy. Although the leaders of the rising declared their desire to unite Irishmen of both religions against English rule, in parts of the south the revolt was accompanied by bloody massacres of Protestants which transformed attitudes on both sides of the Irish Channel. Before 1798, militant Irish nationalism had not been particularly associated with Catholicism. The United Irishmen had originally been founded by Protestants in Belfast and their main strength lay in the Presbyterian north. The sectarian violence against Protestants put an end to the tradition of Protestant radicalism in Ireland. Almost overnight, it transformed Irish Protestants, then about a quarter of the population and the dominant element in the towns, into an embattled, pro-British minority. As the Irish historian William Lecky observed a generation later, the rising of 1798 planted in Ireland the seeds of sectarian hatred which remained thereafter 'the chief obstacle to all rational self-government.' In England, the Prime Minister, William Pitt the Younger, drew the same conclusion. In his view peace in Ireland was indispensable if Britain was to prevail in the struggle with Revolutionary France. The maintenance of a Protestant Parliament in Dublin was no longer sustainable in a mainly Catholic country. Yet the admission of Catholics to the Irish Parliament would only serve to swamp the Protestant minority and perpetuate sectarian divisions. The only solution was to dilute the political passions dividing Ireland by abolishing its independent Parliament and incorporating Ireland in the larger political community of England.

In 1835, the great French political scientist Alexis de Tocqueville spent several weeks in Ireland speaking to Catholic and Protestant, townsmen and countrymen alike. His notes, which he perhaps intended to write up into a book, are among the most revealing portraits of Ireland in the generation after the Act of Union. The most striking thing is the almost complete absence of bitterness or hatred among educated men. De Tocqueville was impressed by the genuine desire of the Protestant minority to improve the condition of all the people of Ireland. Yet, the overwhelming impression which he took away from his conversations with them was one of hopeless resignation in the face of the insoluble problems bequeathed by two centuries of prejudice and folly. De Tocqueville was a liberal Frenchman, a nobleman and a Catholic. He was also a great admirer of England. But his conclusion was that the same tradition of liberal aristocratic government which in his view had made English strong and rich, also accounted for the irredeemable failure of every thing that they did in Ireland. Modern mythology has tended to concentrate on the potato famine of 1846, on the fate of Gladstone's Home Rule policy and on the Easter Rising on 1916. But the Union was doomed well before these events. It did not even bring England the military security which had been Pitt's great object in 1800. In a speech delivered in Glasgow in 1871 Isaac Butt, the first leader of the Parliamentary Home Rule movement, said: 'We were told that the Union would make an invasion of Ireland impossible, but would an enemy be any worse received in Ireland by many of the people now than in 1798?' It was a good question. There were important pro-German movements among Irish nationalists in both world wars of the twentieth century. In the closing days of the Second World War, the Irish President Eamon De Valera famously sent a message of condolence to the German ambassador on the death of Hitler.

I have dwelled upon the unhappy experience of Ireland's union with England, because it is in almost every respect the polar opposite of Scotland's experience. In an essay written in 1881, the great constitutional lawyer A.V. Dicey noted the divergent fortunes of the Scottish and Irish unions over the previous century. His explanation was very simple. 'The shortest summary of the whole matter,' he wrote, 'is that all the special causes which favoured the incorporation of Scotland with England, were conspicuously wanting in the attempt to unite Ireland with Great Britain.'

What were these differences?

In the first place, although Lowland Scotland, like England itself, was occupied by the Normans in the eleventh century, and migrants from England still account for more than a tenth of the population of Scotland, Scotland has never been an English colony. Except for a very short period in the late

thirteenth and early fourteenth centuries, there has never been a sustained English occupation of Scotland. Secondly, Scotland had never been a subordinate lordship. Before the union it was an independent kingdom with an ancient monarchy of its own and institutions that were not just clones of their English equivalents, as the Irish ones were, but had their own distinctive origins and traditions. In 1603, the play of dynastic marriage and inheritance brought a Stuart king to the throne of England. However, this did not bring about a union between two countries. Both countries were parliamentary monarchies in which the power of legislation and taxation were vested in representative assemblies, and there was no parliamentary union until 1707. In legislative terms, Scotland was a foreign country. The only notable gesture towards union was a purely symbolic one: the laying of the St George's cross over the St Andrew's saltire to create the Union Jack. But for a century it was only a royal standard and not a national one. Third, at the time of the union, Scotland was a Protestant country. Except in parts of the Highlands, Catholic practice had disappeared even more completely than it had in England. From the sixteenth century until relatively recent times, Protestantism was at least as important as an element in Scotland's identity as it was in England's. In 1688, England and Scotland both independently renounced their allegiance to James II because he was a Catholic and invited the Dutch Stadtholder William of Orange and his Stuart wife Mary to occupy the throne, because they had undertaken to secure the Protestant religion.

In spite of a common Protestant ideology, however, there was no emotional tide of British nationalism before the union of 1707, and no pressure for a union with England until shortly before the union occurred. On the English side, the pressure for union arose from concerns about the defence of the realm very similar to those which prompted the union with Ireland a century later. After the Glorious Revolution of 1688, the exiled James II lived with his court at Saint-Germain under the patronage of Louis XIV of France at a time of militant international Catholicism and major European wars. When James died, Louis XIV recognised his son as King of England. Jacobitism enjoyed considerable support in the Highlands and Islands, and elsewhere among the Episcopalians who had been ousted from the Church of Scotland. The risk of a French invasion through Scotland was taken extremely seriously at Westminster.

For the Scots, by far the most important reason for agreeing to the union was their desperate need for access to England's rapidly growing markets. The English domestic market was at least ten times the size of the Scottish one, and its colonial markets more important still. The great engine of economic growth across much of eighteenth-century Europe was the raw materials and seaborne

trade of the Americas and Asia. Yet this growth was very unevenly distributed as nations sought to reserve it to themselves. The Dutch, French and Spanish governments all reserved the trade of their colonies for the mother country. In seventeenth-century England, the Navigation Acts reserved the colonial trade to English nationals and English ships. Scots were excluded from the right to trade with English colonies in the Caribbean and North America, and attempts to break the monopoly were suppressed with growing efficiency by the English Navy. Scotland was ill-placed to compete in this world. It had a relatively small economy, with a limited range of exportable products, very little international clout and virtually no navy. Shortly before the union, Scotland's vulnerability was brought home to its inhabitants by the failure of an ambitious scheme of colonisation known as the Darien scheme. In 1695, Scotland chartered a company to found a colony at Darien on the Isthmus of Panama, in a region traditionally regarded as belonging the sphere of influence of Spain. Under pressure from the English government, which wished to maintain good relations with Spain, English financiers refused to invest capital in it. As a result, the capital was ultimately subscribed by a large number of Scottish investors. The venture was a disaster, and by comparison with the modest size of the Scottish economy, the losses were enormous. They particularly affected the classes represented in the Scottish Parliament. There were a number of reasons for the failure of the scheme, including mismanagement, disease, Spanish hostility and absence of naval support. But the Scots blamed English indifference. In the years immediately leading up to the union of 1707, anti-English feeling in Scotland was probably stronger than it had been at any time since the Anglo-Scottish wars of the middle ages. In 1704 the Scottish Parliament passed an Act reserving the right to choose a different monarch from England after the death of the childless Queen Anne, unless arrangements were made to secure 'the religion, liberty and trade of the nation from English or any foreign influence.'

It was this overtly hostile enactment which led to the appointment of the joint commission to prepare the articles of the Treaty of Union. The passage of the Act of Union through the Scottish Parliament was eased by crude political horse-trading and a liberal distribution of bribes, and its enactment was accompanied by riots in Edinburgh, Glasgow and other towns. Rarely can a voluntary union have been agreed amid such a tide of mutual suspicion and resentment. Even after its passage there was a period of disillusionment during which a number of proposals were made for its repeal. One of them, in 1713, failed by only four votes in the House of Lords. In truth, when the Act of Union was passed, the common feeling of belonging which Renan identified as the

foundation of nationhood did not exist. The union with Scotland had been the result of pragmatic calculations of mundane economic and political interest. The emergence of a wider British patriotism was a later development, the result rather than the cause of the union.

There is an interesting parallel to the situation of Scotland on the eve of the union, in the history of that other great imperial power, Spain. Spain came into being in its modern form as a result the dynastic union of Crowns of Aragon and Castile, when Ferdinand of Aragon married Isabella of Castile in 1479. As in Britain after 1603, it was a union of crowns but not a union of nations. Castile and Aragon retained their own distinctive institutions. But the Spanish colonial empire, which was run like the English one on strictly protectionist lines, was a purely Castilian affair. Catalans, traditionally the most dynamic traders among the subjects of the Crown of Aragon, were excluded from the benefits of Spain's Caribbean and South American empire, just as the Scots were excluded before 1707 from England's Caribbean and North American empire. As in Britain, the Catalans had no automatic access to Castilian domestic markets either. They paid duties at the boundary of Castile. As in Britain, this separation of Castile and Aragon ultimately proved to be intolerable because of the threat of foreign intervention. There was a powerful invasion of Catalonia from France in 1640, and another in 1705. But the solution was different. The problem was brought to an end not by a voluntary coalescence, as in England, but by forcible absorption. The whole process was a disaster for Catalonia, which in the middle ages had been the most dynamic trading community, but atrophied economically for nearly two centuries.

This was the fate of eighteenth-century Ireland, and might have been the fate of eighteenth-century Scotland. Ireland became an economic satellite of England, a source of raw materials, food and cheap labour. Economic specialisation was limited. Urbanisation and manufacturing growth were slow. Capital formation was inhibited by the concentration of landed wealth in the hands of a largely non-resident aristocracy. By the beginning of the nineteenth century, industrialisation was actually going into reverse in Ireland, except in the Belfast area where substantially the whole of Irish heavy industry was to be concentrated for most of the next two centuries. The experience of eighteenth-century Scotland could hardly have been more different. After an uncertain start, the union brought spectacular economic benefits to Scotland. In the first century and a half after 1707, Scotland enjoyed a rate of industrialisation second only to England's. To some extent, this was due to purely Scottish factors, in particular a relatively high standard of literacy and general education and a generous

endowment of natural resources, particularly water power and coal. But by far the most important factor in the economic achievement of eighteenth-century Scotland was its new access to the domestic and international markets of England. Glasgow and the Clyde region became one of the major British centres of the transatlantic trades, and one of the greatest concentration of heavy industry in the world. Moreover, the men who built and managed these businesses were native Scots.

The rapid expansion of the Scottish economy in the aftermath of the Act of Union was the most important single factor in the creation of a common British identity. But almost as important was a common belief in the Protestant settlement and the rhetoric of constitutional liberty, which were central to both nations' sense of identity. Nations commonly identify themselves by comparison with some great other, and for both English and Scots, the great other was usually France. Britain was Protestant where the French were Catholic. Britain regarded itself as constitutionally free whereas the French were thought to be the servile helots of a privileged aristocracy and an absolute king. Britain was rich and enterprising, while France stagnated as the riches of the land were appropriated by the few. It was to these stereotypes that the British ascribed their economic success and their remarkable imperial expansion in the eighteenth century. The frame of mind is perfectly encapsulated in William Hogarth's much-reproduced painting *Calais Gate*, of 1749, in which starving and ragged Frenchmen are shown enclosed by a vast prison, pushed about by equally ragged soldiers, as in the background well-fed Catholic monks live on the fat of the land. Appearing on American television last year, our current Prime Minister was unable to identify the author of *Rule Britannia*. For a convinced Unionist, Mr Cameron was missing a trick. It was in fact written in 1745 by a Scot, James Thomson. This famous patriotic song was a great deal more than a celebration of British sea power. It was paeon of praise for political liberty, and a conviction that only in Britain was it to be found. 'The nations, not so blest as thee, must in their turn to tyrants fall, must in their turn, to tyrants fall while thou shalt flourish great and free, the dread and envy of them all.'

Nothing promotes a sense of common patriotism as effectively as a common external enemy. In early eighteenth-century Britain, one of those enemies was Jacobitism. The threat of a Jacobite invasion of Scotland brought an insular, Protestant and British Scotland into conflict with a cosmopolitan Jacobite movement with its roots in international Catholicism and monarchical absolutism. The Stuarts may have been an authentically Scottish dynasty, but their refusal to abandon their Catholic faith made them foreign in the eyes of Britons on both sides of the

border. At the outset of rebellion of 1715, the Old Pretender issued a proclamation declaring that once restored to the Scottish throne, he would repeal the Act of Union. A similar promise was made by his son Bonnie Prince Charlie in 1745. 'No Union' was one of the slogans carried on Jacobite banners in both rebellions. This proved to be a serious misjudgement. In the Lowlands, which accounted for almost all the population and wealth of Scotland, the Stuart Pretenders had little or no support, rather less in fact than they had in the north of England. The main result of the rebellions was to reinforce support for the union in most parts of Scotland. George II's Germanic younger son William Duke of Cumberland may have gone down in history as the Butcher of Culloden, and the highlanders whom he slaughtered have become symbols of a romanticised Scottish past. But at the time of the 'Forty-Five', this quintessentially un-Scottish figure was a hero in Scotland. After the battle, he was elected Chancellor of the University of St Andrews and fêted in the streets of Edinburgh. George II might have been a German who spoke poor English and never visited Scotland, but he was a Protestant and with the Stuarts laying claim to the British Crown, that was what mattered.

Religious allegiance, which had been such a divisive factor in England's relations with Ireland, remained the cement of the union with Scotland for many years after the Jacobite threat had faded away. Even in the twentieth century, Protestantism remained part of the fabric of public life in Scotland in a way that had not been true of England for many years. The Presbyterian churches retained considerable political influence. Until half a century ago, those bastions of Scottish working class culture, the Boy's Brigade, Sunday school and Rangers Football Club, were suffused with the ethic of muscular public Protestantism.

The main shared experience of England and Scotland for the first two centuries of the union was the British colonial Empire. The industries of the Clyde were heavily oriented towards the Atlantic trade, and later to the construction of the Empire's infrastructure: shipbuilding, railway engines and harbour works. Scotland supplied a disproportionate number of the Empire's imperial administrators and soldiers. They were among its most prolific and successful settlers, missionaries, engineers, traders and industrialists. In 1901, at a time when the Scots were about 10% of the population of the United Kingdom, they were about 15% of the British-born population of Australia, 21% in Canada and 23% in New Zealand. There is some evidence that Scottish settlers in the colonies and dominions were not only more numerous but arrived with higher standards of education, more skills, and more capital than other settlers from the British Isles.

When the American steel baron Andrew Carnegie, who was born in Scotland,

remarked that America would have been a poor show without the Scots, he had of course a vested interest. But he was not the only person who said so. The Irish politician Sir Charles Dilke, who toured the Empire in the 1860s, observed that 'for every Englishman that you meet who has worked himself up from small beginnings, without external aid, you find ten Scotchmen.' The novelist Anthony Trollope, returning from Australia in the following decade, famously declared that 'in the colonies those who make money are generally Scotchmen and those who do not are mostly Irishmen.' The English tendency to praise the enterprise of the Scots while denigrating the Irish was perhaps as revealing as anything about their attitude to both of their British neighbours. It was a travesty in fact. There were large and prosperous Irish communities in North America, Australia and New Zealand. But it is undoubtedly true that in proportion to their numbers the Scots played a much larger part in the imperial operations of the British state than any other nation within the British Isles, and their activities as settlers contributed to the enrichment of their home country in a way that was not as true of the Irish or even the English.

In much the same way, the Scots have played a remarkably prominent role in the government of the United Kingdom itself. For much of the eighteenth century the Scottish parliamentary bloc at Westminster produced few leaders, but succeeded in selling its support to the parliamentary managers of the Crown in return for a disproportionately large share of its patronage and influence. The eighteenth-century system of political patronage disappeared after the Reform Bill of 1832, but Scotland continued to have a weight in the government of the United Kingdom out of all proportion to its share of the British population. Of the thirty-two prime ministers who have held office since the 1850s, no fewer than eleven have been of Scottish ancestry and two more have sat for Scottish constituencies.

The emergence of a specifically British patriotism was the result of the two centuries of shared experience of government, war, colonisation and industrialisation which followed the union. By far the most important single factor behind the emergence of a specifically British patriotism was the fact that the union occurred at the outset of the period of Britain's greatest international power and wealth, a process in which the Scots played a particularly important part. To return to the language of Ernest Renan, the English and the Scots did great things together and until quite recently were intent on doing more. It is difficult to imagine that either would have been as successful in the heyday of British power without the other or that either of them was unaware of this at the time.

What is striking about the rise of a specifically British patriotism in Scotland

during the eighteenth and nineteenth centuries is not just that it happened, but that it proved to be entirely consistent with the survival of an authentic Scottish patriotism as well. The Scottish Parliament disappeared in 1707, and so, shortly afterwards, did the Scottish Privy Council, which had been the main organ of government north of the border. Until the creation of the Scottish Office in 1885, there were no government departments concerned specifically with Scotland. Even the Scottish Office was based in London until 1937. Yet the union left intact all of the indigenous institutions that were closest to the Scottish people. The Act of Union guaranteed the position of the Kirk as the established Church of Scotland, which came closest to being the authentic voice of Scotland in the next two centuries. It expressly preserved the Scottish judiciary, administering a body of Scottish law with its roots in continental civil law systems and differing in significant ways from the common law of England. It did not touch the Scottish school system or the four Scottish universities. To these major institutional monuments of Scotland's distinctive past were added in the course of the nineteenth century, a revived interest in Scottish history and in the great epics of the wars against England, like Barbour's *Bruce* and Blind Harry's *Wallace*. Some of the most famous modern symbols of Scottish identity, such as kilts, sporrans, tartans and bagpipes, had been forbidden by statute after the Jacobite rebellion of 1745. But in the early nineteenth century they were readopted by a country by now largely urban and industrial, whose population was concentrated in the lowlands. Yet this recognition of a distinctive past existed side by side with a wider British nationalism. Ironically, the chief agents in the growing popularity of Scottish national dress in the nineteenth century were British institutions, notably the monarchy, which reinvented itself under Queen Victoria as a Scottish institution, and the War Office, which kitted out even the Lowland regiments in kilts and tartans. As the great Scottish historian of the Victorian age, Thomas Babington Macaulay, observed, every self-respecting Scot now went about wearing a costume which would once have been regarded as the authentic uniform of thieves and brigands.

It is obvious that the main factors which brought about the union of England and Scotland at the beginning of the eighteenth century have little if any resonance today. The strategic concerns which determined England's attitude to the union in 1707 have vanished. Although it is notoriously difficult to predict the balance of power internationally more than a generation ahead, there is for the moment no credible external threat to the security of the British Isles and it is not obvious where such a threat might come from in the future. The same is true of the economic factors which propelled Scotland into the union. The economic

imperative to belong to a British common market has become irrelevant with the creation of a wider European common market offering the same benefits. But the fact that the original rationale of the union has gone hardly matters. A great deal has happened since 1707 to create a composite British nation out of the distinctive traditions of English and Scottish nationalism. The interesting question is why this counts for less now than it did only a generation ago.

It is common to answer this question by referring to the well-advertised differences between Scottish politicians and the Conservative governments of the 1980s, and to the striking decline of the electoral fortunes of the Conservative Party in Scotland after a long period when it had been the dominant force in Scottish politics. But it is important not to confuse the symptoms with the cause. Scottish nationalists experienced their strongest electoral performance in Scotland in the first decade of the present century, at a time when the Labour Party was in power at Westminster, was led by Scots and held a large majority of Scottish seats. This interesting phenomenon is likely to have far more profound causes than the ephemeral issues which have preoccupied British politicians for the last thirty years. I want to offer some explanations. In a sense the factors which have encouraged the decline of British nationalism are no more than the obverse of those which led to its creation in the first place.

It is I think worth making three broad points about the present situation.

The first and much the most obvious is the decline of Britain's sense of its own historic destiny and global relevance. This is a remarkable change that has occurred in the relatively short period since the Second World War, an event which marked perhaps the climactic moment of England's and Scotland's shared history. The British Empire was not the only European empire. But it was by far the largest of the European empires and it was the one whose fortunes were most closely bound up with the identity of the nation which created it. Its disappearance has removed the principal historic experience which Scotland shared with England. It has also deprived Scotland, even more than England, of an outlet for emigration and a source of middle-class employment. It is true that the main British possessions in which the Scots were engaged, Canada and New Zealand, have been politically autonomous for many years. But sentiment, ethnic attachment and a large measure of economic interdependence kept them close to Britain until about the 1960s.

The American political scientist Rogers Smith has suggested that every political community depends for its sense of identity on what he calls a 'constitutive story', a historical memory which explains who we are and why we belong together. This is in reality an updated and more elaborately argued version of

Renan's theory of nationhood. In the last half-century, there has been a striking decline in Britain's confidence in the special value of its own collective experience. Take as an example the decline of English constitutional history. The struggles of the Crown and Parliament in the seventeenth century not only fed the eighteenth-century myths of national identity but until quite recently seemed to be the paradigm for the development of constitutional liberty everywhere, a story of universal relevance. British constitutional history has all but vanished from the curricula of university history courses. Britain's overseas Empire, which was a source of pride while it lasted, has become a matter for embarrassment and apology among many who have only the haziest idea of its history. When a state can no longer maintain its own constitutive story, Rogers Smith argues, historical memory becomes localised. This is what has happened in Britain. The last thirty years have witnessed a veritable explosion of interest in Scottish history ranging from work of outstanding originality and scholarship to colourful fantasy and patriotic myth. Scotland is in the process of making its own constitutive story. In a world which is at the same time more globally minded and more locally minded, to be British seems less important. Whether this is a pity or not, I leave to you to judge. For the moment, it is a fact.

Secondly, the institutions at the heart of Scottish life which contributed most to sustaining belief in the union in the eighteenth and nineteenth centuries have recently lost much of their influence. This applies particularly to those great engines of Scottish unionism, the British Army and the Scottish Kirk. For most of the history of the union, the British Army has been recruited in disproportionate numbers from north of the border. A quarter of the Duke of Wellington's army at the Battle of Waterloo fought in regiments raised in Scotland, at a time when only about one in seven of the population of the United Kingdom lived there. The role of Scottish troops as shock troops, generally deployed in the front line, meant that their casualties have always been high. In the First World War the Scottish regiments suffered casualty rates of about one in four, more than twice the average for the United Kingdom as a whole. All of this represented a highly visible contribution to a much admired and authentically British institution. The army has progressively contracted as Britain has shed its international responsibilities since 1945. The contraction has been particularly marked among the famous Scottish infantry regiments. As a result of successive suppressions and mergers, they have been reduced from eleven in 1957 to just one today, the Royal Regiment of Scotland.

The decline of the Kirk, that other notable bastion of unionism, has been a more complex and drawn-out process. The eighteenth and early nineteenth

centuries were probably the high point of its influence. After the so-called Disruption of 1843, when the courts reaffirmed the rights of lay patrons in the Church of Scotland, some 40% of the Kirk's membership seceded to form the Free Church. Although the social and political attitudes of the different Presbyterian churches were much the same, the established church lost much of its social pre-eminence and moral influence. Responsibility for poor relief was transferred from the Kirk to elected parochial boards in 1845. Education was transferred to elected bodies in 1872, with the introduction of universal, publicly funded elementary education. The urbanisation of Scotland inevitably weakened the grip of the Kirk on local government. The Kirk never enjoyed the same influence over the municipal corporations of the expanding industrial cities as it had over the small towns and rural parishes. In 1929, even the Kirk's dominance of rural parochial councils was lost when these bodies were abolished. But since the Second World War, the progressive secularisation of British life on both sides of the border has transformed social attitudes to a degree which is hard for those brought up under modern conventions to grasp. Protestant Church membership in Scotland has declined in half a century by more than two thirds. These changes have served to undermine the political influence of one of the union's principal historic defenders, and put an end to the aggressive Protestantism that was once one of the major components of the British national identity.

The third factor is the existence of a range of social problems, to some extent specific to Scotland, arising from the speed of Scotland's industrialisation in the nineteenth century, and of its de-industrialisation since the last war. These problems have affected the whole of the United Kingdom, but have been more significant in Scotland, where steel, shipbuilding and heavy engineering in their heyday were a larger part of the economy and more highly concentrated geographically than in the rest of the United Kingdom. Perhaps the most notorious single symptom of Scotland's social problems was housing of the working classes, especially in the Clyde. Housing conditions in Glasgow were for many years the worst in Britain and among the worst in Europe. On the eve of the Second World War, one in four dwellings in Scotland was overcrowded according to the not particularly exacting standard laid down in the Housing Act of 1935, as against only one in twenty-five dwellings in England. While the heavy industry of the Clyde prospered, a good deal of social amenity was sacrificed to feed its need for manpower. Yet in the 1930s, at a time of sluggish but steady growth in England, the Scottish economy was actually contracting and in 1937 was smaller than it had been in 1913. After a pause resulting from the long post-war manufacturing boom, these divergences between England and Scotland

resumed in the 1970s and 1980s. Between 1976 and 1987, Scotland lost nearly a third of its manufacturing capacity. Today, the differences have narrowed. The jobs have been replaced. Unemployment is substantially the same in Scotland as it is in England. But there has been a shift away from traditional male working-class jobs in manufacturing, agriculture and construction, towards financial services, public services and tourism, all on a scale and at a speed much greater than the UK average. The legacy of social dislocation resulting from both industrialisation and de-industrialisation has been very great, and has inevitably produced a political agenda in Scotland which differs quite significantly from that of England.

These problems have been addressed mainly, and no doubt inevitably, by the expansion of the social action of the state, something which has made the United Kingdom one of the most centralised countries in the developed world. This was always bound to have a considerable impact on sentiment about the union. Until well into the twentieth century, the central government impinged very little on the lives of the great majority of Scots. What little public authorities did was done locally. Poor relief was originally the preserve of the Kirk and then of the Scottish Board of Supervision. Education was locally managed, also by the Kirk until 1872, and then by local Boards. Law enforcement was the responsibility of the Lord Advocate. Major social initiatives were mainly in the hands of the larger municipal corporations, which dealt with an expanding portfolio of social issues including policing, public health, housing, transport, and utilities. Against this background, the fact that the central government and the legislature were located far away in London and dominated by Englishmen was less likely to be an issue.

In all economically advanced countries, the arrival of a broadly based democracy has been followed by rising public expectations of the state and a considerable increase in its powers. The scale of the social problems associated with Scotland's rapid industrialisation and even more rapid de-industrialisation, was always likely to lead to stronger commitment to governmental action in Scotland than in the rest of the United Kingdom. The only surprise is that it took so long. The Royal Commission on Housing in Scotland, whose report was published in 1918, advised that the housing situation in western Scotland was so catastrophic that it could be addressed only by large-scale state intervention. At the time, this was an unpalatable message, with financial implications that the British state was unwilling to accept. Large-scale state intervention in the Scottish economy and society had to wait another quarter of a century. The turning point came in the 1940s with the Second World War and the major programme of state intervention inaugurated by the Labour government of 1945-51. In fact parts of that programme had already been introduced in Scotland

during the war years, as a result of the determination of the wartime coalition government to ensure the smooth operation of vital war industries located there. Tom Johnston, a Labour MP and Secretary of State for Scotland in the wartime coalition, was given a free hand to promote his own brand of social action under powers derived from the vast apparatus of statutory wartime controls. Among Johnston's more notable monuments were rent review tribunals, the introduction of state-owned hydro-electric power to the Highlands and a sort of prototype national health service in the Clyde area. The postwar housing construction boom in Scotland was almost entirely the work of the public sector. In the two decades after 1945 public housing came to account for 86% of new housing in Scotland, even more in the Glasgow area. Looking at the position more broadly, in parts of western Scotland public spending accounted at the outset of the twenty-first century for something like three quarters of the local economy. These were far higher proportions than could be found in any other part of the United Kingdom. They have inevitably had a profound effect on public attitudes to the state in Scotland, attitudes which differ significantly from the rather more equivocal view of the state taken by most Englishmen.

In a society which is heavily dependent for its wellbeing on state action, the remoteness of the directing organs of the state is likely to be resented. In a society which conceives itself to be different, and in important respects is different, the preference of governments for applying standard solutions across the board and their impatience of regional differences, will provoke a sense of victimhood. All of these observable tendencies in complex societies are likely to be aggravated at a time of financial stringency, when public expectations of the state are likely to be disappointed anyway. But with or without financial constraints, people are likely to respond to state control by trying to break down the organs of the state into smaller and more responsive geographical units. When some of those units correspond to ancient polities with self-conscious identities of their own, the pressure to secede is strong. Whether it is wise is another matter, on which I express no opinion.

I have tried to offer some explanation of how we got here. I do not know, any more than you do, where we may be going to. But there is one aspect of the current debate which warrants a mention, not least because it is so characteristic of England's relations with Scotland from the outset of the union. In no other European country would the government have reacted so calmly to the prospect of secession by a small but highly significant part of its population, with a common language and political tradition, which over a period of three centuries has participated in some of the greatest moments of its history. The British

government might, I suppose, have taken the line that was pressed by Dicey at the end of the nineteenth century. In his pamphlet, *England's Case against Home Rule*, Dicey argued that the shape of the United Kingdom was of equal concern to all of its citizens. The English, he thought, had as much right to decide whether the Irish should continue to be part of it as the Irish themselves did. On an issue which turned more on sentiment than on law, this would not have been a very politic line for a British government to take. And it is not the position that the current British government has taken. Their line has been that it is up to the Scots, which of course in the last analysis it has to be. The polls suggest that most English agree. Their approach is in keeping with the pragmatic and unemotional considerations which brought about the union in the first place. It fits in with the generally co-operative character of a union which has always been regarded as closer to an alliance than a merger of nations.

I began this talk with an Act of Parliament. I want to end it with a work of fiction. In *A Farewell to Arms*, Ernest Hemingway's bleak novel of military life on the Italian front in 1917, there is an interesting exchange between the narrator's friend Rinaldi and the British nurse Helen Ferguson. 'You love Italy?' 'Quite well.' 'That is not good', says Rinaldi; 'you love England?' 'Not too well,' comes the answer. And then, as if no other explanation was called for, 'I'm Scotch you see.' 'But Scotland is England', says Rinaldi. 'Not yet', said Miss Ferguson. 'Not really?' 'Never. We do not like the English.' 'Not like the English?', says Rinaldi. 'You mustn't take everything so literally', she replies before breaking off the conversation. National sentiment depends to an unpredictable degree on rhetoric. Perhaps we too will discover when the referendum occurs next year that we should not have taken any of this too literally.

A POLITICAL PERSPECTIVE ON THE SCOTTISH INDEPENDENCE REFERENDUM

*Lord Hennessy of Nympsfield**

1 Introduction

We historians have a besetting sin. It has to do with watching pantomimes when we are young. It takes the form of shouting ‘Look behind you!’ at those whose patch of history attracts our attention and arouses our fascination. Imagine yourself here, a part of our beloved St John’s College, in November 2063, fifty years on, as a PhD student but five weeks into your first term examining the politics and society of 2013 Britain. What might you be staring at that moved you to shout ‘Look behind you!’? I have a feeling that it could be our theme tonight plus some of the percussive effects of the referendum on Scottish independence on 18 September 2014, whichever way it goes. Three scenarios will be sketched out in this article.

2 Two Scenarios: In or Out?

Let me paint two possible pictures of the road from this chilly—but jolly—evening in Cambridge to the autumn of 2020, highlighting the political issues and repercussions of each of those scenarios, depending on whether or not Scotland votes to stay part of the United Kingdom on 18 September 2014.

2.1 Scenario One: Scotland votes to leave the United Kingdom

SEPTEMBER 2014. The Scottish people vote to separate from the United Kingdom. Negotiations begin on the ingredients and mechanics of separation.

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The Scottish National Party administration hopes this will be concluded by the spring of 2016. But, for reasons Sir Richard Aikens will elaborate in a separate contribution to this symposium, it is likely that getting everything sorted and into the statute ending all forms of Westminster sovereignty would take longer, but it would be done by 2020.

MAY 2015. At the general election due under the Fixed-Term Parliaments Act 2011, Scotland will return 59 Members of Parliament to the House of Commons in Westminster. Last time, in May 2010, 40 of the 59 were Labour MPs. Assume that Labour win a medium to small overall majority in the next general election in May 2015: Ed Miliband will be in 10 Downing Street because of Labour's electoral dividend from north of the border. The moment the 59 MPs are removed by the separation statute, his majority is gone. Does he battle on as a minority government till May 2020 – or do the parties engineer a lost vote of confidence in the House of Commons to trigger another election sooner than the 5-year cycle?

Whatever happens, not just the territorial configuration of the UK will have changed but so will its political nature, in a foreseeable future in which it will be immensely difficult for Labour alone to achieve a majority of seats in the House of Commons of a country which we must call, according to the current Her Majesty's Government, RUK (which stands for Remainder of the UK!). So do we hear much talk of this percussive effect and the sudden ousting of 59 MPs from Westminster? Our Johnian PhD student in 2063 will, I think, be struck by a relative silence here.

2.2 Scenario Two: Scotland votes to stay part of the United Kingdom

SEPTEMBER 2014. Scotland votes to stay a part of the United Kingdom. Opinion polls suggest that economic questions—especially the currency complications—were among the trumping factors determining the outcome.

MAY 2015. The Conservatives win a small overall majority in the general election or they come back, after suitable histrionics spread out over a fortnight-long term of negotiations, with Liberal Democrat coalition partners. There will be a manifesto pledge—or a paragraph in the Coalition Agreement—pledging a referendum on the UK's membership of the European Union in 2017; let's say June 2017.

JUNE 2017. The UK electorate votes to leave the European Union and negotiations begin both for withdrawal and the best replacement economic links possible. The Scottish question will once more come to life despite the result of

the September 2014 referendum. Why? Scottish voters could argue the deal is off. We voted to stay part of a UK outfit that was fully a part of the EU single market. Now we are to be a part of a small, free trade nation trying to make its way as if it were a Singapore in the cold northern seas. The question must be reopened and another Scottish referendum held. The Edinburgh Agreement, which paved the way for the last one, expired on 31 December 2014.

Will you please, David Cameron, get on the train at King's Cross and negotiate another one?

Fair question. Fair point. So alongside all the upheaval and uncertainty of hauling ourselves out of the European Union, with all its impact on inward investment, the prospect of a shrivelled RUK will loom once more as the Scottish referendum of, say, September 2020, gets closer.

Our Johnian PhD student, should this happen, will say 'How could the Brits have been so oblivious in the autumn of 2013, as their political attention swivelled from gas prices to John Major's thoughts on class to David Dimbleby's tattoo and Jeremy Paxman's beard?' And our PhD student will be right. The geopolitical future and the very configuration of our country have never before, in peacetime, been in a condition of such uncertainty in anybody's living memory.

3 Current Scenario

Almost a year ago, the Cabinet decided there would be no contingency planning for the consequences of Scottish separation—just a Scotland Analysis series. Interesting though these are, they are not enough. Why did the Cabinet so decide? Because, the argument ran, if we do a contingency plan it will leak out that we are doing it and Alex Salmond will say: 'Look, they're planning for Scottish independence so it's plainly viable.' The London Cabinet allows itself, in this way, to be mesmerised by the Scottish First Minister. I think it is a dereliction of duty across the piece, not least on the future of the Clyde submarine base at Faslane and the viability of Britain remaining a nuclear weapons state, and across a host of other potential impacts on which you need the beautifully primed little grey cells of a top legal mind. These little grey cells will be consulted elsewhere in this symposium.¹

¹ Lord Justice Richard Aikens, 'The Legal Consequences of Scottish Independence' (2014) 3(1) CJICL 162.

THE LEGAL CONSEQUENCES OF SCOTTISH INDEPENDENCE

*Lord Justice Aikens**

1 Introduction

First of all, thank you all for inviting me to discuss these topics. Secondly can I acknowledge that I have had a great deal of help in researching this matter from Daniel McCarthy, who is a barrister and a judicial assistant at the Court of Appeal. But all views expressed are mine and they are, I emphasise, my views in a private capacity. I should disclose that my father's side came from Scotland where they were probably miners and they were then slate miners in the North West of England before coming south to the Welsh Marches. But, I emphasise that I will not express any opinion on whether Scotland should or should not become an independent country.

Professor Hennessy and I are talking on the assumption that those eligible to vote in the referendum in Scotland on 18 September 2014 will have said 'yes' and that independence is going to happen. We are to imagine that we are there sometime just after this and we have to consider and deal with the legal consequences. What are these consequences and how will they be tackled by the governments in London and in Edinburgh?

Although it has been said that there has been little political contingency planning in London for the consequences of a 'yes' vote, much has been written and said about the legal consequences, at least on the plane of international law. The UK Government published a paper in February 2013 entitled 'Devolution and the implications of Scottish Independence'.¹ It contains an Annex which is an Opinion by Professor James Crawford, Whewell Professor of International Law at the University of Cambridge, and Professor Alan Boyle, Professor of

* Judge of the Court of Appeal of England and Wales. This article is a revised version of a speech that was given to the Winfield Society, St John's College, University of Cambridge, on Thursday 21 November 2013.

¹ HM Government, *Scotland analysis: Devolution and the implications of Scottish independence* (February 2013).

Public International Law at the University of Edinburgh.² The Foreign Affairs Committee of the House of Commons has taken written and oral evidence from distinguished professors on the foreign policy implications for a separate Scotland³ and there have been a large number of articles written by partisans on both sides that analyse the legal issues.⁴ I am much indebted to the views expressed by all of them but particularly to the Crawford/Boyle opinion.

Problems of succession of states or their reorganisation are not new. They arose on a grand scale in 1815 at the time of the Treaty of Vienna; in 1918 at the time of the break up of Austro-Hungary, which involved two treaties: that of *Saint-Germain-en-Laye* and that of *Trianon*; and in 1945 after the second world war with the changes that came about then or just after. (Saarland was a particular problem, because of the plebiscite which resulted in the area ceasing to be part of France and becoming part of Germany). The historians amongst you will know some or all of these events but perhaps they will not have studied the international law aspects before.

From past cases we know plenty about the legal principles that apply to the possible legal issues. There are three particular issues that I want to discuss in relation to an independent Scotland. The first is: what will be the status of a new independent Scottish state in terms of international law and what will be the status of the remaining part of the UK – which the international lawyers have taken to calling ‘rUK’ for short? The analysis and conclusion on the status of Scotland and rUK respectively gives rise to the second issue, because the analysis of the two states’ respective statuses will have important repercussions in relation to the rights and duties of those states on the international stage. In

² Ibid, at Annex A: *Opinion: Referendum on the Independence of Scotland – International Law Aspects* (‘the Crawford/Boyle Opinion’).

³ Written evidence from Dr Jo Eric Khushal Murkens and Prof Robert Hazell dated 24 September 2012; written evidence from Prof Nigel White dated 9 October 2012; oral evidence from Prof Matthew Craven, Dr Murkens, Prof Hazell, Dr Andrew Blick, Prof Richard Whitman, Sir Jeremy Greenstock and Prof White dated 16 October 2012.

⁴ A selection of the articles written on this topic include: D Sinclair, *Issues around Scottish Independence* (1999); A O’Neill, ‘A Quarrel in a Faraway Country?: Scotland, Independence and the EU’, *Eutopia law*, 14 November 2011, <<http://eutopialaw.com/2011/11/14/685/>> [accessed on 1 April 2014]; D Edward, ‘Scotland and the European Union’, *Scottish Constitutional Futures Forum*, 17 December 2012, <<http://www.scottishconstitutional futures.org/OpinionandAnalysis/View-BlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>> [accessed on 1 April 2014]; D Scheffer, ‘International Political and Legal Implications of Scottish Independence’ (2013) *Adam Smith Research Foundation Working Paper Series*; S Tierney, ‘Legal Issues Surrounding the Referendum on Independence for Scotland’ (2013) *European Constitutional Law Review* 359.

particular they will have repercussions in relation to the two states' membership of international organisations, the most important being the United Nations, NATO, the EU and the Council of Europe. Lastly, the status of the two nation states and the working out of their rights and duties to other organisations, in particular in relation to the European Union (EU), will have repercussions domestically for the new Scottish state and, perhaps, the rUK.

There is much more to think about than has, at the moment, been realised by the general public—at least South of the border. I suspect that these issues would surprise most people and may even surprise some of you.

2 Issue one: The legal status of the two new states

First, then, the status of the two states—Scotland and rUK—in international law. I am going to assume that Scotland will become independent by agreement with the rest of the UK. In other words it will not be by a unilateral secession, as was the case between East Pakistan and West Pakistan when the former became Bangladesh in 1971.⁵

When a state that was internationally recognised divides to create two different states, the generally accepted analysis in international law is that there are two possible consequences. The first possibility is that one state is the 'continuator' state and the other, the seceding state, is a new state. The second possibility is that two new 'successor' states are created.⁶ Examples of the first are, first, the partition of British India – India was the continuator and Pakistan the new state; secondly, the break up of the USSR in 1990-1, when the Russian Federation was recognised as the continuator state and other states such as Kazakhstan were new states – but not Ukraine and Belarus as I will explain; thirdly, when Eire, (or Ireland), became independent in 1922: the remainder of the UK was regarded as the continuator state and Ireland was the new state. There are other examples from history. Thus Turkey was regarded as the continuator state after the dissolution of the Ottoman Empire in 1918 and, perhaps not surprisingly, when Algeria, which had been a part of metropolitan France under French law, became independent in 1962 France was regarded as the continuator state.

An example of the second possibility is provided by the break up of Czechoslovakia by agreement. On 1 January 1993 the Czech and Slovak republics

⁵ I was in East Pakistan as a young naval officer helping with flood relief in November/December 1970.

⁶ The Crawford/Boyle Opinion, at paras 47 et seq.

both became successor states. When new states emerged from the former Socialist Federal Republic of Yugoslavia in the 1990s they were all regarded as successor states, although that was not the case when Montenegro seceded from Serbia in 2006.

Now upon Scotland becoming independent the present UK would lose about 1/3 of its land mass, albeit only about 8% of its population. It is generally accepted that the fact of losing a large percentage of the land mass is not enough in itself to vitiate the continuator/new state analysis.⁷ The UK lost a large percentage of its land mass upon the creation of the Irish Free State in 1922. So did the USSR in the break-up of 1990–1. However, in international law, ‘state practice’ recognises a presumption of state continuity. Thus the view of most commentators is that rUK would be regarded as the continuator state and Scotland as a new state, just as was the case with the UK and Ireland in 1922.⁸

There are two other possibilities that have been canvassed. The first is that the UK itself would cease to exist (like the Monty Python ex-parrot) and so there would be two new ‘successor’ states: one being Scotland and the other rUK. However, the ‘successor states’ situation usually arises where there has been a dissolution of the former state altogether, as with Czechoslovakia. Some say that the same was true with the dissolution of Austria-Hungary in 1918, but there are difficulties about that analysis because of the uncertain international law status of the Dual Monarchy between 1867 and 1918. In the case of rUK and Scotland there would be no dissolution of the former UK unless that was what Parliament at Westminster decreed, which seems to me to be unlikely.

The Scottish government has always been attracted to the view that there would be two successor states because it hopes thereby to inherit the same international treaty rights and obligations as the old UK had.⁹ But it would appear that the experts regard this as being contrary to accepted international law analysis.¹⁰

Another, some would say quaint idea, is that Scotland could revert to the status that it had before the Act of Union of 1707 and would thus be a ‘continuator’ of that ancient state. The argument in favour of such a position is that the United

⁷ J Crawford, *The Creation of States in International Law* (2nd ed, 2006), at 673

⁸ The Crawford/Boyle Opinion, at paras 50-70 and see the expert evidence given to the House of Commons Foreign Affairs Committee cited above at n 3.

⁹ See, for example, the evidence of Nicola Sturgeon, Deputy First Minister to the House of Commons Foreign Affairs Committee on 28 January 2013.

¹⁰ HM Government, *Scotland analysis: Devolution and the implications of Scottish independence*, paras 2.15 and 2.18.

Kingdom was created by the Treaty of Union 1707 between England and Scotland and that Act stated in Article 1 that there would thenceforth be a new state of Great Britain. The argument is that once that state of Great Britain goes, as it must with Scottish independence, then the old Scottish state would rise up again, Phoenix-like. This has very little support from experts generally and is inconsistent with the notion of a 'continuator' state. I will not therefore discuss that possibility further.¹¹

3 Issue two: The relationship of the new states with international organisations and treaties

Let us move onto the second question: what are the legal consequences if rUK is to be regarded as the 'continuator' state and Scotland as a new state? Remember: it is the current UK that is a member of the UN and the Security Council; it is the UK that is a member of the EU and the Council of Europe; it is the UK that is party to some 14,000 international treaties, both bilateral and multilateral.¹² If the analysis of rUK being the 'continuator' state is correct, then the new Scottish state will not automatically be a member of the UN; nor of the EU, nor of the Council of Europe; nor will it be a party to the many treaties concluded by the UK. That is what happened, with the exception of Ukraine and Belarus and membership of the UN, when the USSR broke up in 1990-1. Russia was the country that continued to be a party to the many treaties to which the USSR was a party. The other new states had to agree to be bound by them and most did so.

The most important issues concern membership of international organisations such as the UN, NATO, the EU and the Council of Europe. The Scottish government argues that the new independent Scotland would remain a member of these international organisations because of the terms of Articles 34 and 35 of the 1978 Vienna Convention on Succession of States in respect of Treaties. Crawford and Boyle dismiss that argument as being 'at best, inconclusive'.¹³ In addition it can be said that any reliance on Articles 34 and 35 is beside the point because neither the UK nor very many EU states are party to that Vienna Convention.

¹¹ For further detailed discussion of this argument see the Crawford/Boyle Opinion, paras 95 et seq.

¹² The FCO online treaty database <<http://www.fco.gov.uk/en/publications-and-documents/treaties/uk-treaties-online/>> [accessed on 1 April 2014].

¹³ The Crawford/Boyle Opinion, para 119.

Moreover, it is not accepted that Articles 34 and 35 of that Convention constitute a codification of customary international law.¹⁴

Article 4 of the same Convention might be more relevant, because that does express a fairly obvious general principle. It stipulates that the issue of whether the continuator or new or successor states will be parties to treaties involving international organisations will depend on the constitution of the relevant organisation. Thus in the case of the UN it would depend on the Charter and so forth. Moreover, it is accepted that Art 4 of the Vienna convention does represent customary international law.¹⁵ So the question of whether Scotland would be automatically a member of the UN will be decided according to the UN Charter.

Unfortunately, the UN Charter does not deal specifically with the issue of the succession of states and membership of the UN. In practice the issue would be decided by the general assembly on the recommendation of the Security Council. Let me give you an example. You may be surprised to learn that when the UN was created in 1945, and therefore before India became independent in August 1947, India was nevertheless one of the founding members of the new international body. So were the Ukraine and Belarus, despite them then being part of the USSR.¹⁶ When India became independent and the new state of Pakistan was created in 1947, the UN General Assembly adopted a new principle to govern what happened when a member state of the UN divided and a new state was created that also wished to be a member of the UN. Effectively, the existing member continued to be one, (unless it ceased to be recognised as a state altogether) and the new state had to seek formal admission to the UN in accordance with the provisions of the Charter. But each case would be dealt with on its merits. That is how the new state of Pakistan was dealt with upon its creation. The same process was used for the admission of the new states of Bangladesh; Singapore; the former USSR states (other than Ukraine and Belarus of course), the Czech and Slovak republics, Montenegro and, most recently, the South Sudan. So the more accepted view is that Scotland would have apply to be a new member of the UN.¹⁷

On this basis the rUK would also retain its permanent seat on the UN Security

¹⁴ Ibid, para 124.

¹⁵ Ibid, para 125.

¹⁶ It is said that this was a compromise agreed between Roosevelt, Churchill and Stalin, who had originally demanded that each constituent state of the USSR be a member of the General Assembly of the UN.

¹⁷ The Crawford/Boyle Opinion, above n 2, para 132.

Council, just as the Russian Federation has done so after the break-up of the USSR. If this analysis is correct, then, logically, Scotland would have to apply to join all the other international organisations that there are – of which there are very many. But we should consider two of them in particular: the EU and the Council of Europe, which is important because it is the body that regulates the European Convention on Human Rights and is the body that is responsible for the European Court of Human Rights at Strasbourg.

First let us look at the EU. The generally accepted view is that Scotland would not automatically become a member of the EU on independence unless the treaties that make up the EU ‘constitution’ were to provide that a new state formed as a result of secession from an existing state would automatically become a member.¹⁸ Now the EU is not just governed by general international law, but by its own ‘internal legal order’ – European law – which is interpreted exclusively by the Court of Justice of the European Union (CJEU) sitting at Luxembourg. But Mr Barroso, the President of the European Commission, has said, in an answer given on behalf of the Commission in August 2012, that the question of whether a state is a member of the EU has been hitherto treated as a matter of general international law.¹⁹ And it should be noted that, in 1978, the European Court of Justice, (the predecessor of the CJEU), treated the question of the territorial extent of a member state as being an issue to be decided according to general international law principles.²⁰

I appreciate that, in the EU, perhaps more than in other international organisations, politics is paramount. It therefore seems likely that the way Scotland is treated after independence would depend on the attitude of both the EU institutions, including the CJEU and the Commission and also the attitude of other member states, of which perhaps the views of Spain and France, but also Belgium may be particularly important. Ultimately, therefore the way Scotland is dealt with would probably depend on negotiations. I can only try and set out what I think is the accepted strictly legal position, but I suspect that it is going to be more fluid than that in practice.

Let me first consider the position of rUK. If, as I will assume for the present argument, the rUK is the continuator state then its membership of the EU would carry on, perhaps to the disappointment of the more Eurosceptic wing of the

¹⁸ *Ibid*, paras 152 et seq.

¹⁹ European Parliament, ‘Answer given by Mr Barroso on behalf of the Commission’, 28 August 2012: <www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN> [accessed 31 March 2014].

²⁰ Case 148/77, *Hansen GmbH & Co v Hauptzollamt Flensburg* [1978] ECR 1787.

Conservative party. Some commentators like to draw parallels with the case of Greenland, which withdrew from the EC in 1985, when it was an autonomous country within the Kingdom of Denmark.²¹ But Greenland has never been independent; so the constitutional position is not the same as with rUK or Scotland.

Could rUK withdraw from the EU? Since the Treaty of Lisbon 2007 there have been provisions for a state's withdrawal.²² The state that wishes to do so has to notify the European Council and then there have to be negotiations. So, one could imagine a situation where Scotland has become independent, the Scots MPs withdraw from the Westminster House of Commons and possibly leave a Tory majority in the house after 2015 which is 'Eurosceptic'. This majority could then possibly vote to withdraw from the EU in 2017 after any renegotiations have 'failed'. There would still have to be a formal notification of withdrawal and then negotiations. But if the negotiations fail, then the withdrawal takes place 2 years after the notification: see Art 50(3) of the Lisbon Treaty.²³ So, in that event, if the Eurosceptics had the upper hand at Westminster after 2015, there could be a 'Rukxit' – an exit from the EU by the rest of the UK, by default.

On the other hand, from the Scottish point of view, as a successor state, from the strictly legal point of view, it will have to negotiate entry to the EU. Despite arguments to the contrary by some commentators²⁴, I think that it is tolerably clear that an independent Scotland cannot 'succeed' to the old UK's membership, even if the rUK were to withdraw from the EU. On the face of things, Scotland would have to go through the Accession process in accordance with Article 49 of the Lisbon Treaty.²⁵ This means that the application would be examined by the EU Commission, the Parliament and the Council and then the existing members must unanimously ratify a treaty on Scotland's admission. Would other member states such as Spain, or even France, be difficult about this given some 'separatist' movements in parts of those Member States: Catalonia, Euskadi or Basqueland as we might call it; and Brittany? Who knows – I certainly do not. But it might mean that negotiations would be difficult for Scotland.²⁶

²¹ N MacCormick, 'Scotland and Europe; Membership would continue', *Glasgow Herald* (1 June 1999), cited in J Murkens, *Scotland's Place in Europe* (2001) 12.

²² *Consolidated Version of the Treaty of the European Union* [2012] OJ C 326/13 (TEU), Art 50.

²³ *Ibid*, Art 50(3).

²⁴ See for example A O'Neill, at n 4 above.

²⁵ TEU, above n 22, art 49.

²⁶ Belgium is another Member State where there have been strains amongst two communities, but if there is any change I understand it would be more in the form of a 'confederalist' solution.

If Scotland had to apply to accede to the EU, then it would not necessarily be able to do so on the same terms as the current UK has.²⁷ There are a few important areas here where the UK had negotiated 'opt-outs' at the time of the Maastricht Treaty in 1992. But the full treaty terms would apply to all 'new' member states unless a specific 'opt out' was agreed. The first important opt-out the UK obtained was in relation to the requirement to join the European single currency when the pre-conditions are satisfied. The second was the requirement to join the Schengen travel area. The third was in relation to justice affairs. At the moment Scotland does not envisage joining the Euro; but it may have to do so in time if it did not gain an opt-out. If it had to join Schengen, then there would be border controls at Berwick-on-Tweed for the first time ever: I cannot believe they existed prior to 1707!

What about the Council of Europe? The present UK is, of course a member of the Council of Europe and is a state party to the ECHR. It would continue to be so if it is the continuator state: again perhaps to the dismay of certain politicians who are not enamoured of the Convention. But, if Scotland is a new state it would not be a member of the Council of Europe and so the ECHR would not automatically apply to its territory; the two go together. There would probably be no difficulty in an independent Scotland applying to be a new member of the Council of Europe. If so, then it is likely that the Convention would be seen as having applied continuously, even in the interim period when Scotland ceased to be a member of the Council in the period after independence until successful reapplication. That would be logical following a Strasbourg court decision concerning the applicability of the ECHR in Montenegro after it became independent from Serbia in 2006.²⁸

Two final things on the international front. First, the position of rUK and Scotland and NATO. If rUK is the continuator state then its membership of NATO would continue. Scotland would, as a new state, have to apply for membership and that would depend on whether the 28 members of the North Atlantic Council were unanimous in accepting that Scotland met the criteria needed.²⁹ There might be arguments if Scotland maintained a policy that rejected the possession of nuclear weapons and which had said that it would wish to close the nuclear submarine base at Faslane. Of course, the present UK government

²⁷ The Crawford/Boyle Opinion, above n 2, para 166.

²⁸ Application 11890/05, *Bijelic v Montenegro and Serbia*, (European Court of Human Rights, 28 April 2009).

²⁹ For the requirements for NATO membership and the accession process see: NATO, *NATO Enlargement*, <www.nato.int/cps/en/natolive/topics_49212.htm> [accessed 31 March 2014].

has said that it would wish to maintain a 'sovereign base' at Faslane, as it does in Cyprus, but that might be difficult to achieve.

Secondly, as I have already mentioned, the UK is a party to some 14,000 international treaties bilateral and multinational treaties. The better view of international law is that Scotland would not succeed to the rights and obligations of those treaties automatically; it would have to negotiate participation in them.³⁰ One example is the treaty establishing the IMF; others can be multiplied, ranging from the World Trade Organisation to the International Maritime Organisation as well as bilateral treaties with almost all countries in the world on matters ranging from extradition to customs tariffs. The renegotiations might keep the new Scottish Foreign Office busy for years to come.

4 Issue three: Domestic implications of independence

The last of the general topics I want to mention concerns the domestic implications within Scotland and rUK following Scottish independence. They range from the position of the monarchy in Scotland to withdrawal of the Scottish MPs from Westminster to the fact that, as an independent state, Scotland would, at least in theory, need its own currency and a central bank. The last point is of particular practical importance. As a matter of law, the pound sterling would not automatically be legal tender in Scotland. The pound sterling could be used as the everyday currency, just as in Montenegro the Euro is used for everyday transactions. But it could not be the national currency except by agreement with the rUK. Whereas now the Bank of England controls the currency in Scotland; it would not do so any more, unless it were by agreement. It might be thought that both these would constitute a significant loss of 'independence.'

The new state of Scotland would have to decide on what statutes that had previously applied to Scotland as a part of the UK would continue to apply to it. It could decide to pass an omnibus Act that stated that all UK legislation prior to independence would continue to apply unless specifically repealed thereafter. That would be the easiest thing to do for the present. If Scotland were no longer part of a state belonging to the EU, then such EU law as is directly applicable to Scotland at present (by virtue of s.2(4) of the European Communities Act 1972) would no longer do so after Scotland's independence. Even if a

³⁰ HM Government, above n 1, para 3.24.

Scottish parliament passed an Act stating that all EU directly applicable law would continue to be so in Scotland, (which could be done even if Scotland was not a member of the EU), that would not cause Scotland or its citizens to have any direct rights or obligations under EU treaties because Scotland would not be a party to them until agreed. That in turn would depend on Scotland being a member of the EU or having some other kind of association like the EFTA countries.

The lawyers will have great fun with all this – as they have already. But I think that we can safely say that it will be a headache for the politicians and the legislators if the Scots vote ‘yes’ to independence on 18 September 2014.

QUESTION AND ANSWER SESSION WITH LORD HENNESSY AND SIR RICHARD AIKENS

*Daniel Clarry**

Estelle Wolfers

The published articles by Lord Hennessy and Sir Richard Aikens (see previous) were originally delivered as speeches during a debate on Scottish independence held by the Winfield Society at St John's College, University of Cambridge, on 21 November 2013. Following the debate, a number of questions concerning the political and legal dimensions of Scottish independence were put to Lord Hennessy and Sir Richard Aikens by members of the audience in the form of a question and answer session. Some of their answers are discussed here.

1 How would Scottish independence affect the next general election?

The panel noted that very little has been said of how Scottish independence would affect the next general election in the United Kingdom in 2015, particularly if the leader of the Labour Party, Ed Miliband, were appointed Prime Minister of the United Kingdom at the next general election and his majority subsequently expunged by the departure of his Scottish MPs. Lord Hennessy said that he had submitted a written question asking Her Majesty's Government what consideration had been given to the constitutional position of Members of Parliament elected for Scottish constituencies in the 2015 General Election, if the Scottish people had already voted for separation from the United Kingdom, in the light of the Fixed-term Parliaments Act 2011. He was informed that the Government's consideration of these matters was set out in the paper 'Devolution and the Implications of Independence' in the Government's Scotland analysis series.¹ Lord Hennessy stated that, having obtained a copy of the paper, he found

* Daniel Clarry and Estelle Wolfers are both PhD Candidates at the University of Cambridge who attended the debate. These questions and answers represent their recollection of the interaction between members of the audience and the panel that followed the debate.

¹ HL Deb 22 October 2013, vol 748, col 168W.

that it said very little at all about the consequences beyond that ‘some changes would be required ... for example the UK would need to change the number of MPs in the House of Commons, as in the event of independence there would be no MPs representing constituencies in Scotland.’² The paper said nothing, for example, of the legitimacy of a Prime Minister whose appointment had been obtained via strong support in a Scotland that had subsequently seceded.

2 How might Scottish independence affect the political future of the Remainder of the United Kingdom?

Lord Hennessy observed that the Government’s official position was that it would be wrong to have any form of contingency planning for Scottish independence ahead of the vote (a position which has been reiterated in a subsequent debate on Scottish independence³). However, while there were unresolved political issues which contingency planning would have been able to clarify, others could only be the subject of speculation. In the latter category was the question of the effect of the Scottish independence debate on the Remainder of the United Kingdom (‘RUK’)—that is, England, Wales and Northern Ireland. He considered that it was difficult to speculate on whether the Scottish independence referendum was likely to encourage the devolved administration of Wales to call for a similar referendum, or whether Scottish independence might trigger other moves towards further devolution or the further disintegration of the Remainder of the United Kingdom.

However, Lord Hennessy considered that there were various matters upon which some speculation might be entertained. One was the position of the sixty-three Scottish peers in the House of Lords, many of whom are life peers.⁴ Although very little had been said of the consequences for the Upper House of Scotland leaving the United Kingdom, he suspected that Scottish life peers

² Secretary of State for Scotland, *Devolution and the implications of Scottish independence* (Scotland Analysis Series, Cm 8554, 2013) para 3.53.

³ HL Deb 30 January 2014, vol 751, col 1442.

⁴ The precise number of Scottish peers is a matter of debate. Sixty-three appears to be the number agreed upon by the Scottish press and the SNP (e.g. SNP, ‘Peers donated almost £8m to political parties’ (11 August 2013) <<https://www.snp.org/media-centre/news/2013/aug/peers-donated-almost-%C2%A38m-political-parties>> accessed 12 February 2014) but an attempt to confirm this figure with the House of Lords Information Office was met with the denial of the concept of a ‘Scottish peer’.

would be entitled to remain members of the House of Lords by virtue of their method of appointment: that is, a personal writ of summons from the Queen with no geographical qualification.⁵ Lord Hennessy observed that it would be a wonderful anomaly if Scottish peers were to stay in the House of Lords despite Scottish independence.

The panel said that what would not happen in the event of Scottish independence would be that Her Majesty Queen Elizabeth II would cease to be Scotland's sovereign—although they queried whether Her Majesty would remain the nominal second Queen Elizabeth. On independence, would Her Majesty ascend the Scottish throne as Queen Elizabeth I? In any event, they noted that republicanism formed no part of the official agenda of the Scottish independence movement and would not be touched upon in the referendum.⁶

3 What might be the political consequences of a 'no' vote in the Scottish independence referendum?

The panel commented that it was only possible to speculate on the political consequences of Scotland voting to remain a part of the United Kingdom. Would it be the end of the Scottish nationalist sentiment behind the Scottish independence movement? Was a back-up plan in place for this eventuality? Lord Hennessy observed that it might be anticipated that there would be calls from a non-independent, but nevertheless independent at heart, Scotland for further devolution of power to the Scottish Parliament. However, the nature of such proposals was unclear and, so, too, was the effect that a vote for Scotland to stay part of the United Kingdom might have to quieten the separatist movement. However, it was to be hoped that the referendum would tend to bring an end to the estrangement between Scotland and England, and see the establishment of a more productive union.

⁵ Life Peerages Act 1958 (UK) s 1(2).

⁶ See, for example, The Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (2013) 45.

4 What did the panel think of the media coverage of the Scottish referendum in the rest of the UK?

The panel noted that, relatively speaking, there had been a distinct lack of coverage of the pending referendum south of the border: that is, in the London media. It could be argued that this was because the English, for example, did not have the vote on whether or not Scotland would leave the United Kingdom. It was, however, surprising, given that the fate of the nation to which England, Northern Ireland and Wales all belong was to be decided by the vote taken in Scotland.

5 What were the implications of the vote being confined to Scottish residents?

Lord Hennessy observed that it was curious that the vote on whether a part of the United Kingdom would become independent was not a universal one to be undertaken by all those who identified themselves as belonging to the United Kingdom. Only those on the electoral roll in Scotland⁷ would vote on 18 September 2014.⁸ He noted that, interestingly, recent polling suggested that this might in fact decrease the chances of Scotland leaving the United Kingdom. But why was it that the vote was confined to those living in Scotland, even excluding Scots living elsewhere in the UK, when the whole of the United Kingdom would be affected by the result and the majority⁹ could be left as citizens of RUK? It could be assumed that, if a petition for Scottish independence were presented to Her Majesty, it would be accepted despite not representing the vote of the majority of citizens of the United Kingdom. It would, nevertheless, be a curious anomaly.

⁷ Plus those aged 16 and 17 on the register of young voters: Scottish Independence Referendum (Franchise) Act 2013 (UK) s 4.

⁸ Scottish Independence Referendum (Franchise) Act 2013 (UK) s 2.

⁹ 92.62% as at 27 March 2011. See Office for National Statistics, 'Table 2, 2011 Census: Usual resident population and population density, local authorities in the United Kingdom' <<http://www.ons.gov.uk/ons/rel/census/2011-census/population-and-household-estimates-for-the-united-kingdom/rft-table-2-census-2011.xls>> [accessed 13 February 2014].

6 What other issues would have to be resolved in the event of a ‘yes’ vote?

Lord Hennessy remarked that, in the absence of any acknowledged contingency planning, it remained to be seen how much of the potential fallout from Scotland leaving the United Kingdom could be explained by the law of unintended consequences. Sir Richard Aikens noted that, according to the legal opinion of Professor Crawford and Professor Boyle, Scotland would not automatically succeed to the many international treaties—more than 14,000 in total—to which the UK was a party and Scotland would need to negotiate in order to participate in them.¹⁰

7 What would be the implications of Scottish independence for citizenship and nationality?

Decisions concerning the nationality of the citizens of (independent) Scotland and the (Remainder of the) United Kingdom would be particularly problematic. A show of hands among the audience demonstrated that a considerable proportion could lay claim to Scottish ancestry. The panel observed that there were many thousands of people living south of the border who identified themselves as Scottish. Would they be able to choose whether to be Scottish by citizenship? What role, if any, would the notion of dual nationality have to play between an independent Scotland and the Remainder of the United Kingdom? Would citizens of both countries be able to hold the status of dual citizens of Scotland and RUK and, if so, what would be the requirements?¹¹

8 What would be the security implications of Scottish independence?

Another consequence that Sir Richard Aikens identified, drawing again on the legal opinion of Professor Crawford and Professor Boyle, was the likelihood that,

¹⁰ HM Government, *Scotland analysis: Devolution and the Implications of Scottish Independence* (February 2013), para 3.24 and Annex A ('Opinion: Referendum on the Independence of Scotland – International Law Aspects').

¹¹ The Scottish Government has stated that it intends to allow dual Scottish/UK citizenship: The Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (2013) 272.

if Scotland did not automatically acquire status as a party to the many thousands of international treaties to which the UK was presently a party, Scotland would not automatically assume or retain membership of international organisations such as NATO. The panel also noted the importance, from the perspective of national security, of the Joint Intelligence Committee, which is responsible for coordinating and directing the national intelligence organisations of the United Kingdom, and observed that there were obvious difficulties in an independent Scotland remaining an active participant in such an organisation. Lord Hennessy expanded on his comment about the future of the nuclear submarine bases on Clydeside,¹² pointing out that the requirement to recreate such a facility in RUK would have enormous financial and security implications. Only two possible sites had the necessary deep water access—Falmouth in Cornwall and Milford Haven in south Wales—and the planning and construction processes would be undertakings of many years.

9 What might be done with the National Debt?

The panel considered the question of the apportionment of national debt between Scotland and RUK. It noted that it would appear that the Remainder of the United Kingdom, as the larger successor state post-independence, would bear the larger burden of the public sector net debt, but that it was distinctly unclear how a fair division might be made. In addition, it seemed likely that an independent Scotland might have to choose whether to have its monetary policy decided for it by an institution based in a foreign power—the Bank of England—or whether to submit to what were likely to be more punitive interest rates to support its debt.

10 Is there any scope for the Supreme Court of the United Kingdom to continue to be the highest appellate court of an independent Scotland?

The panel noted that the Scottish Government had stated that the Inner House of the Court of Session and the High Court of Justiciary sitting as the Court of Criminal Appeal would collectively become Scotland's Supreme Court. Currently, the right of appeal to the Supreme Court of the United Kingdom ('UKSC')

¹² The nuclear submarine facilities at Faslane and Coulport on the west coast of Scotland comprise Her Majesty's Naval Base Clyde.

from Scottish courts was, in any case, limited to civil matters and those criminal cases in which human rights issues arose under the European Convention on Human Rights.¹³ The panel noted that it would be quite unlikely for the UKSC to retain that role.

11 Is there any scope for the Judicial Committee of the Privy Council to become the court of final appeal for Scotland?

Sir Richard Aikens noted that, in the event of Scottish independence, he thought that it was unlikely that Scotland would elect to establish the Judicial Committee of the Privy Council ('JCPC') as its final court of appeal, either generally or for those criminal appeals in respect which the UKSC presently had jurisdiction. However, there might remain the possibility of certain matters being heard by the JCPC, as Her Majesty Queen Elizabeth II would still be Scotland's sovereign and her power to refer any matter to the Committee might still be invoked in exceptional circumstances.¹⁴

12 What would happen to the two Scottish judges on the Supreme Court of the United Kingdom?

The panel observed that, as with Scottish members of the House of Lords, the two Scottish justices had been appointed to the Supreme Court personally and their appointments would continue in the event of Scottish independence, leaving a slightly anomalous situation in which they would be unable to hear Scottish cases. However, it would be unlikely that further Scottish justices would be appointed from an independent Scotland after the two Scottish justices retired from the UKSC.

¹³ More generally, 'devolution issues' as listed in Scotland Act 1998 (UK) sch 6 para 1.

¹⁴ Judicial Committee Act 1833 (UK) s 4. See D Clarry, 'Institutional Judicial Independence and the Privy Council' (2014) 3(1) *CJICL* 46, 49–50.

13 What would happen to refugees who had taken up residence in Scotland under the terms of treaties to which Scotland was, arguably, no longer a party?

Members of the audience also raised the question of what would happen to students, workers and immigrants who had entered Scotland using visas which had been issued by the UK. The panel suggested that transitional arrangements would have to be put in place in order to secure the status of all these categories but observed that such arrangements were likely to require more time and organisation than the Scottish Government perhaps anticipated. Furthermore, it was to be noted that, whilst the United Kingdom was a party to the Convention on the Status of Refugees of 1951 and the Additional Protocol of 1967, Scotland would not automatically assume the status of a party to that Convention nor the Additional Protocol, on the preferred view expressed in the legal opinion of Professor Crawford and Professor Boyle that RUK would be the continuator state and Scotland would become a new state, which would therefore not automatically succeed as a party to such treaties.

14 Final Remarks

The panel noted that the question and answer session had raised a number of difficult issues concerning the legal consequences and political ramifications, if a 'yes' vote was returned at the Scottish Independence Referendum on 18 September 2014, many of which would remain outstanding until the referendum had taken place. A show of hands in the audience revealed that a clear majority thought that Scotland should not become independent from the United Kingdom and that, of the minority of the audience who thought otherwise, a considerable proportion of their number considered that it was a matter for the Scottish people to decide come September.

AN INDEPENDENT SCOTLAND IN THE EUROPEAN UNION

Kenneth Armstrong*

1 Introduction

One of the intriguing aspects of the Scottish independence debate is its external dimension and more particularly the case presented by the Scottish Government for simultaneous and synchronous independence from the United Kingdom and membership of the European Union (EU). In its White Paper, *Scotland's Future*, the Scottish Government sets out the case for, and preferred legal route towards, an independent Scotland within the EU.¹ In essence, the White Paper suggests that Scotland's EU membership can be achieved without the need to use the formal accession process laid down in Article 49 of the Treaty on European Union (TEU) but can instead be facilitated by a revision of the treaties via the Article 48 TEU treaty amendment process.

Given that the topic engages EU law, public international law and national constitutional law and practice, a plurality of legal arguments can be mustered of greater or less relevance. Moreover, while accepting that there is no direct legal precedent for a constituent territory of an existing Member State to separate from that Member State but seek to retain or acquire EU membership, nonetheless, some legal arguments are more or less plausible. The aim, therefore, is to canvass and critique these legal arguments while considering the wider conceptual and practical issues implicated by them.

The topic of an independent Scotland's path to EU membership has been much debated. Evidence sessions have been held before the United Kingdom Parliament and the Scottish Parliament and a number of contributions have been posted on blogs.² Academic commentaries have explored many of the issues often

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¹ Scottish Government, *Scotland's Future*, 2013, <<http://www.scotland.gov.uk/Publications/2013/11/9348>> [Last accessed 10 March 2014]

² See, for example, <<http://www.scottishconstitutionalfutures.org>> or <<http://www.ukconstitutionalaw.org/tag/scottish-independence>> [Last accessed 14 March 2014].

in comparative perspective.³ For present purposes the intention is to elaborate upon five key focal points. The first issue addressed is the relative perspectives of public international law and European Union law in framing external recognition of Scottish independence in the context of EU membership. Next, the analysis turns to the domestic constitutional process and its external implications. The third focal point is also the flashpoint for much of the legal debate namely, the legal basis and legal process by which Scotland's EU membership might be obtained. The political risks that flow from the choice of legal basis are then explored. Finally, the analysis comes full circle in considering the impact of EU citizenship on the terms of the debate.

2 The View from Public International Law and from EU Law

One of the most cited legal interventions in the debate about an independent Scotland's external identity is the opinion provided to the UK Government by James Crawford and Alan Boyle.⁴ From the perspective of public international law, the authors argued that in all likelihood an independent Scotland would be treated as a new legal entity that would need to seek membership of the EU on its own account. The position of the United Kingdom as a member state of the European Union would remain untouched, albeit that certain consequential treaty amendments might be required. This interpretation flows from a broader understanding of the external consequences of the internal separation/secession/independence process.

Aside from independence movements born out of the colonial experience or the oppression of ethnic minorities, public international law has often struggled to come to terms with how to manage, externally, the consequences of separation/secession/independence claims.⁵ Considering more specifically the

³ See generally T Mullen & S Tierney, 'Scotland's Constitutional Future: The Legal Issues', 5 June 2012, *Edinburgh School of Law Research Paper No. 2013/1*; M Chamon & G Van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?', (2013) *European LJ* (forthcoming)

⁴ J Crawford & A Boyle 'Opinion: Referendum on the Independence of Scotland—International Law Aspects', in HM Government, *Scotland Analysis: Devolution and the Implications of Scottish Independence Annex A* (2013).

⁵ S Mancini, 'Secession and Self-Determination', in M Rosenfeld & A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012); R Howse & R Teitel, 'Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law' (2013) 7

situation of Scotland and the United Kingdom, Crawford and Boyle considered there to be three main ways of conceptualising the legal status of an independent Scotland. One possibility would be to understand Scotland's independence in terms of a restoration of its pre-1707 sovereignty; to draw a computing analogy, a return to a 'last saved' version of Scottish sovereignty. Certainly, the establishment of a Scottish Parliament in terms of the Scotland Act 1998 which devolved certain competences to Scottish institutions was itself portrayed as a reconvening of the Parliament which 'adjourned' in March 1707.⁶ Carried forward into the independence context this would suggest that after more than three hundred years of slumbering, Scottish sovereignty is to be reawakened by a rallying referendum with a consequential claim to external recognition. This claim may or may not be related to a second potential conceptualisation namely that the United Kingdom itself is dissolved with Scotland and other constituent nations acting as multiple successor states in terms of the exercise of external rights and responsibilities. Either because the 1707 Union is dissolved and restored to its pre-1707 position (as might follow from the first perspective) or simply because the Union falls apart, the claim would be that the resulting parts have a legitimate claim severally to external recognition and exercise of the rights exercised jointly by the United Kingdom. The third perspective ensures legal continuity for the United Kingdom and treats Scottish independence as a separation from an entity which will act as the successor state, with the newly independent Scotland seeking external recognition on its own account. It is this third interpretation which underpins the Crawford and Boyle legal analysis. It is also the interpretation that is most inconvenient for the argument that an independent Scotland could somehow act as if it were a member state of the European Union without having to apply to become a member state following independence.

We should be unsurprised that if public international law struggles with separation/secession/independence claims then it is likely to opt for solutions that strive towards continuity in legal relationships, particularly those of dominant state interests. Be that as it may, perhaps the more immediately pressing point for resistance to public international law is European Union law's own internal legal logic which has tended to emphasise its own separateness, and indepen-

Law & Ethics of Human Rights, 155; J Vidmar, 'Conceptualizing Declarations of Independence in International Law' (2012) 32 *Oxford J of L S* 153.

⁶ See the Speech of Dr Winnie Ewing MSP in Scottish Parliament, *Official Report of the Scottish Parliament*, vol 1, no 1, col 5, 12 May 1999, <<http://www.scottish.parliament.uk/parliamentary-business/28862.aspx?r=4160&mode=pdf>> [accessed 13 March 2014].

dence, from public international law. Crawford and Boyle themselves noted, in a rather neutral way, that their interpretation was without prejudice to any more specific guidance or agreement within European law itself. In other words, international law could be open to an alternative solution based on the more specific rules and principles laid down in, or developed under, the founding EU treaties. That generosity of spirit is not always evident the other way round. From its seminal judgment in *Van Gend en Loos* onwards,⁷ the European Court of Justice has identified European Union law as a ‘new legal order’ distinct from international law. This detachment of the EU legal order from international law has often resulted in a rather uneasy and legally uncertain relationship between the European Union’s internal legal order and obligations arising under international law.⁸ Whether because European Union law supplies more specific legal solutions than general public international law or, more ideologically, because European Union law is more possessive of its normative claims, authors have attempted to fashion a more bespoke ‘European’ legal response to an independent Scotland’s path to EU membership.

The most authoritative version of the ‘internal’ European legal order approach can be found in the writings of Sir David Edward, former UK judge at the European Court of Justice.⁹ Recognising that public international law may not be capable of generating definitive legal solutions, Edward draws inspiration from the legacy of *Van Gend en Loos*, to seek within the EU treaties—including its spirit and general scheme, as well as more specific legal provisions relating to EU citizenship – available legal resources through which to address the question of how an independent Scotland ought to be viewed from an EU law perspective. Edward adopts a tripartite approach. His first move is to argue that if the European Union itself is founded upon the principle of democracy (Article 2 TEU), then it is duty bound to recognise the democratically chosen will of the electorate in Scotland for self-government. The second move is a desire to avoid a legal hiatus between the application of EU law to Scotland as a constituent entity of the UK—including, in an echo of *Van Gend*, those rights which extend to EU nationals and which form part of their legal heritage—and the application of EU law to Scotland post-independence. The final move is to argue that all of this demands

⁷ Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR I.

⁸ See generally M Mendez, *The Legal Effects of EU Agreements* (2013); see more specifically G de Burca, ‘European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harv Int L J* 1.

⁹ See in particular D Edward, ‘EU Law and the Separation of Member States’ (2013) 36 *Fordham Int L J* 1151.

that all relevant parties negotiate an outcome in good faith, consistent with normative principles including the principle of sincere cooperation inherent in the EU treaties and given expression in Article 4(3) TEU.

Presented in this way, the EU law perspective is fairly unambitious and largely consistent with contemporary themes in international law scholarship, namely, the desirability of paying close attention to the constitutional and democratic nature of the internal separation process as a precondition for external recognition, combined with support for negotiation processes which are themselves the target of on-going normative considerations.¹⁰ Insofar as the second move is connected to the issue of citizenship, this is dealt with more fully below. For the moment, suffice to say that whatever may be the political and legal desirability of a seamless transition to EU membership, neither the values recognised in Article 2 TEU nor the obligation to negotiate in good faith lead us towards any particular legal route to Scottish membership of the EU. Indeed, as will be argued below, paying close attention to the treaties may lead precisely to the result that an independent Scotland ought to pursue its EU ambitions through an accession process under Article 49 TEU.

Before the more detailed arguments are advanced, it is worth reflecting for a moment longer on the relative perspectives of public international and EU law. In evidence presented to the Scottish Parliament, Sir David Edward drew attention to the necessary political pragmatism that responds to controversial issues. Quoting a Dutch political source's reaction to the Euro crisis—'We will find a way, we always do'—Sir David can be seen to suggest that whatever may be the legal difficulties, a political solution may be found.¹¹ Yet, the spirit of *Van Gend en Loos* and its progeny within EU jurisprudence is that the Union is founded on the rule of law as well as the principle of democracy. The identity of the European Union as a distinct legal order is inextricably bound up with the idea that it is a rules-based organization in which exercises of political discretion are subject to legal control. Indeed the ideology of 'integration through law' is premised upon the idea that politics is controlled through law. While Sir David may indeed be closer to the truth in his depiction of the interplay between law and politics, it may be one that fits more comfortably with our expectations of international law than those of the new legal order of European Union law.

¹⁰ See the literature cited above n 5.

¹¹ Scottish Parliament, *Official Report, European and External Affairs Committee*, 23 January 2014, col. 1690, <<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8859&mode=pdf>> [accessed 13 March 2014].

3 The Internal Constitutional Process and its External Consequences

As intimated already, the international community's response to shifting state boundaries and the emergence of new entities claiming statehood is not unrelated to the internal constitutional quality of the separation/secession/independence process. Schedule 5 of the Scotland Act 1998 makes clear that constitutional matters, including the status of the Union, is a matter reserved to the United Kingdom Parliament. However, through a 'section 30 order' the Scottish Parliament was empowered to legislate for a referendum on Scottish independence. In terms of the 'Edinburgh Agreement' between the Scottish and United Kingdom Governments,¹² the referendum is to be conducted in a manner consistent with the framework laid down in the Political Parties, Elections and Referendums Act 2000. The Scottish Independence Referendum Act 2013 lays down the specific terms and conditions for the conduct of the referendum. The Edinburgh Agreement also states that the two governments 'look forward to a referendum that is legal and fair and produces a decisive and respected outcome.'¹³

There can be no doubt that the referendum itself is a product of a constitutional and legal process designed to allow the electorate in Scotland democratically to come to a view on whether Scotland should become an independent country.¹⁴ The United Kingdom government has facilitated that result through the section 30 order and the Edinburgh Agreement indicates that the outcome of the referendum will be respected. But there is a necessary *quid pro quo* for the manner in which the UK Government is handling the independence referendum which returns us to the discussion in the earlier section. There is simply no possibility that the outcome of a vote for independence is that the United Kingdom would cease to exist either because there is a return to the pre-1707 position or because the United Kingdom simply falls apart. The constitutional and legal nature of the process is instead wholly predicated on Scotland ceasing to form part of the United Kingdom. Consequentially, it is the United Kingdom that will enjoy continuity in its relationships with the international community. An inde-

¹² Scottish Government, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012, <<http://www.scotland.gov.uk/Resource/0040/00404789.pdf>> [accessed 13 March 2014].

¹³ *Ibid* 8.

¹⁴ For a far more developed study of the legal issues surrounding the referendum see S Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland' (2013) 9 *European Constitutional L R* 359.

pendent Scotland will, therefore, have to represent itself and seek international recognition on its own account.

Considering more directly an independent Scotland's relationship with the European Union, it would seem clear from the foregoing that were Scotland to become independent of the United Kingdom, this would not immediately alter the United Kingdom's status as a Member State of the European Union. Moreover, in the period between a vote for independence in the referendum and the moment of independence, as a constituent territory of the United Kingdom, EU law would continue to have application and would require to be respected in Scotland. However, at the moment of independence, the EU treaties would only apply to the territory forming the United Kingdom as a Member State of the EU and would cease to apply to any territory not forming part of the United Kingdom. In other words, it is in the nature of the domestic constitutional process that the United Kingdom as a legal entity and as a Member State of the European Union will endure. An independent Scotland would, therefore, have to seek to become a Member State of the EU in its own right. It is to that legal process that attention will later turn.

There is one other dimension of the internal constitutional process that is worth reflecting upon. Not surprisingly, it is the independence referendum itself which has drawn all the attention. Although the Edinburgh Agreement makes clear that the outcome of the vote is to be respected, there are significant substantive issues that will require to be negotiated after the referendum vote. Yet, it appears not to be envisaged that the electorate itself will have the last word on the terms of the deal negotiated between the UK and Scottish Governments through a further referendum. More significantly for present purposes, no referendum is to be held on Scottish membership of the EU. Rather, the Scottish Government has presented the case for EU membership in its White Paper, *Scotland's Future*.

The White Paper simply asserts that membership of the EU is in an independent Scotland's best interests. It assumes a coincidence in political preferences between rejection of the Union with the United Kingdom and a wish to become a constituent Member State of the European Union. Given that other smaller European states have held referendums on EU membership and given that these have led, for example in Norway and Switzerland, to a rejection of membership, it ought not to be assumed that the Scottish electorate would favour EU membership particularly if alternative relationships with the EU were canvassed. European integration takes multiple legal forms and while it has a particular and intense legal character in the context of the European Union, European integra-

tion since the 1950s has taken on a variety of legal forms, with a tendency towards differentiated legal approaches. The European dimension of the White Paper is, therefore, rather one dimensional. It lies in associating continuity of the United Kingdom with anti-Europeanism, with a consequential linkage of separation/secession/independence with pro-Europeanism manifested only through membership of the European Union. While this may reflect certain, even dominant, political narratives of the relationship between nationhood and European integration, it is evident that there are counter-narratives and alternative legal arrangements.

Had the question of Scottish membership of the EU been put in parallel with the question on independence, and if both were answered in the affirmative, then the argument for EU institutions and Member States to engage constructively in dialogue with the Scottish Government to prepare the way for Scotland's EU membership would be that much stronger. Moreover, if the Scottish electorate rejected independence but voted for EU membership this might go some way towards changing the nature of political discourse within the UK concerning the future of the UK in the EU. The White Paper seeks to bolster the case for independence on the back of a fear that a popular vote in the UK might reject EU membership. Nonetheless, that a constituent nation of the UK had voiced its desire to remain part of the European Union could not simply be ignored by the rest of the United Kingdom without further threatening the constitutional unity of the UK itself. This might, helpfully, draw attention to the related internal and external constitutional dynamics at play.

4 The Legal Basis for Scottish Membership of the EU

The normal mechanism by which a state seeks to undertake the obligations and exercise the rights of EU membership is through the accession process. The legal basis for this process is now to be found in Article 49 TEU. It is a process instigated by the candidate state with the accession process then following the procedure laid down in that article. It constitutes the *lex specialis* in respect of an entity voluntarily taking on the obligations arising from the EU treaties and the law made under the treaties.

The Scottish Government believes there to be an alternative legal basis for Scotland's membership of the EU in the form of Article 48 TEU. This is the provision by which the existing Member States alter the EU treaties to which they are already signatories as Member States of the EU. This provision has never

been used as a basis for extending the rights, duties and obligations created by the treaties to an entity seeking to become a Member State. At the core of the claim to use Article 48 TEU is the idea that the treaties currently apply to the territory and institutions that would form an independent Scotland. For this reason, it is argued that an independent Scotland ought not to follow an accession process under Article 49 TEU but instead that the geographical scope of application of the existing treaties should continue to apply to Scotland through a renegotiation of the treaties under Article 48 TEU. The Scottish Government's ultimate aim is to ensure a seamless transition to EU membership notwithstanding the break from the United Kingdom.

If there are good reasons to take seriously an expression of democratic self-government because it is consistent with the values of the European Union as expressed in Article 2 TEU, then there are at least equally good reasons to take seriously the requirement in Article 5 TEU that the Union act within the limits of the powers conferred up in it by the treaties. That requires there to be an appropriate legal basis in the treaties for the actions that the EU intends to take. In a consistent line of case law, the European Court of Justice has made clear that the choice of legal basis does not depend on the subjective opinion of the EU's institutions or its Member States but must instead be based on objective factors amenable to judicial review.¹⁵

There must be a genuine and objective connection between the purpose of the legal basis and that of the act adopted. Moreover, a more specific legal basis for an EU measure takes precedence over a more general legal basis.

Applied to the context of an independent Scotland seeking membership of the Union, the argument for the use of Article 49 TEU would seem substantially more legally plausible than resort to Article 48 TEU for three main reasons. Firstly, the objective which is pursued by Article 49 TEU is to allow for verification that the applicant state can fulfil its obligations arising under EU law. Of course, it is the case that as a constituent territory of an EU state, and a territory with its own legal and devolved political system, EU law currently has application in Scotland and its institutional structures play a role in the implementation of EU law. However, on the policymaking side, certain important policy fields—monetary policy, taxation, social welfare, defence, immigration – are currently reserved to the UK government. While these are areas in which Member States are primarily competent, the exercise of these competences, nonetheless, falls within the scope

¹⁵ See, *inter alia*, Case C-137/12, *Commission v Council* [2013] OJ C 151 (26 May 2012) and the judgments cited therein.

of the EU treaties. An independent Scotland would be assuming new domestic policy responsibilities—after all, that is part of the case for independence—in areas within the scope of application of the treaties. It is, therefore, appropriate that other EU Member States and institutions have the opportunity to assess how an independent Scotland would, institutionally and politically, exercise its domestic competences in their European context, including those competences which were hitherto reserved to Westminster.

Secondly, the Article 48 TEU procedure is a means for altering the legal relationship between ‘Member States’. While the post-*Van Gend en Loos* understanding of the legal identity of the European Union has continually emphasised that the EU is more than an agreement between Member States—particularly in its capacity to confer rights on individuals—it remains founded upon an agreement between Member States. Treaty amendments and accession treaties require the unanimous consent of Member States and ratification by all Member States in accordance with their constitutional requirements. The German Constitutional Court’s view that the Member States are ‘masters of the treaties’ is a counter-narrative to the Court of Justice’s *Van Gend en Loos* mantra and a powerful means of underscoring the conferral principle in Article 5 TEU. Therefore the identity of being a Member State cannot be lightly dismissed and that identity is crucial to the personal scope of Article 48 TEU. In other words, Article 48 TEU can only serve as the legal basis for amending the treaties as they apply to existing Member States. It is not, therefore, an appropriate legal basis by which to create a new Member State as would be the case were it to be used to effect Scotland’s EU membership.

It is true that existing Member States may wish to alter the territorial scope of application of the treaties via Article 48 TEU. For example, the pre-Lisbon equivalent of Article 48 TEU (Article 236 EEC Treaty) was used by the Member States to alter the territorial scope of application of the treaties to deal with Greenland’s changed relationship with Denmark and the European Communities. Although in fact no formal treaty revision process was triggered, a formal revision to the treaties might have been undertaken to deal with German unification. However, what both the Greenland and German unification situations highlight is actually the limited scope of application of Article 48 TEU to manage the territorial scope of application of the treaties in respect of existing Member States. In neither circumstance was a new entity created with obligations as a new Member State of the EU. There is a world of a difference between, on the one hand, a treaty ceasing to apply to a territory (Greenland) or extending to a territory within the responsibility of an existing Member State

(Germany) and, on the other hand, the application of a treaty to a new legal entity which seeks to undertake and independently exercise the obligations and rights of EU membership.

Thirdly, any analysis of Articles 48 and 49 TEU has to give due regard to Article 50 TEU which now contains the 'withdrawal clause'. Introduced by the Lisbon Treaty, there is a mechanism and procedure for an existing EU state to withdraw from the EU and to cease fulfilment of its obligations. The drafters of the treaty envisaged that a state that had exercised the right to withdraw might later seek to rejoin the EU. In such a case, Article 50(5) TEU is explicit that the state in question must follow the procedure laid down in Article 49 TEU. Thus, notwithstanding that the state had previously undertaken the obligations and exercised the rights associated with EU membership, it would still be required to follow the Article 49 TEU accession process. Arguably the same logic ought to apply to a constituent territory of a Member State seeking EU membership on its own account.

5 The Political and Legal Obstacles on the Path to EU Membership

It is the ambition of the Scottish Government that independence from the United Kingdom and membership of the European Union will occur simultaneously on its chosen date of 24 March 2016. This would require not only all internal and external negotiations to be completed in 18 months but as far as the EU is concerned all the ratification procedures to be concluded. While not entirely implausible, there are significant political and legal obstacles to the achievement of this ambition.

Whichever of Article 48 or 49 TEU may prove to be the correct legal basis, the same legal and political obstacles of unanimity among existing Member States and consequential ratification will apply. Any Member State has the legal capacity to veto Scotland's EU membership. There has been some speculation as to the position of Spain given its own attempt to resist Catalonian independence. In an interview with the *Financial Times* the Spanish Foreign Minister made clear that Spain would not interfere with the internal referendum campaign in Scotland. However, he also made clear that Scotland's admission to the EU could only be considered once it became independent and through the normal accession process rather than through a treaty amendment.¹⁶ A decision by the European

¹⁶ 'Spain promises non-interference on Scotland', *Financial Times*, 2 February 2014.

Council to open up a treaty amendment process could not itself be vetoed by Spain as it requires a simple majority. However, as acts of the European Council are susceptible to annulment proceedings before the Court of Justice, a legal challenge by Spain could not be ruled out. Therefore, even without EU states formally exercising vetoing rights, there remains significant room for political and legal tactics which create significant obstacles to Scotland's EU membership ambitions at least within the timescale demanded by the Scottish Government.

If the Article 48 TEU route were to be pursued, Scotland would be wholly reliant on the initiative of other Member States or other EU institutions to instigate and manage the proposed treaty revision. It would seem that the Scottish Government would look to the United Kingdom government to pilot this process on its behalf. Paradoxically, adopting the Article 48 TEU route would deprive an independent Scotland of the autonomy to make the request to join the EU on its own initiative as would be the case were it to seek accession under Article 49 TEU. It would also make Scottish negotiators highly reliant on UK government departments to conduct EU negotiations on their behalf in a manner not dissimilar to existing arrangement for handling EU matters in a devolved context: arrangements that the White Paper derides and dismisses. There is also the small problem of the UK General Election in 2015. Although the tradition in the UK is that election campaigns are short and governments—including coalition governments—are formed relatively quickly, nonetheless, the election process, let alone the outcome may well disrupt the conduct of negotiations.

The central difficulty with the Scottish Government's case for a treaty amendment is the assumption that this can be done on a single issue basis. Any observer of contemporary European affairs cannot help but be struck by how contentious is the idea of opening up a treaty amendment process for whatever reason, but particularly one that may be instigated by the United Kingdom. The UK's relationship with the EU has never been more difficult due in large part to internal difficulties within the Conservative Party and the rise of the United Kingdom Independence Party as a Eurosceptic rival to the Conservatives. The consequence is that the Conservative Prime Minister David Cameron is under significant pressure within his own party to seek a renegotiation of the treaties as a pretext for a future in/out referendum on EU membership. It is hardly conceivable that a Conservative Prime Minister would be in a position to pilot a single-issue treaty amendment to provide for Scotland's membership of the EU and to ignore the clamour within his own party for more wide-ranging treaty amendments. Indeed, the proposal for a treaty amendment ostensibly to deal with Scottish independence might well be viewed in other European

capitals as something of a Trojan horse. At a bilateral meeting with the French President François Hollande in January 2014, the UK Prime Minister was left in no doubt that the French President has no appetite to open up the EU treaties to amendments before the next presidential elections in 2017. Given the Scottish Government's stated aim of synchronous independence and EU membership by March 2016, an accession process under Article 49 TEU might not only be more legally secure it may also be quicker.

Even without attempting to read the political tea leaves through the murky waters of EU politics, the opening of any treaty amendment process is simply a politically risky business. Firing the starting gun of treaty negotiations does not necessarily encourage all participants to run in the same direction let alone for all to cross the finishing line.

6 Citizenship of the EU and the Consequences of Independence

Perhaps the most powerful argument that has been deployed to support the case for a pragmatic solution that will ensure continuity in external legal relationships notwithstanding Scottish independence links us back to the *Van Gend en Loos* depiction of the EU as a new legal order that confers rights upon individuals. Those rights now extend to rights linked to the status of being a citizen of the EU. The idea that Scottish independence without synchronous EU membership might result in a disruption or hiatus in the enjoyment of legal rights has given a particularly legal dimension to the debate about an independent Scotland's membership of the EU.

This issue deserves a more extended legal treatment than can be offered here. One rather blunt reaction may simply be that if Scotland no longer wishes to remain a constituent part of an EU Member States, then any consequential loss of legal status is merely the necessary corollary of that decision. However, even that appraisal is not without its difficulties. EU citizenship and other legal rights are premised on being a national of a Member State. Who is or is not a national of a Member State is a matter for domestic nationality law. A vote for independence begs rather than settles the issue of nationality of the resulting entities.

If, for example, Scottish independence is not intended to alter or diminish the rights of UK nationals, then it is conceivable that all existing UK nationals will retain that status post-independence unless and until they acquire a different nationality. That would ensure continuity in the EU citizenship rights of such

nationals, but lead to the uncomfortable situation that the vast majority of the residents in Scotland would not hold the nationality of the newly independent state. Other EU nationals in Scotland would not, of course, enjoy their rights derived from EU law in a pre-EU membership Scotland, although such rights could quite easily be extended as a matter of Scots law. So it is not entirely clear that independence without EU membership need result in a dramatic change in legal relationships, particularly if the hiatus between independence and Scottish accession to the EU through the normal process was relatively short. If residents of a newly independent Scotland opted, however, to give up their UK nationality in favour of a new Scottish nationality then they would do so freely and in full knowledge of the legal consequences including the potential impact on their EU citizenship rights. At least in that sense, a vote for independence would not involuntarily deprive Scottish nationals of their EU citizenship rights. The option of dual Scottish-UK nationality might also be canvassed.

The point, therefore, is that the argument from citizenship does not trump all other considerations. It certainly would not turn the choice of an incorrect legal basis for Scotland's EU membership—Article 48 TEU—into a correct legal basis. Moreover, if the principle of sincere cooperation in Article 4(3) TEU does have a particular legal bite in the independence debate it is probably one that would suggest that, within their own competence over issues of nationality, EU Member States ought to strive to avoid situations in which the exercise of their competence over nationality law was exercised without due regard for EU law.¹⁷ In that spirit, the effects of an independence votes on the rights of European nationals might be managed, not least on a transitional basis pending formal accession to the EU by an independent Scotland.

7 Conclusions

In a somewhat unexpected way, the referendum on Scottish independence is rather revealing about the relationship between international, EU and domestic constitutional law and practice. What it reveals is both the pathways and pitfalls that attend any separation/secession/independence process, particularly in terms of its external consequences. There are a plurality of plausible legal responses to the Scottish Government's ambition for Scotland's EU membership. This adds to, rather than reduces, the levels of uncertainty surrounding Scotland's future. But the plurality and uncertainty should not be read as a synonymous with an

¹⁷ See Case C-135/08, *Janko Rottman v Freistaat Bayern* [2010] ECR I-1449.

abandonment of law in favour of a quick political fix. It is not the absence of law that is the issue but rather the plurality of legal responses which need to be mustered in a fashion that is plausible and which reconciles in an appropriate manner the competing interests at stake. It remains important that law frames and informs political processes, whatever their eventual outcome. Indeed, the argument that the outcome will be one in which law inevitably bends to political need is in tension with the idea that the identity of the European Union is premised upon its 'new legal order'. Law and politics will need to be reconciled. For the reasons advanced above, it seems far more plausible that an independent Scotland would need to secure its place as a Member State of the European Union through an accession process rather than via a treaty amendment. This is not a question of political expediency but rather an issue of the correct choice of legal basis informed by the values, principles and general scheme of the EU treaties.

CRIMINAL LAW, EVIDENCE AND PROCEDURE

Matthew Davie

Joshua A Zell

1 Introduction

In 2012–13 the Supreme Court’s jurisprudence on criminal law, evidence and procedure revealed three major themes. First, the Court continued its development of human rights law in criminal cases. Secondly, the Court heard two cases with significant implications for victims’ access to justice. Lastly, it considered the relationship between moral blameworthiness and criminal liability.

2 Human rights law in criminal cases

Regarding human rights law, the Court’s decisions covered the continuation of the *Cadder v HM Advocate*¹ line of cases, Scottish human rights cases, and a potentially new approach to applying the European Convention on Human Rights² (ECHR) and European Court of Human Rights’ (ECtHR) decisions.

2.1 The *Cadder* line

During the 2010–11 legal year, Lord Hope authored the controversial *Cadder* decision for the Court, following the ECtHR’s *Salduz v Turkey*³ decision in holding that the right to a fair trial includes the right of access to a lawyer during police questioning. In the 2011–12 year, the Court began clarifying the many legal questions raised by that decision in *Ambrose v Harris*,⁴ *HM Advocate v P*,⁵ *McGowan*

¹ [2010] 1 WLR 2601.

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

³ (2008) 49 EHRR 421.

⁴ [2011] 1 WLR 2435.

⁵ [2011] 1 WLR 2497.

*v B*⁶ and *Jude v HM Advocate*.⁷ In 2012–13, this line of cases continued with *O'Neill v HM Advocate*,⁸ addressing whether *Cadder* also changed the law on the right to a hearing within a reasonable time (right to a speedy hearing).

The question arose due to a twist in the reasoning of *Salduz* and *Cadder*. In upholding the right to a lawyer during questioning, the ECtHR in *Salduz* and the Court in *Cadder* relied on the ECHR Article 6(1) right to a fair trial, understanding that the fairness of a trial can be affected by events occurring during the investigation.⁹ However, for additional support, the courts also cited the Article 6(3)(c) right to legal assistance in presenting a defence, which by its text applies only after a defendant has been charged with a criminal offence.¹⁰ By extending this right back in time beyond the judicial process to the police investigative process, the courts created the legal fiction that a suspect is 'charged with a criminal offence' when police conduct the initial suspect interview, long before formal charging. In hindsight, the courts might have avoided confusion by relying solely on the Article 6(1) right to a fair trial. Because Article 6(1) also contains the right to a speedy hearing, and this clock also starts when a defendant is charged with an offence, under *Cadder* it appears that the speedy hearing clock begins ticking at the initial suspect interview. This earlier start to the clock would create foreseeable problems in a criminal justice system in which the gap between initial questioning and formal charging can be several years, particularly if the suspect is questioned near the beginning of a complicated investigation. Unsurprisingly, the issue was raised before the Court this year in *O'Neill*.

The appellants in *O'Neill* were initially interviewed by police in 1998, formally charged in 2005, and tried and convicted of murder in 2010.¹¹ Applying *Salduz* and *Cadder*, as well as the later *Shabelnik v Ukraine*¹² and *Ambrose* (Lord Hope), the appellants logically argued that they were charged in 1998 rather than 2005, causing a violation of their speedy hearing rights.¹³ Lord Hope, again writing for the Court, worked a bit of judicial magic and found that the term 'charged' has two quite different definitions depending on which right is being analysed: for the right to a speedy hearing, the defendant is only charged when officially

⁶ [2011] 1 WLR 3121.

⁷ [2011] UKSC 55.

⁸ [2013] UKSC 36.

⁹ *Salduz*, above n 3, para 55; *Cadder*, above n 1, para 35 (Lord Hope).

¹⁰ *Salduz*, above n 3, para 63; *Cadder*, above n 1, para 63 (Lord Hope); ECHR, above n 2.

¹¹ *O'Neill*, above n 8, para 12 (Lord Hope).

¹² (2009) ECHR 302.

¹³ *O'Neill*, above n 8, paras 14, 27–33 (Lord Hope).

notified that he or she will be prosecuted; for the right to a lawyer, an individual is charged at the moment he or she becomes a suspect.¹⁴

2.2 Scottish human rights cases

In addition to the substantive legal issues, *Cadder* also raised political and jurisdictional issues in the Court's relationship to Scottish criminal law. In 2012 Parliament attempted to address those issues in the Scotland Act 2012 (the 2012 Act), amending the Court's jurisdiction over human rights questions arising in Scottish criminal proceedings.¹⁵ At the heart of this change, Sections 288AA and 288ZB provide that in such cases the Court now has authority only to decide the narrow human rights question on referral or appeal, and then must remit the case back to the Scottish courts for any further action.¹⁶ The Court had an immediate opportunity to analyse and apply these new jurisdictional limits in *O'Neill* and *Kapri v The Lord Advocate*.¹⁷ In *O'Neill* the Court duly noted the effect of the 2012 Act, decided the human rights questions before it and remitted the proceedings to the Scottish High Court of Justiciary.¹⁸ *Kapri* was an appeal of the Scottish government's decision to extradite the appellant to Albania. In that case, the Court decided that extradition proceedings are not technically criminal proceedings, and therefore the 2012 Act and its jurisdictional limits do not apply to human rights questions arising from extradition proceedings.¹⁹ However, in the end the Court still limited itself to answering a simple evidentiary question and remitted the proceedings to the High Court of Justiciary.²⁰ Given these two decisions, it appears the Court is quite content to answer the questions posed to it in Scottish human rights cases and leave the rest to the Scottish courts.

2.3 A new view of the ECHR?

Generally speaking, the Court this term continued its previous approach to applying ECtHR judgments; that is, that the Court will keep pace with ECtHR jurisprudence, but will go no further than the ECtHR in expanding the application

¹⁴ *Ibid*, paras 35–6 (Lord Hope).

¹⁵ Scotland Act 2012 (UK) s 34.

¹⁶ *Ibid*, s 35–6.

¹⁷ [2013] UKSC 48.

¹⁸ *O'Neill*, above n 8, paras 4–11, 58 (Lord Hope).

¹⁹ *Kapri*, above n 17, para 23 (Lord Hope).

²⁰ *Ibid*, para 35 (Lord Hope).

of ECHR rights.²¹ However, in *Faulkner v Secretary of State*²² the Court demonstrated a marked dedication to following the ECtHR's lead, and in *R v Waya*²³ provided a striking exception to the non-expansion principle. The issue in *Faulkner* was whether substantial delays in the appellants' parole board hearings violated their ECHR rights and entitled them to damages.²⁴ In analysing these questions the Court reviewed dozens of ECtHR judgments, in order to identify and apply ECtHR principles on substantive rights and damages.²⁵ For Lord Reed, writing for the Court, the goal is to naturalise ECtHR judgments for consistent and accurate application within the common law, and not to somehow limit their influence.²⁶ *Waya* dealt with confiscation orders under the Proceeds of Crime Act 2002 (POCA), which removed judicial discretion in shaping such orders.²⁷ The Court, sitting in a panel of nine for the special occasion, addressed the question of whether confiscation orders under the POCA might violate the ECHR.²⁸ After expressly noting that the ECtHR had not addressed this particular question, the Court took the opportunity to return some judicial discretion to the POCA and found that confiscation orders could in fact violate the ECHR.²⁹ The Court did not acknowledge that it had departed from its usual principle, but at least on these facts the Court did not hesitate to go beyond the jurisprudence of the ECtHR in applying the ECHR. The interesting question going forward is whether the Court now sees the ECHR as a tool for reshaping legislation.

3 Victims of crime

In 2012–13 the Court heard two cases which bore on the rights of victims of crime turned private prosecutors: *R (on the application of Gujra) (FC) v CPS*³⁰ and *Hayes v*

²¹ See e.g. *R v Varma* [2012] UKSC 42, para 57 (Lord Clarke); *R v The Parole Board of England and Wales and another* [2013] UKSC 47, paras 47–8.

²² [2013] UKSC 23. The full title of the case is *R (Faulkner) v Secretary of State for Justice and another; R v Secretary of State for Justice and The Parole Board; R v The Parole Board of England and Wales and another*.

²³ [2012] UKSC 51.

²⁴ *Faulkner*, above n 22, para 13 (Lord Reed).

²⁵ *Ibid*, paras 20–74 (Lord Reed).

²⁶ *Ibid*, para 29 (Lord Reed).

²⁷ *Waya*, above n 23, para 4 (Lord Walker and Sir Anthony Hughes).

²⁸ *Ibid*, para 1 (Lord Walker and Sir Anthony Hughes)

²⁹ *Ibid*, paras 5, 16 (Lord Walker and Sir Anthony Hughes).

³⁰ [2012] USKC 52.

Willoughby.³¹ In *Gujra* the appellant challenged the Director's policy, instituted in 2009, of taking over and abandoning prosecutions which, considered objectively, are unlikely to result in conviction. By a majority decision (Lords Neuberger, Kerr and Wilson) the Court upheld the Director's policy as within the bounds of his statutory authority.

Heading prosecutions off at the pass which will not succeed is good public policy—for obvious economic reasons, and because putting a person on trial is a serious infringement of personal liberty. But even when a prosecutor seemingly makes the 'right' decision a victim can feel aggrieved at losing her day in court. The victim may ask: 'if I can pay a lawyer to prosecute this case on my behalf, and if the court will permit it to go to a jury, why should I not be allowed to proceed?'³² She may feel as if she has been denied access to justice. This concern is articulated by the dissenting judges in *Gujra*, Lady Hale and Lord Mance, who allot the right of private prosecution a different place in English law from the majority. The majority view takes a distinctly utilitarian approach: private prosecutions are a useful constitutional safeguard against 'inertia or partiality'³³ on the part of the authorities.³⁴ In this way, *Gujra* is consistent with *Jones v Walley*,³⁵ the leading House of Lords decision on private prosecutions. The minority judgments, however, see the right as part of the right to justice and thus grounded in human rights law.³⁶ Notably, Lord Mance went further in conceptualising the right of private prosecution in *Gujra* than he did in *Jones*, on which occasion the Judge simply said: 'the right to institute a private prosecution is an important right and safeguard possessed by any aggrieved citizen.'³⁷

In *Hayes* the Supreme Court examined the scope of the defence in s 1(3)(a) of the Protection from Harassment Act 1997, which applies where the impugned course of conduct 'was pursued for the purpose of preventing or detecting crime'. The issue was whether Mr Willoughby's conduct towards Mr Hayes fell within

³¹ [2013] UKSC 17.

³² A court will only prevent a jury from deciding a case on its merits if the evidence is not such at a properly directed jury could properly convict or if the prosecution is otherwise an abuse of process: *R v Galbraith* [1981] 1 WLR 1039. This is a lesser standard than the 'better than evens' test approved of by the majority of the Court in *Gujra*.

³³ *Gouriet v Attorney-General* [1978] AC 435, 477, 498 (Lord Wilberforce).

³⁴ See in particular the concurring judgment of Lord Neuberger, paras 52, 59, 64–66.

³⁵ [2007] 1 AC 63. Some of the judges in *Jones*, particularly Lord Bingham of Cornhill, thought the 'safeguard' to not be of much importance in light of the existence of a professional, independent prosecution service.

³⁶ See paras 107–108, 113, 114, 116 (Lord Mance) and para 123 (Lady Hale).

³⁷ *Jones*, above n 35, para 39.

the scope of s 1(3)(a), even though Mr Willoughby did not act reasonably. A majority of the Court (Lords Neuberger, Mance, Wilson and Sumption) held that it could not. Lord Reed dissented, reasoning that if Parliament did not intend for a subjective belief to be sufficient it would have said so plainly.

Hayes is a pragmatic decision, and one which is probably right on its facts, but it may well exert a chilling effect on victims of crime who genuinely wish to obtain evidence for legal proceedings. The majority is right to say that the test adopted—rationality—is not an exacting standard.³⁸ But it is an ambiguous one, and one which a jury in criminal proceedings may well misapply. In itself, this will give some victims pause for thought before pursuing self-help. These victims, who for whatever reason feel they have not been well served by the authorities, are often those most in need of assistance in obtaining access to justice. Compounding the difficulty is the 1997 Act's definition of 'harassment', which has been criticised as over-broad and difficult to understand.³⁹ The decision in *Hayes* engages the concern which caused Lady Hale to dissent in *Gujra*: 'I add only a few words because the issue is of such fundamental importance for the protection of all victims of crime, but in particular of those most vulnerable victims, those who have traditionally had such difficulty in getting their voices heard or, if heard, believed.'⁴⁰ Arguably, *Hayes*, like *Gujra*, tends to restrict access to justice by making private prosecution more difficult.

4 Moral blameworthiness and criminal liability

In 2013 the Supreme Court heard two cases on the relationship between moral blameworthiness and criminal liability. *R v Brown*⁴¹ was an appeal against conviction for sexual intercourse with a girl under the age of 14. The issue was whether the offence in question⁴² could be committed notwithstanding the defendant's belief that the victim was of age. Delivering the judgment of the Court, Lord Kerr referred to the constitutional principle that, subject to clear Parliamentary intention to the contrary, a court will construe a criminal offence

³⁸ *Ibid*, para 15.

³⁹ Aileen McColgan 'Case Law: *Hayes v Willoughby*, harassment defence requires "rational belief", *Inform's Blog*, 8 June 2013, <<http://inform.wordpress.com/2013/06/08/case-law-hayes-v-willoughby-harassment-defence-requires-rational-belief-aileen-mccolgan/>> [accessed 27 December 2013].

⁴⁰ *Gujra*, above n 30, para 124.

⁴¹ [2013] UKSC 43.

⁴² Section 4, Criminal Law Amendment Act (Northern Ireland) 1885–1923.

as requiring proof of *mens rea* on the part of the alleged offender. He quoted the pronouncement of Lord Reid in *Sweet v Parsley*:⁴³ '[...] there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did.' However, in this case the Court found that the presumption was displaced by clear Parliamentary intention to the contrary.

In *R v Hughes*⁴⁴ the Supreme Court considered the meaning of s 3ZB of the Road Traffic Act 1998 (Causing death by driving: unlicensed, disqualified or uninsured drivers). The section creates liability where a motorist who is unlicensed, disqualified, or uninsured 'causes the death of another person by driving a motor vehicle on a road'. The issue was whether the section applies in circumstances where the 'victim' is entirely to blame for his or her death. The Court held that, for the purposes of this provision, some fault in the defendant's driving is a necessary element of causation, and therefore of liability under s 3ZB. The Court was concerned at the prospect of holding a defendant liable for consequences which have nothing to do with his or her blameworthy conduct (in this case, driving without a license or insurance),⁴⁵ particularly as the offence at issue was a form of culpable homicide. Giving the judgment of the Court, Lord Hughes and Lord Toulson said: 'To label a person a criminal killer of another is of the greatest gravity.'⁴⁶

At first blush, there are significant differences in the Court's approach to moral blameworthiness in *Brown* and *Hughes*. In both cases the Court referred to the concept as being the foundation of criminal responsibility, describing it as 'constitutional' and analogous to the 'principle of legality'.⁴⁷ Yet, in *Brown* the Court failed to read a *mens rea* requirement into a serious sexual offence carrying a maximum penalty of life imprisonment; in *Hughes* the Court departed from the literal wording of s 3ZB (which carried a maximum penalty of two years imprisonment) and built in a fault requirement. The legislative history of s 3ZB pointed towards liability without driver fault⁴⁸ and liability would promote the public policy of ensuring motorists are insured and licensed. Standing back, however, one can see the logic in the Court's decisions and their consistency with

⁴³ [1970] AC 132, 148–49 (HL).

⁴⁴ [2013] UKSC 56.

⁴⁵ *Ibid*, para 17.

⁴⁶ *Ibid*, para 26.

⁴⁷ *R v Secretary of State for the Home Department, Ex Parte Simms and O'Brien* [2000] 2 AC 115, 131 (Lord Hoffman).

⁴⁸ *Hughes*, above n 44, para 23.

the principle that moral blameworthiness is, except in rare cases, a prerequisite to criminal liability. The defendant in *Brown* ran a risk by sleeping with a girl who was obviously capable of being underage. He made a moral choice which was directly related to the harm which he caused.⁴⁹ Conversely, the moral choices of the defendant in *Hughes* had nothing to do with the victim's death. Everything else being equal, the victim would have died whether or not the defendant was insured or held a licence. *Brown* and *Hughes* are significant because they show the importance of moral blameworthiness in interpreting the scope of a criminal offence, even to the exclusion of other traditional indicia of Parliamentary intent such as the provision's maximum penalty and legislative history.

5 Conclusion

The Supreme Court's criminal jurisprudence over the past year showed a preference for practical outcomes, both in the facts of each case and the wider effects of the Court's decisions. The Court made a real effort to accurately apply ECtHR judgments to the common law, and dealt pragmatically with the consequences. It made it more difficult for victims of crime to conduct prosecutions, shifting authority to the Police and CPS. Finally, the Court reduced the 'bite' of some offence provisions by reaffirming the importance of moral blameworthiness in criminal liability.

⁴⁹ *R v Brown*, above n 41, para 39.

EUROPEAN DIMENSIONS

Clara Rauchegger

1 Introduction

National judges in the European Union (EU) wear two hats: they are both national and EU judges. That the Supreme Court of the United Kingdom (UKSC) plays a crucial role in the implementation of EU law in this Member State is reflected in its case law of the 2012/13 judicial year. Sixteen cases required the interpretation or application of EU law. They concerned a wide range of complex issues, from the inclusion of a new trunk road in a pre-existing transport strategy to the anonymous selling of tickets for rugby matches on a web page, and various areas of substantive EU law, such as tax, IP or equality law. In the vast majority of the judgments,¹ the UKSC, implicitly or explicitly, found the correct application of EU law to be beyond reasonable doubt and thus no obligation under Article 267(2) of the Treaty on the Functioning of the European Union² (TFEU) to ask the Court of Justice of the European Union (CJEU) for a preliminary ruling. Three judgments are preliminary references³ and one raised controversial questions

¹ *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59; *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)* [2012] UKSC 55; *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55; *Zakrzewski v The Regional Court in Lodz, Poland* [2013] UKSC 2; *Digital Satellite Warranty Cover Ltd v Financial Services Authority* [2013] UKSC 7; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46; *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2013] UKSC 30; *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Ltd (formerly k/a Loyalty Management UK Ltd)* [2013] UKSC 15, [2013] UKSC 42; *Joint Administrators of Heritable Bank plc v Winding-Up Board of Landsbanki Islands HF (Scotland)* [2013] UKSC 13; *BCL Old Co Ltd v BASF plc* [2012] UKSC 45; *Birmingham City Council v Abdulla* [2012] UKSC 47.

² *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47 (TFEU).

³ *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25; *Jessy Saint Prix v Secretary of State for Work and Pensions* [2012] UKSC 49; *Public Relations Consultants Assn Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18.

that were, however, not relevant for the decision at issue.⁴ Only one judgment constituted the application of a conclusion of the CJEU in a preliminary ruling.⁵

This analysis identifies three main contributions by the UKSC judgments of 2012/13 to the development and clarification of EU law. First, the requirements to be met by national remedies for breach of secondary EU law were further elucidated. Second, the UKSC has thrown light on the meaning of ‘worker’ for the purposes of EU law. Third, the criteria to be fulfilled for intrusions into the right to data protection to be proportionate were further explained.

2 Remedies: national relief for breach of EU law in light of the principles of effectiveness and equivalence

A number of cases of the 2012/13 judicial year concerned the requirements that national remedies for breach of secondary law have to fulfil in order to comply with the principles of effectiveness and equivalence as developed by the CJEU and guaranteed in Article 19(2) TFEU and Article 47 of the Charter of Fundamental Rights of the European Union⁶ (CFR). Under the principle of procedural autonomy of the Member States, the detailed procedural rules governing remedies are a matter of domestic law, ‘provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the [EU] legal order (principle of effectiveness)’.⁷

The judgment in *Walton v Scottish Ministers*⁸ (*Walton*), involving a potential breach of the Strategic Environmental Assessment Directive⁹ (SEA Directive), contains significant *obiter* observations on the scope of national courts’ discretion to grant or refuse a remedy in case of a breach of EU directives relating to environmental assessment. In *Berkeley*¹⁰, the House of Lords had held that under

⁴ *Walton v Scottish Ministers* [2012] UKSC 44.

⁵ *O’Brien v Ministry of Justice (Formerly the Department for Constitutional Affairs)* [2013] UKSC, [2010] UKSC 34.

⁶ *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391.

⁷ Case C-201/02, *Wells* [2004] ECR I-00723, para 67.

⁸ [2012] UKSC 44.

⁹ *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment* [2001] OJ L 197/30.

¹⁰ *Berkeley v Secretary of State for the Environment, Transport and Regions (No. 1)* [2001] 2 AC 603.

Article 4(3) of the Treaty on European Union¹¹ (TEU), a national court had no discretion not to quash a planning permission that had been adopted in breach of the Environmental Impact Assessment Directive¹² (EIA Directive). Lord Carnwath, with whom the other Lords agreed, distinguished *Walton* from *Berkeley* because of the different statutory context and factual circumstances.¹³ His strongest argument was that, in the case at issue, quashing the trunk road construction order might lead to a potential prejudice to public and private interests that had to be weighed against the environmental interests.¹⁴ Moreover, Lord Carnwath emphasised that the CJEU had envisaged the payment of compensation as an alternatively effective remedy for breach of an EIA requirement to revoking a mining consent in *Wells*.¹⁵ Likewise, in *Inter-Environnement Wallonie*, the CJEU had ‘exceptionally’ accepted that the order in question could briefly be left in operation until the SEA was completed.¹⁶ The conclusion that Lord Carnwath draws from these authorities is that no automatic quashing of any schemes or order having been adopted without full compliance with the SEA Directive’s requirements is prescribed by EU law. National courts may thus use their discretionary powers to take into account wider public interests.¹⁷

The danger of allowing such a balancing exercise to take place is that it opens the door to the denial of relief for breaches of environmental assessment obligations by downgrading EIAs or SEAs from essential elements of the EU environmental protection regime to merely procedural ones.¹⁸ The interest of the public in the observance of environmental law needs to be given sufficient weight by the national court to ensure the effectiveness of EU law in this field. As the issue of remedial discretion was not directly relevant to the decision in the case at issue, the UKSC did not make a reference to the CJEU for a preliminary ruling.

A second judgment of the past judicial year raises questions on remedies in case of a breach of an environmental protection directive. In its preliminary reference in *R (ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs*¹⁹ (*ClientEarth*), the UKSC asks, *inter alia*, what remedies a national

¹¹ *Consolidated Version of the Treaty on European Union* [2012] OJ C 326/13.

¹² Now Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

¹³ *Walton*, paras 131–3 (Lord Carnwath).

¹⁴ *Ibid*, para 131 (Lord Carnwath).

¹⁵ Case C-201/02, *Wells* [2004] ECR I-00723, para 69; *Walton*, para 135 (Lord Carnwath).

¹⁶ Case C-41/11, *Inter-Environnement Wallonie* [2012] 2 CMLR 623, para 48.

¹⁷ *Walton*, paras 138–40 (Lord Carnwath).

¹⁸ JNE Varuhas, ‘Judicial review: Standing and remedies’ (2013) 72 *CLJ* 243, 245–6.

¹⁹ [2013] UKSC 25.

court must provide if national provisions do not comply with the requirements of the Air Quality Directive²⁰. The UKSC was satisfied that the appellant is entitled to a declaration that the UK is in breach of its obligations to comply with the nitrogen dioxide limits provided for in Article 13 of the Directive.²¹ However, it required guidance from the CJEU on the difficult, but relevant question of the extent of other relief that a national court had to provide in order to comply with Article 30 of the Air Quality Directive and/or Article 4 or 19 TEU.²² The CJEU's answer will require the application of the principles of effectiveness and equivalence. By the end of 2013, this case was still pending before the CJEU, the request to apply the accelerated procedure having been rejected.²³

In *BCL Old Co Limited and others v BASF plc and others*²⁴ (*BCL*), the UKSC assessed a statutory limitation period, which would otherwise bar the appellant's claim for damages for participation in an unlawful cartel, in the light of the principles of effectiveness, equivalence and legal certainty. As is well-established by the case law of the CJEU, limitation periods cannot render the exercise of European legal rights 'excessively difficult'. Lord Mance, with whom the other Lords agreed, extracted from the three relevant judgments of the CJEU²⁵ that this was the case where the application of a limitation period was not sufficiently clear and foreseeable.²⁶ It could not, however, be inferred from these judgments that the appropriate test was one of 'clarity beyond doubt'.²⁷ This interpretation is, according to Lord Mance, confirmed by the approach of the European Court of Human Rights.²⁸ Applying these requirements to the present appeal, the UKSC found that the starting date of the two-year limitation period and the lack of the possibility of seeking an extension laid down in the domestic statutory provisions were sufficiently clear and foreseeable.²⁹ The judgment also contains an interesting *obiter* statement on the appropriate relief. Lord Mance found it 'impossible to think that European law requires the setting aside as between civil

²⁰ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1.

²¹ *ClientEarth*, para 37 (Lord Carnwath).

²² *ClientEarth*, para 39 (Lord Carnwath).

²³ Case C-404/13, *ClientEarth* [2013], Order of the President of the Court, 28 November 2013.

²⁴ [2012] UKSC 45.

²⁵ Case C-453/99, *Courage Ltd v Crehan* [2002] ECR I-6297; case C-445/06, *Danske Slagterier v Germany* [2009] ECR I-2119; case C-456/08, *Commission v Ireland* [2010] ECR I-859.

²⁶ *BCL*, paras 17-8 (Lord Mance).

²⁷ *Ibid*, paras 19-24 (Lord Mance).

²⁸ *Ibid*, paras 25-8 (Lord Mance).

²⁹ *Ibid*, paras 40, 43 (Lord Mance).

parties of a limitation defence, which a defendant, who is independent of the State, has successfully established under domestic law'.³⁰

3 The concept of 'worker': refining the scope of EU equality and free movement law

In several cases heard in the past judicial year, the application of secondary EU law depended on the meaning of the term 'worker'. There is no generally applicable answer to the question of who is a worker for the purpose of EU law. However, the judgments given by the UKSC (will) provide important clarifications on the scope of three directives in the field of equality and free movement law.

In *X v Mid Sussex Citizens Advice Bureau*³¹ (*X v Mid Sussex CAB*), the UKSC held that a volunteer could not rely on the disability discrimination protection provided by the Employment Equality Framework Directive³² (Framework Directive) to challenge her dismissal. According to Lord Mance, who delivered the only substantive judgment, the concept of 'occupation' does not operate at the same level as 'employment' and 'self-employment'. As part of the specific clause of Article 3(1)(a) of the Framework Directive dealing with conditions for access to a sector of the market, the term 'occupation' is limited to this context.³³ This interpretation is reinforced by other language versions of this provision and the omission of any reference to 'occupation' in Article 3(1)(c) of the Framework Directive dealing with employment and working conditions and dismissal.³⁴ Moreover, neither the original Commission proposal nor the annexed impact assessment leading to the Framework Directive considered voluntary activity.³⁵ An amendment which had been proposed by the European Parliament to include unpaid and voluntary work was ultimately not accepted by the Council.³⁶ Finally, the European Commission has never objected to any national implementation of the Framework Directive which did not include voluntary activity.³⁷ For Lord Mance, it was thus beyond any reasonable doubt that voluntary work fell outside

³⁰ Ibid, paras 45 (Lord Mance).

³¹ [2012] UKSC 59.

³² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

³³ *X v Mid Sussex CAB*, paras 29-30 (Lord Mance).

³⁴ Ibid, paras 31-4 (Lord Mance).

³⁵ Ibid, paras 37-8 (Lord Mance).

³⁶ Ibid, paras 39-41 (Lord Mance).

³⁷ Ibid, para 42 (Lord Mance).

the scope of the Framework Directive so that there was no need or obligation for a reference to the CJEU.³⁸

In light of the importance of volunteering as part of the UK government's strategy to reduce unemployment, this conclusion has been criticised as 'a missed opportunity to address a lacuna in the law'.³⁹ It can certainly be doubted that it is *acte clair* that voluntary work is not covered by the Framework Directive. A more purposive and less literal interpretation of its Article 3 by the CJEU might have led to a different result. The UKSC was obviously wary of pre-empting the EU legislator in this matter.

The question referred to the CJEU for preliminary ruling in *Jessy Saint Prix v Secretary of State for Work and Pensions*⁴⁰ (*Saint Prix*) was whether a woman who has temporarily left work because of late stages of pregnancy and early aftermath of childbirth remains a 'worker' for the purpose of the right to free movement established in Article 45 TFEU and the right of residence conferred by Article 7 of the Citizenship Directive⁴¹. EU citizens who are 'workers' in the UK within the meaning of EU law cannot be discriminated against based on their nationality and are therefore entitled to the same income support as UK nationals.⁴² In the UKSC's view, it would be consistent with the general principles of EU law, in particular the equal treatment of men and women, to develop the concept of 'worker' to meet the situation at issue.⁴³ In light of the broad purposive interpretation of the concept of 'worker' by the CJEU so far and the recently delivered affirmative opinion of Advocate General Wahl, it is to be expected that the CJEU will comply with this request.⁴⁴

The judgment in *O'Brien v Ministry of Justice*⁴⁵ (*O'Brien*) was based on the interpretation of 'worker' given by the CJEU in a preliminary ruling that the UKSC had sought.⁴⁶ *O'Brien*, a retired barrister, claimed to be entitled

³⁸ Ibid, paras 45–8 (Lord Mance).

³⁹ S Lowe, 'Case Comment: X v Mid Sussex Citizens Advice Bureau' (2013) 113 *Emp. L.B.* 5, 7.

⁴⁰ [2012] UKSC 49.

⁴¹ *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance)* [2004] OJ L 158/77.

⁴² *Saint Prix*, para 5.

⁴³ Ibid, para 21.

⁴⁴ Case 507/12, *Saint Prix* [2013], Opinion of Advocate General Nils Wahl, 12 December 2013.

⁴⁵ [2013] UKSC 6, [2010] UKSC 34.

⁴⁶ Case C-393/10, *O'Brien* [2012] 2 CMLR 25.

to a pension in respect of his part-time non-salaried work as a recorder. Answering the question of the UKSC, the CJEU held that for the purposes of the Framework Agreement eliminating discrimination against part-time work⁴⁷, the term ‘worker’ is not an EU law concept but has to be interpreted in accordance with national law.⁴⁸ However, Member States cannot adopt definitions which deprive the principle of equal treatment of its effectiveness.⁴⁹ Therefore, the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the benefits of the protection of part-time workers.⁵⁰ As suggested by the CJEU,⁵¹ the UKSC drew a distinction between ‘worker’ and self-employed persons and, taking into account the criteria advanced by the CJEU, concluded that ‘recorders are in an employment relationship within the meaning of clause 2.1. of the Framework Agreement on part-time work’.⁵²

4 Proportionality: balancing data protection and countervailing interests

Two judgments of the past judicial year substantiate the limitations placed on data protection under the EU data protection regime as they provide important clarifications on the balancing of data protection and countervailing interests. Moreover, they shed light on the relationship between primary law data protection⁵³ and the Data Protection Directive⁵⁴ and more generally on the scope of application of the CFR.

In *Rugby Football Union v Viagogo*⁵⁵ (*Rugby Football Union*), the appellant’s argument before the UKSC was confined to the claim that the grant of a *Norwich*

⁴⁷ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work [1997] OJ L 14/9; Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland [1998] OJ L 131/10.

⁴⁸ Case C-393/10, *O’Brien* [2012] 2 CMLR 25, paras 31-2.

⁴⁹ *Ibid*, paras 34-5.

⁵⁰ *Ibid*, para 41.

⁵¹ *Ibid*, para 44.

⁵² *O’Brien*, para 42.

⁵³ Article 8 CFR; Article 16 TFEU.

⁵⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

⁵⁵ [2012] UKSC 55.

Pharmacal order⁵⁶ to reveal the identities of potential wrongdoers would lead to a breach of their fundamental right to data protection protected by Article 8 CFR. The CFR has the same status as EU primary law since the entry into force of the Treaty of Lisbon⁵⁷ in December 2009. However, according to its Article 51(1), Member States are only bound by its provisions when they are ‘implementing Union law’, a provision that had not yet been interpreted by the UKSC. As a first step, the UKSC therefore had to decide, whether the situation at issue fell within the scope of application of the CFR. The UKSC saw no need to make a reference to the CJEU or to look at the latter’s case law pre- or post-Lisbon and opted for a broad interpretation, equating ‘implementing’ with ‘acting in the material scope of EU law.’⁵⁸ As the granting of the *Norwich Pharmacal* order involved the disclosure of personal data as defined in Article 2(a) of the Data Protection Directive, it fell within the material scope of EU law.⁵⁹ This result complies with the CJEU’s broad interpretation of Article 51(1) CFR a few months later in its seminal judgment in *Åkerberg Fransson*, where the European Court held that the applicability of EU law entails the applicability of fundamental rights guaranteed by the CFR.⁶⁰

Regarding the application of the principle of proportionality, Lord Kerr, delivering the unanimous judgment, held that the aim of the Rugby Football Union (RFU) to promote the sport of rugby by maintaining tickets at a reasonable price was an ‘entire worthy motive.’⁶¹ According to the RFU’s terms and conditions, any resale of a ticket it had supplied at prices above face value constituted a breach of contract. The UKSC clarified that in assessing the proportionality of the making of the *Norwich Pharmacal* order to compel a ticketing website to reveal the identity of those who breached these conditions, not only the particular benefit that obtaining the information relating to an individual data subject might bring, but also the wider context, i.e. the interest of all members of the public interested in attending games at Twickenham stadium, had to be taken into account.⁶² This is helpful guidance as to the identification of legitimate aims that could justify an infringement of the right to data protection.

⁵⁶ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

⁵⁷ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon* [2007] OJ C 306/1.

⁵⁸ *Rugby Football Union*, para 28.

⁵⁹ *Ibid*, para 32.

⁶⁰ Case C-617/10, *Åkerberg Fransson* [2013], para 21.

⁶¹ *Rugby Football Union*, para 45.

⁶² *Ibid*, para 37-40.

The judgment in *South Lanarkshire City Council v The Scottish Information Commissioner*⁶³ (*South Lanarkshire City Council*) also involved the assessment of the proportionality of the processing of personal data. Before the UKSC, the principal argument focused on the meaning of the term ‘necessary’ in Article 7(f) of the Data Protection Directive and thus on the second step of the proportionality analysis. As Lady Hale, who delivered the judgment, stated, necessity is a well established part of the proportionality test in EU law and requires that a measure which interferes with a right protected by EU law must be the least restrictive for the achievement of a legitimate aim.⁶⁴ Based on the CJEU’s judgment in *ORF*⁶⁵, the UKSC then drew a distinction between data processing which involves an interference with the data subject’s right to respect for his private life and data processing which does not. Only in the first scenario must the requirements of Article 8(2) of the European Convention of Human Rights⁶⁶ be fulfilled.⁶⁷ In the particular case at issue, however, Article 8 of the Convention was not engaged as the processing requested would not enable anyone to discover the identity of the data subjects.⁶⁸ Mr Irvine had requested information from the Council on how many of their employees were placed at a particular point of the Council’s pay scale to find out whether the pay gradings favoured work traditionally done by men. As he did not want to know the names of the employees concerned, Article 8 of the Convention was not engaged and he could not have asked for a lesser degree of disclosure.⁶⁹

While the UKSC’s definition of necessity and its application to the case at issue are uncontroversial and convincing, the distinction between data processing that does, or does not, interfere with the right to private life does not find a clear basis in *ORF*. Besides, it is incompatible with Article 1(1) of the Directive, which establishes the ‘right to privacy with respect to the processing of personal data’ as the general objective of the Directive. Thus, all data processing covered by the Directive engages the right to private life. The UKSC’s reason for drawing this distinction seems to be that it was common ground in the case at issue that the

⁶³ [2013] UKSC 55.

⁶⁴ *Ibid*, para 27, with reference to case C-524/06, *Huber* [2008] ECR I-9705, Opinion of Advocate General Miguel Poiares Maduro, para 27.

⁶⁵ Joined cases C-465/00, C-138/01 and C-139/01, *ORF* [2003] ECR I-4989, paras 68-74.

⁶⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), 4 November 1950, 213 UNTS 222.

⁶⁷ *South Lanarkshire City Council*, para 25.

⁶⁸ *Ibid*, para 26.

⁶⁹ *Ibid*, para 27-8.

information requested was personal data.⁷⁰ However, the UKSC could have come to the same result without denying that the data processing at issue involved an interference with fundamental rights. The balancing exercise could have shown that the minimal interference with the fundamental rights of the data subjects at issue was outweighed by Mr Irvine's legitimate interest.

5 Conclusion

The analysis of the judgments involving the application of EU law of the 2012/13 judicial year shows that the UKSC wears its European hat with both conscientiousness and confidence. On the one hand, its discussion of EU law related questions involves detailed and competent studies of the relevant CJEU case law and it aims at securing the *effet utile*. On the other hand, in some cases where the UKSC found the interpretation of EU law to be beyond reasonable doubt, the uniform application of EU law would have benefited from a preliminary ruling by the CJEU.

⁷⁰ Ibid, para 2.

FAMILY LAW

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1 Introduction

In the judicial year 2012–2013, the Supreme Court considered a plethora of diverse and significant issues relating to family law. Notably, these have included the initiation of care proceedings,¹ adoption procedures,² the grant of protective orders,³ the role of the doctrine of ‘piercing the corporate veil’ in divorce proceedings⁴ and the question of how best to balance the ‘right to privacy’ with the best interests of a child.⁵ When carefully scrutinized, the response of the Court to these wide-ranging concerns suggests the emergence of a more fact sensitive approach to family law matters. In particular, the recent jurisprudence of the Court in this context indicates that it is adopting a more flexible interpretation of relevant statutory texts, a wider application of legal principles and giving greater recognition to complex familial relationships, with the overarching aim of producing a more equitable outcome in family law related litigation.

2 Securing the interests of the Child

Throughout the judicial year, the Supreme Court has considered various cases concerning the interests of a child. In most of these situations, the approach of the Court has been to specifically consider the individual needs of the relevant child concerned and pay particular attention to the individual fact patterns raised.

¹ *In Re J (Children)* [2013] UKSC 9.

² *Re B (A Child)* [2013] UKSC 33.

³ *Re A (Children) (AP)* [2013] UKSC 60.

⁴ *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

⁵ *In Re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60.

2.1 Non-Consensual Adoption Procedures

In *Re B (A Child)*,⁶ the Supreme Court was required to consider several aspects of the non-consensual adoption procedure as provided for under section 31 of the Children Act 1989 (the 'CA 89'). Of particular importance, the Court interpreted the necessarily elastic terminology of 'significant harm'⁷ as including emotional as well as physical harm,⁸ thereby overruling a number of previous precedents to the contrary.⁹ In addition, it also indicated that it would hesitate to interfere in future cases of this kind unless the decision of the first instance judge could be shown to be 'outside the generous ambit of reasonable disagreement or wrong within the meaning of the various expressions to which he had referred.'¹⁰ Hence, the Court emphasized the significance of both a flexible approach and of a decision reached on the basis of full and detailed factual scrutiny. Whether this ultimately raises or lowers the threshold of the interference test remains of course to be judicially answered. The matter will however likely be developed on a case-by-case basis.

A similarly fact sensitive approach by the Supreme Court was also apparent in the case of *In Re J (Children)*.¹¹ In this matter, the primary issue again concerned the threshold conditions which must be satisfied in order for non-consensual care proceedings to be initiated in respect of children whose parents were previously involved in cases of child abuse against other children. Significantly, the case involved discussions focused upon how best to balance the need to prevent unnecessary state interference in families pursuant to Part IV CA 89 against the likelihood of future harm being inflicted upon a child pursuant to section 31(2)(a) CA 89 in cases where the perpetrator of the previous abuse continues to remain open to doubt.

On the facts of *Re J (Children)* itself, a mother had previously been involved in a case in which it had been determined that the death of her child had been caused by either herself or by the child's father. That Court had however been unable to conclusively identify the responsible perpetrator.¹² An application was later made by the Local Authority to take a new child born to the mother, but not to the same father as the couple had separated, and two other step-children (from

⁶ *Re B (A Child)* [2013] UKSC 33.

⁷ Children Act 1989 s 31(2)a.

⁸ *Re B (A Child)* [2013] UKSC 33, para 48 (Lord Wilson).

⁹ *Re L (Children) (Care Proceedings: Significant Harm)* [2006] EWCA Civ 1282; *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050.

¹⁰ *Re B (A Child)* [2013] UKSC 33, para 40 (Lord Wilson).

¹¹ *In Re J (Children)* [2013] UKSC 9.

¹² *In Re J (Children)* [2012] EWCA Civ 380, paras 19-20 (McFarlane LJ).

the new relationship) into care. In deciding whether the fact that the mother was a ‘possible perpetrator’ of child abuse in a previous case was sufficient to conclude that there was a legitimate likelihood of harm to these children, the approach of the Supreme Court was to ensure that the entirety of the facts were looked into and where appropriate, distinguished from past situations and precedents.¹³ In particular, the substantial change in the circumstances of the mother, including her separation from the other possible perpetrator of the death of the child, was instrumental in convincing the Court that the care proceedings should be discontinued.¹⁴ Unlike in previous decisions such as *Lancashire County Council v B*¹⁵ and *In Re S-B (Children) (Care Proceedings: Standard of Proof)*,¹⁶ each of which involved a similar question of law, this case suggests that in future cases of this kind, the Court will consider such applications based on the merits of the specific facts of the relevant case, without excess influence being given to prior judgments. This is true even where such decisions concern the exact same parties as those in the new application.

2.2 Jurisdiction

Another family law case from the past judicial year concerned the question of jurisdiction. In *Re A (Children)*,¹⁷ the Supreme Court unanimously found that the High Court had inherent jurisdiction to make an order requiring a child to be returned to the United Kingdom from Pakistan where that child was a British national. Although it also agreed with the view of Lord Justice Thorpe in *Al-H (Rashid) v F (Sara)*¹⁸ that it should be ‘extremely circumspect’ when deciding whether in fact to exercise that jurisdiction, the Court went on to hold that in the end, ‘all must depend on the circumstances of the particular case.’¹⁹ This case therefore highlights the sensitive treatment and progressive stance of the Justices in such matters and a will to support a more fact-sensitive approach in this context in future agendas.

¹³ *In Re J (Children)* [2013] UKSC 9, para 53-6 (Baroness Hale)

¹⁴ *Ibid.*

¹⁵ *Lancashire County Council v B* [2000] 2 AC 147.

¹⁶ *In Re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678.

¹⁷ *Re A (Children) (AP)* [2013] UKSC 60.

¹⁸ *Al-H (Rashid) v F (Sara)* [2001] EWCA Civ 186 (Thorpe LJ).

¹⁹ *Re A (Children) (AP)* [2013] UKSC 60, para 65 (Baroness Hale).

2.3 Right to privacy

In *Re A (A Child) (Family Proceedings: Disclosure of Information)*,²⁰ the Supreme Court considered how best to balance the ‘irreconcilable’ clash between the ‘right to privacy’ of a vulnerable victim who was likely to suffer serious psychological harm if forced to be a witness on the one hand, with the interests of the child in obtaining justice on the other.²¹ In this case, a young woman appealed against a ruling that allegations of sexual abuse that she had made against an older gentleman should be disclosed as part of contact proceedings involving another young girl. The Court ultimately dismissed the appeal, upholding the order for disclosure so as to have the allegations of sexual abuse properly adjudicated. In doing so, it argued that sufficient safeguards could be instituted to ensure that no harm befell the victim of the alleged assault. While the judgment was ultimately made based upon a balance of the conflicting rights involved, judicial discussion was heavily devoted to a consideration of the exact nature of the harm that was likely to be caused to the victim by adjudication of the matter. This particular factor was then weighed against the nature of harm that could be caused by a failure to submit the matter for adjudication.²² To briefly add, the inclusion of safeguards for such a trial is indicative of the Supreme Court’s sensitivity to the variance in the circumstantial needs of parties in different cases.

3 Principle of ‘beneficial entitlement of assets’

The case of *Prest v Petrodel Resources Ltd*²³ is a further example of an innovative fact sensitive approach to family law undertaken by the Supreme Court in the past judicial year. In particular, this case concerned the interaction of a corporate law doctrine known as ‘piercing the corporate veil’ with an obligation based in family law to ensure an equitable distribution of assets in the context of an action for ancillary relief as part of a divorce settlement.²⁴ In deciding the case, the Supreme Court unanimously overturned the decision of the Court of Appeal,²⁵ ordering that seven properties vested in Petrodel Resources Ltd be transferred to the former wife in part settlement of a £17.5 million award in her favour. This

²⁰ *In Re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60.

²¹ *Ibid*, para 1 (Baroness Hale).

²² *Ibid*, paras 6-13 (Baroness Hale).

²³ *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

²⁴ Matrimonial Causes Act 1973 s 24(1).

²⁵ *Prest v Petrodel Resources Ltd* [2012] EWCA Civ 1395.

decision was justified on the basis that the husband was the beneficial owner of the properties under a trust, a result based on the peculiar circumstances of the case.²⁶

In addition to the main finding of the case, Lord Sumption also made a series of observations concerning the scope of the doctrine of ‘piercing the corporate veil’. In particular, it was observed that the corporate veil may be pierced only in exceptional cases, specifically where no alternative remedy was available.²⁷ This possibility was also to be construed narrowly so as to prevent the abuse of corporate legal personality. Since such exceptional circumstances were not present in this case, the Court also elaborated upon the doctrines of ‘evasion’ and ‘concealment’. These actions suggested that the Court must look behind the façade to identify the true nature of the transaction where the company has been interposed to conceal an impropriety or where an individual deliberately seeks to evade an existing legal obligation.²⁸

Within this judgment, the fact sensitive approach adopted by the Justices is clearly accentuated. The strategy of refraining from overturning the established law relating to the concept of piercing the corporate veil whilst also granting an apparently just verdict is undoubtedly commendable. This case ultimately suggests a progressive trend, wherein the Court has even been able to reaffirm that the doctrine of piercing the corporate veil will be exercised in limited circumstances, a position previously advanced by the Court in the case of *VTB Capital Plc v Nutritek International Corporation and Others*.²⁹ This judgment therefore also serves as a positive precedent for discouraging personal assets being included in the corporate structure as a means of protecting them from such divorce settlements.

4 Critical Appraisal

When focusing upon the approach of the Supreme Court with respect to family law matters, a changing trend is clearly visible. Both the concepts of protecting the ‘interest of the child’ and the ‘beneficial entitlement of assets’ directly indicate a more fact sensitive assessment of family law disputes is being adopted. It is essential to observe that each of the cases concerning children involve a high

²⁶ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, paras 45-7 (Lord Sumption).

²⁷ *Ibid*, para 27 (Lord Sumption).

²⁸ *Ibid*, para 28 (Lord Sumption).

²⁹ *VTB Capital Plc v Nutritek International Corporation and Others* [2013] UKSC 5.

level of factual scrutiny of the complex familial relationships and a focus upon the impact of such relations upon the specific child concerned. The usage of past and present circumstances to determine the future developments with regard to the child has also proved to be an innovative feature of such an approach. Similarly in *Prest*, the concept of 'beneficial entitlement of assets' was used as a means to deliver a just decision. It is admirable that in such circumstances, the Justices succeeded in doing so by virtue of a close analysis of the facts. In each case, it was therefore possible to achieve what is undoubtedly a more equitable outcome between the parties.

In addition, the high dependence on the factual interpretation of the situation in such contexts ultimately ensures that the complex familial relations and their impact on the individuals are highlighted before the Court. This ensures that such cases are not decided based on a strait-jacket, mechanical formula wherein the main issues are tackled with solely a rigid legal outlook. Since family law disputes involve a foundational, functional but rapidly changing unit of society, it is therefore also important that the law is prepared to take into account societal developments and the complex nature of such relationships in its approach to such issues.

Nevertheless, this approach also brings to the forefront certain valid concerns. Most importantly, if Courts rely too heavily on a fact-based interpretation, such an approach could prove to be fatal for the authority of precedents. If every case is distinguished on trivial facts, the predictability and consistency of the judicial system will be at stake. Also, a factual interpretation will become highly dependent on the subjectivity of the judge. With a high degree of subjectivity and discretion attached to factual interpretation, judgments may therefore become based more on opinion than reason. In addition, it is also essential that in refraining from interfering with the family, protection of children from deliberate harm and / or harm due to neglect is not compromised. Undue emphasis on non-interference in family matters may well cause harm which could have otherwise been prevented.

5 Conclusion

To conclude, a more fact sensitive approach by the Supreme Court in matters relating to family law in the past judicial year is quite apparent. Where necessary, the Court has distinguished the specific facts of each case from past cases and legal precedents in order to minimise interference with the familial rights of the

parties. Such an approach can be considered to be essential both for preventing undue harm in the personal sphere of family life and also ensuring the rights of the parties to justice, not least because the particular circumstances of each case are too varied for decisions based purely on legal precedent to be completely just. This has the benefit of allowing for flexible adjudication of future cases based on the specific facts of the relevant case rather than mandating a purely legal adjudication without consideration of individual factual differences, something which is particularly important in this context.

As a result of the nature of family law cases however, a fact sensitive approach brings with it a number of risks, most importantly that of a potential lack of consistency and predictability. As such, courts are ultimately required to strike a balance and only utilize such an approach where the factual scenarios present are in fact different. Only when Judges are cautious and capable of highlighting the relevant differences between the cases can such an approach endure the test of time and facilitate the administration of justice in this field. If the emerging fact sensitive approach is plagued with a high degree of subjectivity and decisions therefore based more on opinion, this approach will remain a passing phase. The burden is therefore upon the Judges to ensure that this approach does not merely remain a transient phase seen in sporadic judgments. It is hoped that this goal can be achieved in the cases that lie ahead.

HUMAN RIGHTS LAW

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1 Introduction

The UK Supreme Court's approach to human rights adjudication in 2012–2013 in the face of the European Court of Human Rights (ECtHR) was one of measured sensitivity. On the one hand, the UK Supreme Court showed an openness to draw on the jurisprudence and doctrines of the ECtHR, and on the other hand, it retained a consciousness of its different role to that multinational court. In 2012–2013, the UK Supreme Court had two cases in respect of which the appellants sought rulings that the ECtHR had previously held could only be made in 'exceptional circumstances'. In one of these cases, *Kapri v Lord Advocate representing Government of the Republic of Albania (Scotland) ('Kapri')*,¹ the UK Supreme Court applied ECtHR jurisprudence, despite the fact that the claim was more general in nature than any that had ever come before the European court. In the second of these cases, *Smith v Ministry of Defence, Ministry of Defence v Ellis and Ministry of Defence v Allbutt and others*² (*Smith v MOD*), the UK Supreme Court's use of ECtHR precedent led it to overturn its previous position on the scope of Article 1 of the European Convention of Human Rights ('ECHR' or 'the Convention').³ Further reflecting the influence of European judicial reasoning, the UK Supreme Court in 2012–2013 also considered and developed the doctrine of proportionality in a number of cases. Proportionality was at the heart, for example, of both *In the Matter of B (a Child)*⁴ and *R v Waya*,⁵ and was also significant in a number of other cases involving Article 8 of the Convention and Article 1 of the First Protocol to the Convention that are beyond the scope of this paper.

¹ [2013] UKSC 48.

² [2013] UKSC 41.

³ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

⁴ [2013] UKSC 33.

⁵ [2012] UKSC 51.

Therefore, in both its reasoning and its adoption of precedent, the picture of the UK Supreme Court that emerges is one of a court sensitively negotiating its role and relationship vis-à-vis the European court with respect to human rights adjudication.

2 The United Kingdom Supreme Court's Measured Sensitivity towards European Court of Human Rights Jurisprudence

In 2012–2013, the UK Supreme Court was confronted with two landmark human rights cases that sought rulings that the ECtHR had previously held could only be granted in 'exceptional circumstances'.⁶ What emerges, above all, about the UK Supreme Court's approach in these cases is the extent to which the Court drew on ECtHR jurisprudence as a central part of its reasoning. *Kapri*,⁷ the first of these cases, concerned whether extraditing the appellant to Albania would interfere with his right to liberty and his right to a fair trial under Articles 5 and 6 of the Convention respectively. In bringing the claim, Mr Kapri put forward evidence of systemic judicial corruption in Albania. This argument before the UK Supreme Court was unique in that the threshold test for a denial of justice had previously only been advanced in relation to the specific circumstances of a particular individual's trial in question. The generality of the claim is striking, as the Court noted that a finding in favour of the appellant would mean that every extradition to Albania for retrial would be affected, and so would cases concerning other states where systems were arguably even more corrupt and with which the UK has extradition agreements.⁸

The uniqueness of the claim meant that the UK Supreme Court did not have a clear precedent for the test to be used in assessing the systemic judicial corruption of an entire judicial system. Nonetheless, it is significant that the UK Supreme Court drew on the ECtHR's threshold test that had been previously used to assess objections to a particular individual's risk of an unjust trial developed in *Mamatkulov and Askarov v Turkey*,⁹ which had been approved in the House

⁶ *Insanov v Azerbaijan* (Application No 16133/08) unreported, 14 March 2013, para. 184 and *Banković v Belgium* (2001) 11 BHRC 435, para 67.

⁷ *Kapri*, above n 1.

⁸ *Ibid*, para 27.

⁹ (2005) 41 EHRR 494.

of Lords case *EM (Lebanon) v Secretary of State for the Home Department*.¹⁰ The threshold test was whether the appellant's trial in Albania would result in 'a flagrant denial of justice'.¹¹ Whilst the UK Supreme Court did not ultimately find that the case fell within the 'exceptional circumstances' envisaged by the threshold test, the Court did unanimously allow Mr Kapri's appeal and remitted the case to the High Court of Judiciary for further consideration,¹² thereby entertaining the possible success of the claim. What we see, then, in the *Kapri* case is the UK Supreme Court's willingness to draw on a test developed by the ECtHR for a more narrow set of facts, applied by the Court in a more general context so as to ascertain whether a finding should be made.

In the joint case of *Smith v MOD* the UK Supreme Court further demonstrated marked sensitivity to ECtHR jurisprudence in a second human rights case seeking a finding only to be made in 'exceptional circumstances'.¹³ *Smith v MOD* raised claims under Articles 1 and 2 of the Convention arising out of the deaths of three, and the serious injury of two, young British servicemen in Iraq. Whilst the Court's treatment of the Article 2 claim is beyond the scope of this paper, the Court unanimously held that the jurisdiction of the UK under Article 1 of the Convention extended to British servicemen when serving abroad.¹⁴ The Court, drawing on the ECtHR case *Al-Skeini v United Kingdom*¹⁵ ('*Al-Skeini*'), unanimously recognised that the otherwise territorially-limited jurisdiction of the Convention could be extended extra-territorially in the 'exceptional' case¹⁶ where the state exercises authority and control over members of the armed forces through its agents.¹⁷

Smith v MOD marked a significant departure from its own ruling three years earlier on this issue in *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner*¹⁸ ('*Smith*'), holding it to be 'inconsistent' with the recent guidance given by the ECtHR in *Al-Skeini*.¹⁹ In its 2010 decision, the Court had been divided on the jurisdictional issue by 6:3,²⁰ with the majority holding that the ECHR

¹⁰ [2009] UKHL 64.

¹¹ *Kapri*, above n 1, para 29.

¹² *Ibid*, para 35.

¹³ *Banković*, above n 6, para 67.

¹⁴ *Smith v MOD*, above n 2, para 55.

¹⁵ *Al-Skeini v United Kingdom* (55721/07) (2010) 53 E.H.R.R. 18.

¹⁶ *Smith v MOD*, above n 2, para 46.

¹⁷ *Ibid*, paras 42–52.

¹⁸ [2010] UKSC 29; [2011] 1 A.C. 1.

¹⁹ *Smith v MOD*, above n 2, para 55.

²⁰ The dissenting judges were Lord Mance, Lady Hale and Lord Kerr.

contracting states would not have intended the Convention to cover their armed forces outside their territories.²¹ The Court's departure from its 2010 decision illustrates the high degree of significance that the UK Supreme Court accorded to ECtHR case law.

What is noteworthy about these 'exceptional' cases is the UK Supreme Court's openness to ECtHR jurisprudence and reasoning. It may well be counter-argued that in the same legal year the UK Supreme Court *prima facie* took a different approach in respect of Strasbourg jurisprudence in *R (on the application of Faulkner) v Secretary of State for Justice; R (Sturnham) v The Parole Board of England and Wales*²² ('*Faulkner*'), which concerned the amount of damages that should be awarded in the case of false imprisonment. In that case, Lord Reed drew a distinction between 'tak[ing] into account' ECtHR jurisprudence, to which UK courts are directed by section 2(1) of the UK Human Rights Act 1998, and necessarily following such jurisprudence—saying, 'the words "must take into account" are not the same as "must follow"'.²³ Lord Reed further observed that the difference between the international nature of the ECtHR and the domestic nature of UK courts was particularly significant with respect to the awarding of damages.²⁴ He held that it was sufficient for UK courts to 'pitch their awards at the general level indicated by Strasbourg awards in comparable cases'.²⁵ Whilst ostensibly the UK Supreme Court's approach in the 'exceptional cases' discussed above and *Faulkner* seem opposed, instead arguably all three cases show a measured respect towards ECtHR jurisprudence. That is, in *Faulkner*, on the one hand, the Court goes to pains to explain its departure from some ECtHR jurisprudence, and to align its decision at least to the 'general level' of ECtHR precedent. On the other hand, the Court articulates that it has clear differences from the ECtHR of which it must remain conscious. Therefore, what emerges from these three cases is a picture of the UK Supreme Court in the process of negotiating its ongoing role in the face of the ECtHR with conspicuous sensitivity on the one hand and an awareness of where it diverges from the supranational court on the other.

²¹ *Smith*, above n 18, para 25.

²² [2013] UKSC 23.

²³ *Faulkner* [2013] UKSC 23, para 33.

²⁴ *Ibid*, para 34.

²⁵ *Ibid*, para 35.

3 Proportionality

Not only did the UK Supreme Court in 2012–2013 continue to draw on ECtHR jurisprudence in making its determinations, but the domestic court also further developed the test of proportionality over that time. Proportionality is a test which the UK courts originally borrowed from European jurisprudence and that has no origin in UK legislation or common law.²⁶ In this way, the UK Supreme Court's ongoing use and development of proportionality as a doctrine is yet another manifestation of the influence of the ECtHR on the UK Supreme Court in adjudicating human rights disputes.

The place of proportionality as a separate ground of review came to a head in *In the Matter of B (a Child) (Re B)*.²⁷ The case concerned whether the trial judge's care order in relation to a child, which represented an interference with the child's right to respect for family life under Article 8, was nonetheless defensible and necessary in a democratic society for the protection of the right of the child to grow up free from harm. Each member of the UK Supreme Court held that the threshold conditions for making a care order in relation to a child under subsection 31(2) of the Children Act 1989 had been met.²⁸ The Court split, however, regarding whether the correctness and the proportionality of a lower court's care decision were one and the same inquiry, or whether they were in fact separate considerations.

For Lord Wilson, Lord Neuberger and Lord Clarke, the role of an appellate court is simply to determine whether the trial court's decision is defensible.²⁹ Indeed, Lord Neuberger opined that treating proportionality as a separate ground for review involved assuming that an appellate court's primary role was to reconsider rather than review, without the trial court's benefit of hearing evidence and seeing witnesses.³⁰ With great respect to the views of Lord Wilson, Lord Neuberger and Lord Clarke, the idea that the trial judge is in a better position to make an assessment as to the proportionality of a measure than an appellate judge may overstate the factual dimension of the proportionality

²⁶ Lady Justice Arden DBE, 'Proportionality: The Way Ahead? United Kingdom Association of European Law Annual Address,' Judiciary of England and Wales, 15 November 2012, <<http://www.judiciary.gov.uk/media/speeches/2012/lj-speech-ukael-proportionality-15112012>> [accessed 30 December 2013].

²⁷ [2013] UKSC 33.

²⁸ *In the Matter of B (a Child)* [2013] UKSC 33, para 48 (Lord Wilson), para 64 (Lord Neuberger), para 131 (Lord Kerr), para 134 (Lord Clarke), para 214 (Lady Hale).

²⁹ *Ibid*, para 46 (Lord Wilson), para 91 (Lord Neuberger), para 139 (Lord Clarke).

³⁰ *Ibid*, para 90 (Lord Neuberger).

test. That is, proportionality may be variously defined or applied, but essentially involves examining a measure's impugned purpose, the relationship between the measure and the limitation on the right, the necessity of the measure to achieve its purpose, and the balance between the benefit gained by the measure and the loss suffered by an impact on the right.³¹ Whilst each of these assessments obviously draws on the facts in each case, its ultimate assessment is arguably one of 'evaluation'³² or judicial discretion, meaning that its assessment is eminently suited to appellate review.

Indeed, Lord Kerr, in the minority on this issue, opined that an inquiry into proportionality is not one which may be satisfactorily answered by the conclusion that another agency has so decided it.³³ Similarly, Lady Hale held that since the court that makes the final care decision is the public authority responsible for the invasion of Convention rights, that court must make a separate decision as to whether a lower court's correct decision was also proportionate to that invasion.³⁴ Moreover, as Lord Kerr opined, the appeal required the appellate court to confront the possibility that its decision could involve the infringement of a Convention right.³⁵ At heart, what underlies this debate is the question of what role this standard of review, so central to ECtHR reasoning, should play in the UK Supreme Court. For completeness, it should be noted that, whilst Lord Kerr held that proportionality was a separate consideration, he ultimately found that the trial judge's care order was proportionate anyway, thereby joining the majority in dismissing the appeal against the care order. Lady Hale, however, in a strong dissent, opined that the care order was not proportionate to the child's rights under Article 8 of the Convention.³⁶

The doctrine of proportionality was also at the heart of *R v Waya*.³⁷ The case concerned a defendant who had purchased a flat for £775,000 using £310,000 of his own honestly obtained money, whilst the remaining £465,000 came from a mortgage obtained through misrepresentation. Over time, the defendant's equity in the flat was found to be worth £1.1 million. The primary issue was

³¹ M Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8(2) *International Journal of Constitutional Law* 298. For a thorough review of the assessment of proportionality in the ECHR context, see Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002).

³² Lady Arden, above n 26, 3.

³³ *Re B*, above n 28, para 121 (Lord Kerr).

³⁴ *Ibid*, para 205 (Lady Hale, diss).

³⁵ *Ibid*, para 121 (Lord Kerr).

³⁶ *Ibid*, paras 194–198 (Lady Hale, diss).

³⁷ [2012] UKSC 51.

whether the defendant should be ordered to pay an amount equivalent to his entire interest in the flat in confiscation proceedings under the Proceeds of Crime Act 2002 (POC Act). Lord Walker and Sir Anthony Hughes held that, in order to comply with Article 1 Protocol 1 (A1P1) of the Convention, the section of the POC Act that required a confiscation order to be made that is equal to a defendant's 'recoverable' benefit from crime should be interpreted as being subject to the qualifying words, 'except insofar as such an order would be disproportionate and thus a breach of [A1P1]'.³⁸ Accordingly, the UK Supreme Court held that judges should refuse to make confiscation orders that disproportionately interfere with a person's rights under A1P1, and instead, substitute orders they regard as proportionate. Whilst the *indicia* of proportionality that the Court gave are beyond the scope of this paper,³⁹ the important point for our purposes is to note the extent to which the UK Supreme Court embraced the doctrine of proportionality in this case in order to make domestic legislation compatible with Convention rights. To put it another way, the UK Supreme Court drew on an ultimately European test in order to salvage domestic legislation from being declared illegal.

4 Conclusion

The UK Supreme Court's human rights adjudication in 2012–2013 on the one hand shows an openness to the jurisprudence and reasoning of the ECtHR. We saw this, for example, in the UK Supreme Court's willingness to apply ECtHR jurisprudence in new ways in *Kapri*; whilst in *Smith v MOD* the Court demonstrated a preparedness to overturn its previous position because of its inconsistency with ECtHR jurisprudence. On the other hand, Lord Reed's statement in *Faulkner* demonstrates that such an openness to ECtHR jurisprudence has by no means been applied uncritically by the UK Supreme Court, but rather in a manner that is conscious of the differences underlying domestic and multinational courts. Similarly, in our discussion of proportionality, we noted the UK Supreme Court's openness to the doctrine to some extent. Particularly in *Re B*,⁴⁰ however, it is clear once again that such openness is by no means uncritical, as the members of the Court in that case split over how such a test should be applied by a domestic court in the particular case before it. Therefore, the image with which

³⁸ *Ibid*, para 16.

³⁹ For such *indicia*, see *ibid*, paras 25–35.

⁴⁰ Above n 28.

we are left of the UK Supreme Court in its treatment of human rights adjudication in 2012–2013 is that of a court engaged in an ongoing process of negotiating its role with the multinational human rights court with caution and admirable sensitivity.

JURISDICTION AND DEVOLUTION ISSUES

Calum Docherty

Matthew Kennedy

1 Introduction

This year the UK Supreme Court has considered three related problems with regard to jurisdiction and devolution: its relationship with the executives of foreign states; its relationship with foreign courts; and its relationship with the courts and executives of the UK's own devolved entities. Whilst the particular problems raised in each case are both practically and doctrinally distinct, each reveals an aspect of the political limits to the UK Supreme Court's jurisdiction. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*¹ and *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah*² the limits imposed upon English courts by the principle of comity and the doctrine of Act of State respectively were illustrated. In three further cases, the Supreme Court gave guidance on the ambit of the UK's devolved bodies' legislative competence and the potential for constitutional review under the relevant devolution legislation. In *Local Government Byelaws (Wales) Bill 2012—Reference by the Attorney General for England and Wales*³ the UK executive requested the court to exercise its powers of pre-legislative scrutiny for the first time; in *Imperial Tobacco Ltd v The Lord Advocate (Scotland)*⁴ the statutory ground of reserved matters was invoked for the first time; and in *Salvesen v Riddell, Lord Advocate intervening (Scotland)*⁵ the court held for the first time that an Act of the Scottish Parliament was *ultra vires* and therefore 'not law'.

¹ [2013] UKSC 35.

² [2013] UKSC 48.

³ [2012] UKSC 53.

⁴ [2012] UKSC 61.

⁵ [2013] UKSC 22.

2 Comity

The issue in *Ust-Kamenogorsk* was whether, outside of the 'Brussels/Lugano space', 'the English court has any, and if so what, power to declare that [a] claim can only properly be brought in arbitration and/or to injunct the continuation or commencement of the foreign proceedings.'⁶ The Kazakh Supreme Court had previously ruled that the arbitration clause was invalid. However, both Burton J at first instance and the Court of Appeal held that 'they were not bound by the Kazakh court's conclusions in relation to an arbitration agreement subject to English law.'⁷ Proceedings were brought in the Specialist Inter-District Economic Court of East Kazakhstan Oblast where the appellant's application to stay the proceedings under the arbitration clause was dismissed. An anti-suit injunction was granted by the English Commercial Court, but attempts to rely on this were rejected by both the Economic Court and Regional Court.⁸ The Supreme Court upheld the trial judge's decision to grant an injunction pursuant to section 37 of the Senior Courts Act 1981. In doing so, Lord Mance eschewed the approach advocated in, for example, *Sokana Industries Inc and Others v Freyre & Co Inc. and Another*⁹ preferring the approach in *The Angelic Grace*¹⁰ which held that 'courts ought not to feel diffident about granting an anti-suit injunction,' because without it 'the claimant would be deprived of its contractual rights in a situation where damages would be manifestly an inadequate remedy.'¹¹ There will, however, still be 'some cases ... [where] the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement ...'¹²

An anti-suit injunction is 'directed not against the foreign court but against the party proceeding or threatening to proceed in the foreign court.'¹³ The object of the court's power is the party in breach, or threatening breach, of the agreement rather than the foreign court per se and the injunction therefore 'need entail no

⁶ *Ust-Kamenogorsk*, para 2 (Lord Mance).

⁷ *Ibid*, para 10 (Lord Mance).

⁸ *Ibid*, para 12 (Lord Mance).

⁹ [1994] 2 Lloyd's Rep 57.

¹⁰ [1995] 1 Lloyd's Rep 87.

¹¹ *Ust-Kamenogorsk*, para 25; see also para 58 (Lord Mance).

¹² *Ibid*, para 61 (Lord Mance).

¹³ J J Fawcett & J M Carruthers, *Cheshire, North & Fawcett Private International Law* (14th edn, 2008), 455; *Donohue v Armco Inc* [2002] 1 All ER 749, 757; *Turner v Grovit and Others* [2001] UKHL 65, para 23; moreover, granting an anti-suit injunctions does not require the English court to make any determination as to the jurisdiction of the foreign court: *ibid*, para 26.

disrespect to the foreign court'.¹⁴ However, 'there is, nonetheless, an implicit interference with the jurisdiction of the foreign court whenever the English court grants an [anti-suit injunction]'¹⁵ and concerns of comity in such cases have, therefore, long been recognised.

In *Airbus Industrie G.I.E. v Patel and Others*¹⁶ Lord Goff held that 'comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.'¹⁷ More recently, in *Star Reefers Pool Inc v JFC Group Co Ltd*,¹⁸ Rix LJ went as far as to hold that considerations of comity might be determinative of whether an injunction would be granted.¹⁹ What then accounts for the boldness with which the Supreme Court approached this issue in *Ust-Kamenogorsk*?

Firstly, as Fentiman has noted, under section 32 of the Civil Jurisdiction and Judgments Act 1982 the 'English courts shall not recognise foreign judgments obtained in breach of jurisdiction or arbitration agreements, and are not bound by decisions of foreign courts concerning the validity of such agreements.'²⁰ The court, therefore, had statutory authority for not accepting the Kazakh courts' decisions. Secondly, it was accepted that English law was to determine the effect of the arbitration agreement.²¹ Thus, any finding as to the effect of the agreement under Kazakh law could also be ignored.

Perhaps, however, a more general conclusion can be drawn. In *Airbus Industrie* Lord Goff stated, when formulating the general principle considered above, that he was not concerned 'with those cases in which the choice of forum has been, directly or indirectly, the subject of a contract between the parties.'²² This dictum and the development of the case law following *The Angelic Grace* has led J J Fawcett and J M Carruthers to argue that in cases where the foreign proceedings would be in breach of an agreement 'there is not the same concern with comity.'²³ In *Ust-Kamenogorsk* the respondents were relying on a contractual

¹⁴ R Fentiman, 'Anti-suit Injunctions—Comity Redux?' (2012) 71 *CLJ* 273, 273.

¹⁵ Fawcett & Carruthers, above n 13, 456.

¹⁶ [1999] 1 AC 119.

¹⁷ *Ibid*, para 138 (Lord Goff).

¹⁸ [2012] EWCA Civ 14.

¹⁹ See particularly *ibid*, para 40 (Rix LJ).

²⁰ R Fentiman 'Antisuit Injunctions and Arbitration Agreements' (2013) 72 *CLJ* 521, 522.

²¹ *Ust-Kamenogorsk*, para 61 (Lord Mance).

²² *Airbus Industrie*, para 138 (Lord Goff).

²³ J J Fawcett & J M Carruthers, above n 13, 470; see also 472-3 especially 475 regarding the development of the case law.

right not to be sued otherwise than in an agreed forum, and this clearly influenced Lord Mance's approach.²⁴ In this way, the decision in *Ust-Kamenogorsk* 'highlights the substantive rather than procedural character of injunctions to restrain the breach of dispute-resolution agreements ... such relief is concerned with the vindication of *contractual rights*, not (directly) with the allocation of jurisdiction.'²⁵ Furthermore, by 'championing the contractual rights of those who submit to arbitration *Ust-Kamenogorsk* is a reminder of how the enforcement of those rights is diminished in cases subject to the EU jurisdiction regime embodied in Regulation 44/2001.'²⁶

That the English courts are more willing to assert jurisdiction when they are of the opinion that the parties have either agreed to conduct any litigation in England, or should at least have expected that England would be the preferred forum, can also be seen from dicta in *VTB Capital plc v Nutritek International Corp and Others*²⁷.

In *VTB* one issue before the Court was whether there was a presumption that England was the appropriate forum for establishing that a tort had substantially taken place in the jurisdiction of the English courts. The appellants alleged that they had been induced to enter into a facility agreement by representations of the first defendant which was not a party to the contract. In considering the relevance of jurisdiction clauses in the agreement, Lord Mance held that 'the fact that the alleged torts were designed to induce the making of a loan facility agreement, under which England was accepted as the most appropriate and convenient forum is a potentially relevant factor' to the question of where the appropriate forum is.²⁸ It could not, however, 'determine the appropriate forum in which to decide whether there was in fact any such deceit ...'²⁹

In considering the same issue in relation to the fourth defendant, Mr Malofeev, Lord Neuberger said that 'it is true that, at least on the unchallenged evidence on behalf of VTB, Mr Malofeev was involved, and may have been instrumental in, negotiating the agreements in question, and he can therefore be said to have approved, or at least have had knowledge of, their terms ... [t]o that extent, it can come as no surprise to him that VTB wish to litigate a claim which,

²⁴ *Ust-Kamenogorsk*, paras 25, 26 and, by implication, para 58 (Lord Mance).

²⁵ Fentiman, above n 20, 524 (our emphasis).

²⁶ *Ibid.*

²⁷ [2013] 2 WLR 398.

²⁸ *VTB*, para 65 (Lord Mance).

²⁹ *VTB*, para 70 (Lord Mance).

at least on its case, arises out of those agreements, in London.³⁰

Lord Clarke, dissenting, was more forceful still: ‘the fact that those clauses were included in the agreement ... seems to me to be a strong pointer to the conclusion that the natural forum for the resolution of the dispute is England.’³¹

In *VTB* no proceedings were on foot in Russia and no issue of comity arose *per se*. The Supreme Court’s acceptance that the existence of a contractual agreement to submit to the non-exclusive jurisdiction of the English courts was relevant in determining the question of the appropriate forum for a tort claim being brought against a non-party confirms that the existence of a contractual right which bears upon the question of jurisdiction is an important factor influencing English courts’ willingness to assert jurisdiction, in both appropriate forum and anti-suit cases.

3 Act of State

In *Rahmatullah*, counsel for the Secretaries of State argued that the doctrine of Act of State, founded on the principle of comity, applies in respect of detention by a foreign state. It could not be said, he argued, that the Secretary of State had control for the purposes of *habeas corpus* as his ability to comply with the writ would be dependent on the reaction of a sovereign state to the diplomacy of the British Government. Both counsel for the respondent and the intervener argued that the Act of State doctrine had little or no application in the present case.

There is support for the latter proposition in Lord Kerr’s judgment in which he stated that:

[the] conclusion [that Mr Rahmatullah was unlawfully detained] depends on the effect of the Geneva Conventions, not on an examination of the legal basis on which the US might claim to justify his detention. ... This court is not asked to “sit in judgment on the acts of the government of another, done within its own territory” ... [t]he illegality in this case centres on the UK’s obligations under the Geneva Conventions. It does not require the court to examine whether the US is in breach of its international obligations ... [h]ere, there was evidence available to the UK that Mr Rahmatullah’s detention was in apparent violation of GC4. The illegality rests not

³⁰ *VTB*, paras 107 and 111 (Lord Neuberger).

³¹ *VTB*, para 221 (Lord Clarke); see also paras 222 and 234 (Lord Clarke).

on whether the US was in breach of GC4 but on the proposition that, conscious of those apparent violations, the UK was bound to take the steps required by article 45 of GC4.³²

Likewise, Lord Carnwath and Baroness Hale considered that it was not necessary 'to consider whether the detention [was] legal in any broader sense, in particular whether it [was] lawful from the perspective of the United States government.'³³ The question of illegality 'arises as between the applicant and the respondent, and then only if the respondent has "control"'.³⁴

Yet, despite his repeated statement that 'the legality of the US's detention of Mr Rahmatullah is not under scrutiny here'³⁵ Lord Kerr was of the view that '[t]he, presumably forcible, transfer of Mr Rahmatullah from Iraq to Afghanistan is, at least *prima facie*, a breach of Article 49. On that account alone, his continued detention post-transfer [was] unlawful.'³⁶ Furthermore, it was considered likely that Britain was under an obligation under Art 45 of GC4 to 'take effective measures to correct the situation or request the return of the protected person.'³⁷ For these reasons, '[t]here [could] be no plausible argument,' in Lord Kerr's opinion, 'against the proposition that there is clear *prima facie* evidence that Mr Rahmatullah is unlawfully detained and that the UK government was under an obligation to seek his return unless it could bring about effective measures to correct the breaches of GC4 that his continued detention constituted.'³⁸

It is, of course, accepted that the Supreme Court cannot determine the lawfulness of the actions of a foreign sovereign state³⁹ and it is not suggested that Lord Kerr's comments above should be understood as a judicial determination

³² *Rahmatullah*, para 53 (Lord Kerr).

³³ *Rahmatullah*, para 117 (Lord Carnwath and Baroness Hale).

³⁴ *Ibid.*

³⁵ *Rahmatullah*, para 70 (Lord Kerr).

³⁶ *Rahmatullah*, para 36 (Lord Kerr).

³⁷ *Rahmatullah*, para 37 (Lord Kerr).

³⁸ *Rahmatullah*, para 40 (Lord Kerr). See also para 53 (Lord Kerr).

³⁹ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for the Home Department* [2002] EWCA Civ 1598 was prayed in aid of this proposition in *Rahmatullah* para 66 (Lord Kerr). Note however the qualification to the general principle in para 57 (Lord Phillips). Hooper has argued that there 'is little practical difference between the decision of the Supreme Court in *Rahmatullah* and the decision in *Abbasi*' because of the court's 'absolute deference to the meaning accorded by the Government' to the US letter produced on the return of the writ (H J Hooper, 'Shining light on the darkness? *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence*' (2013) *PL* 213, 221). For a recent consideration of this see *Belhaj & Anor v Straw & Ors* [2013] EWHC 4111 (QB).

of the legality of the US's action. However, it is suggested that the acute tension, which the doctrine of Act of State raises in the context of an application for *habeas corpus* where the physical detention of the applicant is by a foreign state, does not seem to have been fully acknowledged in *Rahmatullah*.

Suppose, for the sake of argument, that on return of the writ it was held that the Secretaries of State *did* have sufficient control over the applicant then, according to Lord Carnwath and Baroness Hale's scheme, the question of the legality of detention arises. Lord Kerr stated that the question of illegality 'rests not on whether the US was in breach of GC4 but on the proposition that the UK ... was bound to take the steps required by Article 45 of GC4.'⁴⁰ Lord Carnwath and Baroness Hale, on the other hand, stated that 'the illegality of detention arose through the actions of the US, rather than the UK', but opined that 'it is difficult to see why this should make a difference in principle.' They reached this conclusion on the basis that 'illegality of detention is presumed in favour of the applicant,' and that it should therefore, 'not be a defence for the UK to say that it arose from someone else's action, if the UK had the practical ability to bring it to an end.'⁴¹

It is submitted that neither approach is unproblematic but that Lord Carnwath and Baroness Hale were correct to hold that the illegality of Mr Rahmatullah's detention arose through the actions of the US rather than the UK. Examination of Article 45 bears this out. The UK's obligations under Article 45 only arise when the accepting power 'fails to carry out the provisions' of GC4; that is, a breach of Article 45 by the UK presupposes an antecedent breach of the Convention by, in this case, the US. For this reason, both Lord Kerr and counsel for the applicant necessarily assume such a breach by the US. Lord Kerr's statement that

⁴⁰ *Rahmatullah*, para 53 (Lord Kerr). Indeed it was only the UK's putative obligation under GC4 and its right under the 2003 MOU, which enabled the Court to consider the application at all. Lord Reed, at para 115, stated that 'it is important, in my view, that Mr Rahmatullah was initially detained by British forces, with the consequence that the question was whether the Secretaries of State's control over him had been relinquished. But for that factor, I would find it difficult to see why the English courts should entertain an application which would otherwise have no real or substantial connection with this jurisdiction.' Likewise Lord Carnwath and Baroness Hale, at para 122, emphasise that the case 'rests ... on the ... basis that the UK was the original detaining power, that as such it has continuing responsibilities under GC4, and that it entered into an agreement with the USA giving it the necessary control for that purpose.' See also, T Eatwell, 'Selling the pass: habeas corpus, diplomatic relations and the protection of liberty and security of persons detained abroad' (2013) 62 *ICLQ* 727, 738.

⁴¹ *Rahmatullah*, para 123 (Lord Carnwath and Baroness Hale). The Court of Appeal accepted the 'presumption of illegality' argument but before the Supreme Court counsel for the respondent conceded that 'the respondent had to raise a prima facie case that he was unlawfully detained', *ibid*, para 27 (Lord Kerr).

‘the legality of the US’s detention of Mr Rahmatullah is not under scrutiny here’ may, therefore, be better understood as a statement of the limits of the Court’s jurisdiction; the legality of the US’s detention *cannot be* under scrutiny. Yet, as Lord Kerr’s own statements at paragraphs 36 and 40 illustrate, it was not possible to decide the case without making reference to the putative illegality of the US’s acts. The same is true for the applicant’s argument that a *prima facie* case of illegality could be made out on the basis of the UK and the US’s ‘clear violations of articles 45 and 49 of GC4’⁴² respectively.

For this reason, any final determination of the issue of illegality would therefore necessary involve a determination of the legality of the US’s actions, something the Supreme Court rightly considered itself unable to do. It is, however, unlikely that this issue would have arisen in practice. If the Secretaries of State had been found to have control, this would be on the basis that the US authorities acceded to their request for Mr Rahmatullah’s release (either pursuant to the MOU of 2003 or GC4). Mr Rahmatullah would have ceased to have been detained and the question of legal justification for any detention would necessarily fall away.⁴³

Lastly, it should be noted that the principle of comity cut both ways in *Rahmatullah*. Counsel for the Secretaries for State argued, in accordance with the US government’s position, that GC4 did not apply to Al-Qaeda operatives. Lord Kerr dismissed this argument as ‘simply not open to the Secretaries of State’ and noted that the UK government’s position was ‘plainly at odds with the stance taken by the US’.⁴⁴ As Eatwell notes, ‘[t]o adopt the US position would be to undermine the UK’s sovereignty by paying deference to another State’s opinion of the application of international law in clear contradiction to the UK government’s own policy.’⁴⁵

4 Legislative Competence

The *Welsh Byelaws* reference pertained to a Bill that streamlined provisions for making and enforcing local authority byelaws⁴⁶ by removing the requirement

⁴² *Rahmatullah*, para 27 (Lord Kerr).

⁴³ Lord Kerr recognises the inverse of this argument at para 23, i.e. if the question of legality can be determined the question of control falls away.

⁴⁴ *Rahmatullah*, para 34 (Lord Kerr).

⁴⁵ Eatwell, above n 40, 733.

⁴⁶ *Welsh Byelaws*, para 7 (Lord Neuberger).

that Welsh Ministers and the Secretary of State confirm the byelaw.⁴⁷ The Attorney General questioned whether sections 6 and 9 of the Bill fell within the competence of the Assembly, arguing that the provisions removing the Secretary of State's role in confirming byelaws would be invalid unless they were 'incidental to, or consequential on' another provision contained in the Bill.⁴⁸

Exercising its powers of pre-legislative scrutiny, the Supreme Court unanimously declared that the Welsh Assembly did not act *ultra vires*. It held that section 6 was lawful as the removal of the Secretary of State's confirmatory powers in relation to scheduled enactments would be incidental to, and consequential on, the Bill's primary purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments—and the primary purpose could not be achieved without this operative provision.⁴⁹ The Court held that section 9 was within the Assembly's legislative competence because the jurisdiction of the Assembly is strictly limited to removing, or delegating powers to remove, functions of the Secretary of State, and no wider powers were bestowed on the Welsh Ministers.⁵⁰ This conclusion would also be reached by invoking section 154(2) of the Government of Wales Act 2006, which states that a provision of a Bill which could be read in a way as to be outside the Assembly's legislative competence is to be read as narrowly as is required for it to be within that competence.⁵¹ While the oral and written arguments touched upon a number of broader constitutional issues, including the proper approach to the interpretation of the 2006 Act as a constitutional enactment, the Court did not deal with these issues in the instant matter, and Lord Neuberger's judgment notes that it is 'appropriate to leave them to be resolved if and when it is necessary to do so in a future appeal or reference.'⁵²

This opportunity came shortly afterwards in *Imperial Tobacco*, an appeal from the Inner House of the Court of Session that challenged the validity of an Act of the Scottish Parliament on the ground that it related to a matter reserved for the Westminster Parliament. Specifically, *Imperial Tobacco* argued that sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010—which prohibit the display of tobacco products for sale as well as tobacco

⁴⁷ This was previously required under section 236(11) of the Local Government Act 1972 and the National Assembly for Wales (Transfer of Functions) Order 1999.

⁴⁸ *Welsh Byelaws*, para 46 (Lord Neuberger).

⁴⁹ *Welsh Byelaws*, paras 52, 53, 54 (Lord Neuberger).

⁵⁰ *Welsh Byelaws*, para 63 (Lord Neuberger).

⁵¹ *Welsh Byelaws*, para 64 (Lord Neuberger).

⁵² *Welsh Byelaws*, para 69 (Lord Neuberger).

product vending machines—were outside the Scottish Parliament’s legislative competence.⁵³ The appellants principally argued that the Scotland Act 1998 reserves matters of ‘the sale and supply of goods to consumers’ and ‘product safety’ to the UK Parliament.⁵⁴

The Supreme Court unanimously dismissed the appeal. The Court firstly examined the purpose of sections 1 and 9 before assessing the rules in the 1998 Act to identify the tests that must be applied to reach a conclusion on the validity of sections 1 and 9. The Court found that sections 1 and 9 were designed to reduce the visibility of cigarettes and thereby reduce rates of smoking, which has little to do with the reserved matter of consumer protection and was therefore within the legislative competence of the Scottish Parliament.⁵⁵

In giving judgment, Lord Hope emphasised that the issue of legislative competence is essentially an exercise of statutory interpretation, outlining three principles for determining whether an Act of the Scottish Parliament is outside its competence: the court must firstly determine the question of competence according to the rules of the Scotland Act 1998,⁵⁶ then the rules must be interpreted as with any other statute⁵⁷ and finally the description of the 1998 Act as a constitutional statute cannot solely be taken as a guide to its interpretation.⁵⁸

This third principle is perhaps the most interesting, as the Supreme Court seems to back away from the earlier House of Lords position in *Robinson v Secretary of State for Northern Ireland and Others*.⁵⁹ While the *Robinson* decision held that the Northern Ireland Act 1998, as a ‘constitutional statute’, should be interpreted ‘purposively and generously’, both *Welsh Byelaws* and *Imperial Tobacco* limit this expansive approach. While Lord Neuberger specifically declined to comment on *Robinson* in *Welsh Byelaws*, Lord Hope noted that the description of the Government of Wales Act 2006 as a ‘constitutional statute’ should not be taken as a guide to interpretation and instead ‘must be interpreted like any other statute.’⁶⁰ He repeats this almost verbatim in *Imperial Tobacco*, noting that the description of the Scotland Act 1998 ‘as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation.’⁶¹ So while the Court does not

⁵³ *Imperial Tobacco*, para 3 (Lord Hope).

⁵⁴ *Imperial Tobacco*, para 25 (Lord Hope).

⁵⁵ *Imperial Tobacco*, para 42 (Lord Hope).

⁵⁶ *Imperial Tobacco*, para 13 (Lord Hope).

⁵⁷ *Imperial Tobacco*, para 14 (Lord Hope).

⁵⁸ *Imperial Tobacco*, para 15 (Lord Hope).

⁵⁹ *Robinson v Secretary Of State For Northern Ireland & Ors* [2002] UKHL 32.

⁶⁰ *Welsh Byelaws*, para 80 (Lord Hope).

⁶¹ *Imperial Tobacco*, para 15 (Lord Hope).

overrule *Robinson*, it confines the case to its facts and clarifies an approach for the interpretation of devolution statutes.

The legislative competence of the Scottish Parliament was further explored in the *Salvesen* case. The Supreme Court was asked to decide whether section 72 of the Agricultural Holdings (Scotland) Act 2003 – which altered rights to security of tenure for tenant farmers—was incompatible with the appellant’s rights to peaceful enjoyment of property under article 1 of the First Protocol to the European Convention on Human Rights⁶² (A1P1). Under section 29 of the Scotland Act 1998, an enactment is ‘not law’ if incompatible with Convention rights as enumerated in the Human Rights Act 1998. The finding of incompatibility,⁶³ while interesting, is perhaps less relevant to devolution jurisprudence than its effect: rather than immediately declaring the statute ‘not law’, the Court suspended the effect of its decision for twelve months⁶⁴ to allow the Scottish Parliament to remedy its breach of Convention rights, following Strasbourg jurisprudence upholding the importance of legal certainty.⁶⁵

5 Conclusion

The Supreme Court’s recent consideration of the doctrine of Act of State and the principle of comity illustrate the continuing importance of conventions to the harmonious operation of national courts in an increasingly international litigation environment. This, however, ought to be contrasted with the willingness with which the Supreme Court exercised its powers with respect to the UK’s devolved bodies. The Court’s approach in the devolution cases is brought into even sharper relief when contrasted with the extended consideration in *Rahmatullah* of the ‘forbidden territory’ of the UK government’s foreign policy.⁶⁶ Although in *Salvesen* the Court exercised some judicial deference to the Scottish Parliament in suspending its judgment, imagine the Supreme Court declaring an Act of the UK

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 262.

⁶³ *Salvesen*, para 51 (Lord Hope).

⁶⁴ *Salvesen*, para 57 (Lord Hope).

⁶⁵ *Salvesen*, para 56 (Lord Hope).

⁶⁶ See particularly, *Rahmatullah* para 60 and 68 (Lord Kerr); contrast Lord Phillips’ view in para 92; for an illustration of particular judicial deference see Lord Neuberger MR’s comments quoted at para 82 (Lord Kerr) and for an illustration of a position at the opposite end of the spectrum see para 129 (Lord Carnwath and Baroness Hale).

Parliament *ultra vires* and therefore 'not law'.⁶⁷ The reasons for the difference in approach are clear. On the one hand the extent of the court's power was, at least in Lord Hope's view, simply a question of statutory interpretation, on the other it is an issue which is determined in the penumbra of international and diplomatic relations. However, taken together, this series of cases helps to shed light on the developing contours of the UK Supreme Court's jurisdiction in its various guises.

⁶⁷ The Court's judgment in *Salvesen* also highlights the comparatively anodyne nature of declarations of incompatibility under s 4 of the Human Rights Act 1998.

PRIVATE LAW

Anjali Anchayil

Pierre Pêcheux

1 Introduction

The Supreme Court must, of necessity, adopt an incrementalist approach to decision-making. In the field of private law especially, the imperatives of morality and policy have less weight than they might in criminal or public law. Business people want certainty, and continuity comes at a premium, conducive as it is to economic efficiency. This does not preclude creativity, albeit that it must remain of a casuistical sort, drawing ever neater distinctions in order that a rule may be found that will do justice in the case. However, creativity has certain pitfalls: no matter how brilliant the judge, there is no guarantee that he will be fully understood by his colleagues on the bench, or by future practitioners. A good rule of law is one that can be followed with ease by a practitioner of only average ability. There is a risk that drawing new distinctions will open up fissures in the law in unexpected places, as new doctrines contradict old ones. For these reasons, much of the Court's work involves the upholding of precedent, and many of its cases produce results that are orthodox and unsurprising. This article will seek to give an overview of certain private law cases from the 2012–13 session, in which the Court has creatively expanded the law beyond its existing boundaries or used precedent to reach a novel solution.

2 *Pitt v Holt; Futter v Futter*

In *Pitt*,¹ a special needs trust, set up under advice from professional tax advisers, incurred a substantial liability to inheritance tax. This could have been averted by the inclusion of a provision to the effect that at least half the settled property was to be applied for Mr Pitt's benefit. In *Futter*, heard concurrently with *Pitt*, the trustees had received incorrect advice on how to minimise liability for capital

¹ [2013] UKSC 26.

gains tax by offsetting it against allowable losses. Both cases raised, *inter alia*, the issue of the application of the rule in *Hastings Bass*,² which was thought to allow the acts of trustees to be voided when done in ignorance of a relevant matter.

Lord Walker, who gave judgment for the court, began by highlighting the narrow basis of the judgment in *Hastings Bass*: that where a trustee had acted *ultra vires* in exercising a power of advancement, the disposition was voidable, not void, and since the statutory basis on which trustees exercise a power of advancement specified that the power had to be used for the benefit of any person entitled to the capital of the trust property,³ any disposition which had a detrimental effect could be said to be *ultra vires*.⁴ The rule on the basis of which Lord Walker eventually rejected the appeals is narrower: trustees' dispositions will only be voidable not void, and even then only when the failure to take into account relevant considerations is such as to amount to a breach of fiduciary duty.⁵ The ruling acts to prevent what Lord Walker, writing extra-judicially, had previously described as an expansion *ad absurdum* of the law whereby trustees would become a category much like minors, whose every act might be subject to invalidity.⁶

Until this judgment, it seemed settled that trustees had duties of administration and decision-making which they could not delegate.⁷ Someone under a non-delegable duty can be held liable for the negligence of their contractors, in the absence of a relationship of vicarious liability, even when they have been competent in contracting out the work.⁸ The upshot of *Futter*, however, is that where the trustee has been competent in taking into account professional advice, the adviser's negligence does not place the trustee in breach of duty: in that sense, it is delegable, contrary to previous authority. A distinction is drawn, however, between acts done outside the scope of the trustee's powers—for which they do bear strict liability—and acts done within the scope of their powers, but following incorrect advice.⁹ The result is that we might expect further debate on when a trustee acts *ultra vires*, and when merely in breach of duty.

² *In re Hastings Bass* (deceased) [1975] Ch. 25.

³ Trustee Act 1925 ss 31–32.

⁴ Per Lloyd LJ in the Court of Appeal's judgment (*Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197), approved in Lord Walker's judgment, above n 1, para 25.

⁵ *Pitt*, above n 1, paras 70–73.

⁶ R Walker 'The Limits of the Principle in *Re Hastings Bass*' (2002) 4 *Private Client Business* 226, 238–239.

⁷ Per Walker J in *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717; referred to in *Pitt*, above n 1, para 81.

⁸ See *Woodland v Essex County Council* [2013] UKSC 66.

⁹ Above n 1, paras 78–80.

3 *Benedetti v Sawiris*

In this case,¹⁰ Lord Reed, drawing on academic opinion, literature, and imagination clarified the law on how enrichment is valued in restitutionary claims. The only danger in engaging in such pyrotechnics is that there is no guarantee that one will have the field to oneself. Lord Clarke's judgment, which received approval from Lords Kerr and Wilson, made a similar overview of the field, sometimes contradicting Lord Reed's. But the latter is to be preferred for its conceptual clarity.

The facts in this case were complicated, but not complex. Strip away the elaborate corporate structure, what remains is that the claimant provided the defendant with brokerage services without entering into a contract. The main issue revolved around how the court should value the benefit by which the defendant was unjustly enriched, and whether this could be influenced by the subjective value the defendant attached to the benefit.

Lord Reed drew a distinction between what a party can negotiate on the market—which is an objective measure, i.e, one that does not take into account whether he actually values the benefit—and the value a party would be willing to part with to obtain the goods or services, which is an expression of the party's intentions and does not impact on his bargaining power in the market.¹¹ This turns the valuation exercise into a three step test. First we look at the ordinary value of goods on a market,¹² which can be very context-specific. Lord Reed takes an example from *Vanity Fair*, in which Becky Sharp sells horses at well above their usual price to an Englishman in Brussels who has heard false news of Napoleon's victory at Waterloo (the relevant market is that for horses in Brussels at that time). Secondly, we examine the way in which the market is altered by specific characteristics of the defendant: for example, a famous actress might be able to obtain a large reduction in the price of a designer dress because of the publicity she provides in wearing it. This last is still an objective measure. Finally, out of respect for the defendant's autonomy and freedom to prioritise spending, we allow the defendant to adduce evidence showing that he did not value the benefit.¹³ This is referred to as 'subjective devaluation' and since its rationale is respect for individual autonomy, there is no comparable reason to allow subjective over-valuation.¹⁴ It can be added that the latter would impose

¹⁰ [2013] UKSC 50.

¹¹ *Ibid*, para 101.

¹² *Ibid*, paras 104–109.

¹³ *Ibid*, paras 110–119.

¹⁴ *Ibid*, paras 120–121.

a cost on the defendant beyond that for which he might have been willing to bargain, and anyway tends to confuse the service received with the end-product benefit of that service.

Lord Clarke took the view that the inquiry should start by applying an objective test to the issue of market value, defined as what the reasonable person in the defendant's position would pay for the services.¹⁵ Lord Clarke proposed the example of D, who, wishing to ship coal, is willing to pay twice the market rate to ensure that he secures the services of C specifically. The contract is subsequently frustrated during shipping and C brings a restitutionary claim against D.¹⁶ The question is whether D is liable at the ordinary market rate or at the negotiated rate. Lord Clarke took the view that only the standard market rate would be payable and that to impose the pre-agreed rate would amount to measuring the enrichment based on the defendant's own higher subjective over-valuation. However, where Lord Clarke sees D's willingness to pay extra to secure C's services as a subjective measure, Lord Reed's approach leads to the view that it is merely one aspect of the market in which D operates. Lord Clarke's approach was to distinguish between a standard market price and one which the party pays by virtue of his special characteristics. In any specific case, it would be very difficult to ascertain how much of the price is attributable to market conditions and how much to a party's specific position. In markets such as insurance or stage-costumes for pop stars (in another of Lord Reed's colourful examples)¹⁷ there is no real difference between the two. Lords Reed and Clarke seem to be broadly in agreement, and yet they diverge in certain crucial details; as sometimes happens when jurists enter the esoteric debate of the objective/subjective distinction, seemingly well-defined concepts prove difficult to pin down.

4 *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*

The issue of validity of a European patent may arise in two sets of proceedings, one before national courts and the other before the European Patent Office ('EPO'). As the latter can take years to resolve, national courts are not encouraged

¹⁵ Ibid, paras 16–17.

¹⁶ Ibid, para 31.

¹⁷ Ibid, para 102.

to stay proceedings. In this case,¹⁸ which dealt with an alleged infringement of a patent relating to airline seats, Virgin had obtained a judgment awarding damages from the English Court of Appeal against Zodiac. However, prior to an inquiry for damages, the EPO declared the patent invalid for lack of novelty. Previous Court of Appeal decisions had ruled that in such a situation, the principle of *res judicata* meant that the defendant was barred from disputing the validity of the court's decision and remained liable for an infringement. Lord Sumption overruled these on the basis that cause of action estoppel was not absolute but existed only in relation to points actually determined by the previous application, or that could have been raised by the party at that time. It did not apply to something that could not have been raised, such as the invalidity of the patent, which was only established by the EPO afterwards, with retrospective effect.¹⁹ The decision represents a victory for common sense, cutting the ground from under incorrect case-law on *res judicata*, while urging reform on the part of the national courts and the EPO, which exercise concurrent jurisdiction.

Here, as elsewhere, a clarification in the law is also likely to generate new questions: as Lord Neuberger pointed out,²⁰ the situation is simplified by the fact that no damages had as yet been paid. Had the invalidity finding followed payment, it is uncertain on what basis restitution could have been ordered.

5 *The Catholic Child Welfare Society and others v Various Claimants and the Institute of the Brothers of the Christian Schools and others (Catholic Child Welfare Society)*

The law of vicarious liability has developed through judicial precedent to extend beyond the traditional master-servant relationship. This year, in *Catholic Child Welfare Society*,²¹ Lord Phillips delivered an insightful judgment covering two key issues—dual vicarious liability and the modern test of vicarious liability. This judgment is particularly significant for the creativity exhibited by Lord Phillips in considering these issues. The judgment dealt with the imposition of vicarious liability on an association of brothers ('the Institute') for acts of sexual abuse

¹⁸ [2013] UKSC 46.

¹⁹ *Ibid*, paras 16–27.

²⁰ *Ibid*, para 67.

²¹ [2012] UKSC 56.

committed by its members in their capacity as teachers. The management of the school had already been held vicariously liable and the issue in this judgment was whether the Institute could concurrently be held liable. While it is noted in the judgment itself that this decision would pertain to vicarious liability in relation to the sexual abuse of children,²² it is likely that the legal principles stated in this decision will also be applicable in other contexts.²³

5.1 Dual vicarious liability

The concept of dual vicarious liability was recognised by the Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others*.²⁴ *Catholic Child Welfare Society* developed this concept further by identifying the correct test to impute dual vicarious liability from the two tests adopted in *Viasystems* – the control test and the integration test. In *Viasystems*, Rix LJ had considered the level of integration of the tortfeasor in the work/business or organisation of both defendants to impute dual vicarious liability. *Catholic Child Welfare Society* adopted this test as the correct test.²⁵ From a policy perspective, this test considers the overall relationship between the tortfeasor and each of the defendants sought to be held liable, rather than mere control, and is more consistent with the enterprise risk justification for imposing vicarious liability.

5.2 Modern test of vicarious liability

Traditionally, the test of vicarious liability involved a two-step analysis considering: a) whether there was an employer-employee relationship between the defendant and the tortfeasor; and b) whether the tortfeasor was acting ‘in the course of his employment’ while committing the tort. However, in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*,²⁶ the Court of Appeal extended the scope of vicarious liability to relationships akin to the employer-employee relationship as it was ‘fair, just and reasonable’ to do so.²⁷ In *Catholic Child Welfare*

²² *Ibid*, para 3.

²³ The principles in *Lister v Hesley Hall Ltd*. [2002] 1 AC 215 in the context of vicarious liability for sexual abuse have been applied to other scenarios. See *Dubai Aluminium Co Ltd. v Salaam* [2002] UKHL 48.

²⁴ [2005] EWCA Civ 1151.

²⁵ Above n 21 para 45.

²⁶ [2012] EWCA Civ 938.

²⁷ As referred to in *Catholic Child Welfare*, above n 21, para 47.

Society, the Supreme Court adopted this approach. The Court held that the relationship between the Institute and the brothers was akin to that of an employer and an employee as the brothers were bound by vows to the Institute and obeyed its rules.²⁸ At a policy level, this approach extended vicarious liability to all situations where the relationship between the defendant and the tortfeasor included elements of an employer-employee relationship.

Furthermore, the Supreme Court replaced the concept of ‘course of employment’ with an inquiry as to whether there was a connection between the relationship between the defendant and the tortfeasor and the act or omission of the tortfeasor. The concept of ‘course of employment’ was first modified in *Lister v Hesley Hall Ltd.*,²⁹ where the House of Lords applied a ‘close connection’ test to hold the owners and managers of a school vicariously liable for acts of sexual assault committed by its warden as such acts were ‘inextricably interwoven’ into the execution of duties by the warden.³⁰ Unfortunately, *Lister* did not prescribe any criteria for determining a ‘close connection’ between a tort and the employment of the tortfeasor. In *Catholic Child Welfare Society*, this approach was clarified to some extent by stating that a close connection could arise where the risk of the tort was created or enhanced by the employment of the tortfeasor—i.e. if the tort became possible or more likely on account of the employment of the tortfeasor. At a policy level, this approach expanded enterprise risk to include torts made possible or more likely on account of employment.

6 *Day v Hosebay Limited; Howard de Walden Estates Limited v Lexgorge Limited (Day v Hosebay)*

The Leasehold Reform Act 1967 grants an expropriatory right to lessees to compulsorily acquire freeholds from their lessors. Since this right applies to houses only, defining the term ‘house’ assumes significance. However, courts have struggled to develop a reasonable understanding of the term. Section 2(1) defines a ‘house’ as: a) a building designed or adapted for living in; and b) a house reasonably so called. In *Day v Hosebay*,³¹ the Supreme Court made headway on this issue by creatively circumventing existing precedent in *Tandon v Trustees of*

²⁸ *Ibid*, paras 56–58.

²⁹ Above n 23.

³⁰ As referred to in *Catholic Child Welfare*, above n 21, para 68.

³¹ [2012] UKSC 41.

*Spurgeons Homes*³² (*Tandon*) to avoid an unjust outcome. In *Tandon*, Roskill LJ had laid down two legal principles derived from the decision in *Lake v Bennett*:³³ (a) that any building capable of mixed use could be considered as a house reasonably so called; and (b) that any building designed or adapted for living in would be considered a house reasonably so called, except in exceptional circumstances.³⁴ The implication of the first principle was that buildings used for commercial purposes, but also nominally considered as houses on account of factors such as inclusion in the English Heritage list, would be houses and their tenants would have an expropriatory right. In *Day v Hosebay*, Lord Carnwath restricted the application of this principle by emphasising the facts in *Tandon* and limiting this principle to buildings actually being used simultaneously for residential and non-residential purposes. The interpretation of the second principle was that the second element of the statutory definition had no real significance once the first element was satisfied, leading to unjust consequences where buildings designed as houses were later used for other purposes. Lord Carnwath stymied this principle by negating any presumption applying from the fulfilment of the first element to the second element of the definition. Therefore, Lord Carnwath, by creative employment of precedent, ensured that the expropriatory right granted under the Act did not exceed the bounds envisaged by Parliament.

7 Conclusion

A look at the judgments delivered by the Supreme Court this year indicates that by and large the nature of judicial developments has remained incremental. However, there have been cases in which the Court has exhibited a fair degree of creativity in expanding the law or using precedent to meet certain policy objectives. This approach demonstrates the willingness of the Court to play a constructive role in the development and maintenance of legal doctrine. It is trite to say that such willingness is the bedrock of a healthy common law system.

³² [1982] AC 755.

³³ [1970] 1 QB 663.

³⁴ As referred to in *Day*, above n 31, para 24.

OVERVIEW: ADMINISTRATIVE LAW

Bruno Gélinas-Faucher

The Supreme Court decided 16 cases involving aspects of administrative law in the 2012–13 legal year.

In *B (Algeria) v Secretary of State for the Home Department*,¹ the Court held that, where an appellate court has concluded that the basis on which the decision of the lower court to sentence someone for contempt is flawed, it does not follow that the sentence chosen by the lower court is inevitably wrong. In this case, the four-month sentence of the Special Immigration Appeals Commission was affirmed, albeit for different reasons from those articulated by the Commission. It was felt unnecessary to remit the case to the Commission on this issue.

Composed of a panel of nine judges, the Court issued two decisions regarding an Order for restrictive measures imposed by the Treasury under the Counter-Terrorism Act 2008 Schedule 7. In *Bank Mellat v Her Majesty's Treasury (No. 1)*,² the Court determined by a majority of six to three that it had the power to adopt a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under s 63(2) of the 2008 Act, and by a majority of five to four that it would be appropriate in this particular case to do so.

In *Bank Mellat v Her Majesty's Treasury (No. 2)*,³ the Court quashed the Treasury's Order on both substantive and procedural grounds. A majority of five Justices to four held that the Treasury's direction to restrict the access of an Iranian bank and its UK subsidiaries to the UK financial markets on the ground that it posed a significant risk to national security by providing banking services to those involved in the development or production of nuclear weapons in Iran was both irrational and disproportionate. A majority of six Justices to three further found that the restrictions were unlawful because of a failure to give prior notice or any opportunity to make advance representations.

¹ [2013] UKSC 4.

² [2013] UKSC 38.

³ [2013] UKSC 39.

In *BCL Old Co Ltd v BASF plc*,⁴ the Court held that the statutory limitation period for a claim for damages under the Competition Act 1998 s 47A and the Competition Appeal Tribunal Rules 2003 r 31 was sufficiently clear, precise, and foreseeable and did not breach European principles of effectiveness and legal certainty. The existence of arguable doubt or of the need for interpretation was not itself sufficient to render national law insufficiently foreseeable or to make it excessively difficult for the subjects of the law to know their legal position.

The appellant in *Davies t/a All Stars Nursery v Scottish Commission for the Regulation of Care (Scotland)*⁵ operated a children's nursery registered by the respondent Commission under the Regulation of Care (Scotland) Act 2001. The Commission served notice of its intention to cancel the nursery's registration. The nursery appealed, and during the process, the Public Services Reform (Scotland) Act 2010 was enacted, pursuant to which all the Commission's staff and resources were transferred to the Social Care and Social Work Improvement Scotland (SCSWIS). The Court held that the effect of the transitional provisions introduced following the enactment of the 2010 Act was that the SCSWIS took the place of the Commission as respondent to outstanding proceedings in relation to the regulation of care services as of April 1, 2011.

In *R (Sturnham) v Secretary of State for Justice*,⁶ the court determined that a prisoner serving a life sentence or an indeterminate sentence of imprisonment for public protection (IPP) who had served his tariff period and whose case had not been considered by the Parole Board within a reasonable period thereafter, was not the victim of either false imprisonment or a violation of the European Convention on Human Rights⁷ Art 5(1). Nevertheless, damages were ordinarily to be awarded for such delay where it was established that a violation of Art 5(4) of the Convention had resulted in the detention of a prisoner beyond the date when he would otherwise have been released. Where that was not established, modest damages were to be awarded where the delay in violation of Art 5(4) had caused sufficiently serious frustration and anxiety.

In a second judgement, *R (Sturnham) v Parole Board of England and Wales (No 2)*,⁸ the Court addressed the claim of Mr Sturnham that the Parole Board had applied the wrong test when deciding whether to direct his release from a

⁴ [2012] UKSC 45.

⁵ [2013] UKSC 12.

⁶ [2013] UKSC 23.

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

⁸ [2013] UKSC 47.

sentence of IPP. The Court dismissed the appeal and held, *inter alia*, that the test which the Parole Board should apply when considering whether to direct release from IPP, pursuant to s 28(6)(b) of the Crime (Sentences) Act 1997, was not the same as that which the sentencing judge had to apply in order to pass a sentence of IPP in the first place under s 225(1)(b) of the Criminal Justice Act 2003.

The question in *Imperial Tobacco Limited v The Lord Advocate (Scotland)*⁹ was whether s 1 and s 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 were outside the legislative competence of the Scottish Parliament for the purposes of the Scotland Act 1998 s 29. On a proper construction, it could not be said that their purpose 'relate[d] to' matters reserved by Schedule 5 Part II para C7(a) ('sale and supply of goods to consumers') and para C8 ('product safety'). The Court also held that s 1 and s 9 did not breach the restrictions in Schedule 4 because they did not modify Scottish criminal law as it applied to reserved matters.

In *McGraddie v McGraddie (Scotland)*,¹⁰ the Court addressed the role of appellate courts in respect to findings made by the trial judge. It restated long-settled principles and held that in the circumstances, the Extra Division had had no proper basis for concluding that the judge had gone plainly wrong in weighting the evidence related to the disposition of a house between family members.

The appellants in *Public Prosecution Service of Northern Ireland v Elliott*¹¹ sought to render fingerprint evidence inadmissible on the ground that it was taken using a device not approved by the Secretary of State as provided by the Police and Criminal Evidence (Northern Ireland) Order 1989 Art 61(8B). The Court dismissed the appeal and held that Parliament had not intended that a failure by the Secretary of State to authorise an electronic fingerprinting device for use means that any fingerprint evidence obtained as a result of using of such a device be automatically inadmissible.

In *R (Modaresi) v Secretary of State for Health*,¹² the Court held that the Secretary of State had not erred in refusing to exercise his discretion under the Mental Health Act 1983 s 67(1) to refer a mental patient's case to the First-tier Tribunal in circumstances where the tribunal had unlawfully declined to hear the patient's s 66 challenge to her detention. The patient still had a right of access to a tribunal to have her detention reviewed under s 3 of the 1983 Act.

⁹ [2012] UKSC 61.

¹⁰ [2013] UKSC 58.

¹¹ [2013] UKSC 32.

¹² [2013] UKSC 53.

*R (New College London Ltd) v Secretary of State for the Home Department*¹³ concerned the system for licensing educational institutions to sponsor students from outside the European Economic Area. The educational institutions contended that the Secretary of State's guidance on sponsors had involved the unlawful delegation of her powers and contained rules which were required to be laid before Parliament. In dismissing the appeals, the Court held that the Secretary of State had not delegated her power as she retained the last word on leave to enter or remain. The guidance was concerned with the position of the sponsor and did not have to be laid before Parliament.

The appellant in *RM v Scottish Ministers (Scotland)*¹⁴ was a patient detained in a non-state hospital who brought a claim for judicial review of the Ministers' failure to draft and lay regulations under s 268(11) and (12) of the Mental Health (Care and Treatment) (Scotland) Act 2003 before the Scottish Parliament. The lack of regulation prevented the appellant from making an application to the tribunal to review his detention for excessive security despite s 333 stating that the relevant provisions 'shall come into force on 1st May 2006'. The Court held that the failure to make the necessary regulations by or since that date had thus thwarted the intention of the Scottish Parliament and was unlawful.

In *Ruddy v Chief Constable, Strathclyde Police (Scotland)*,¹⁵ the appellant alleged that he was mistreated by police officers and that the investigation into the incident was ineffective. He commenced proceedings against the chief constable and the Lord Advocate in which he sought an award of damages at common law and under the Human Rights Act 1998. The Inner House of the Court of Sessions objected to the competency of the action in part because it held that the claims involving human rights questions should have been brought by way of judicial review. In rejecting the objection, the Supreme Court held that judicial review would have been an inappropriate action since the claims were in essence claims of damages where the appellant was not asking for the review or the setting aside of any decision of the Chief Constable or the Lord Advocate.

In *Uprichard v Scottish Ministers (Scotland)*,¹⁶ the Court held that Scottish Ministers had given adequate reasons under s 10(10) of the Town and Country Planning (Scotland) Act 1997 for their approval of a structure plan concerning future development around St Andrews. The appellant's objections had been adequately considered by the Ministers.

¹³ [2013] UKSC 51.

¹⁴ [2012] UKSC 58.

¹⁵ [2012] UKSC 57.

¹⁶ [2013] UKSC 21.

In *Zakrzewski v The Regional Court in Lodz, Poland*,¹⁷ the Court determined that a European Arrest Warrant was valid for the purposes of the Extradition Act 2003 s 2(6)(e) even if it contained particulars of separate sentences for multiple convictions which, after the issue of the warrant, were aggregated by a criminal court in the requesting state. The warrant was valid upon issue and it did not become invalid when the aggregation order was made despite its failure to specify 'the current operative sentence'. The requesting authority's conduct in persisting with extradition proceedings after the aggregation order was not therefore an abuse of process.

¹⁷ [2013] UKSC 2.

OVERVIEW: CIVIL PROCEDURE

Maximillian Evans

The Supreme Court decided six Civil Procedure cases in the 2012–2013 legal year.

The Supreme Court in *R (Prudential plc and another) v Special Commissioner of Income Tax*¹ confirmed that common law legal advice privilege is confined to advice given by lawyers, as distinct from other professionals. The appellants could not therefore refuse to disclose expert tax advice they had received from their accountants to the Inland Revenue. Lord Neuberger, giving the main majority decision, refused to extend privilege for three reasons: it would introduce uncertainty into the law; any change, and its proper ambit, was properly for Parliament; and the lack of forthcoming legislation, despite Parliamentary activity, suggested Parliament had chosen not to extend legal advice privilege to accountants giving tax advice. Lords Sumption and Clarke dissented: neither regarded Parliamentary inactivity nor potential uncertainty as sufficiently weighty to undermine what they saw as a client's functional right to privilege in relation to advice from any professional legal adviser.

The Supreme Court considered injunctions in two cases. The first, concerning freezing injunctions, was *Financial Services Authority v Sinaloa Gold plc (Barclays Bank plc intervening)*.² The Court unanimously held that the Financial Services Authority (FSA) should not be required to give a cross-undertaking in damages in respect of third party losses caused by a freezing injunction. The FSA was therefore able to continue its injunction freezing the defendant's assets in six bank accounts at Barclays Bank, without being required to give an undertaking in respect of losses caused to Barclays. Lord Mance, giving the judgment of the Court, confirmed that there is no general rule that a public authority acting pursuant to a public duty should be required to give a cross-undertaking; nor were there particular circumstances requiring such an undertaking on the facts of this case.

¹ [2013] UKSC 1.

² [2013] UKSC 13.

The second case discussing injunctions was *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*.³ The parties had contracted to submit any contractual dispute to arbitration in London. Nonetheless, JSC commenced proceedings against AES in the Kazakhstan courts. AES sought an anti-suit injunction from the Commercial Court, although no arbitration proceedings had begun nor were any intended to be commenced. JSC argued that the Arbitration Act 1996, which gives the court power to grant injunctions only in relation to arbitral proceedings, necessarily limited the inherent jurisdiction of the court under s 37 of the Senior Courts Act 1981 to grant an injunction in the absence of such proceedings. The Supreme Court unanimously rejected this argument. Lord Mance, giving the judgment of the Court, stated that a party may invoke the Court's inherent jurisdiction at any time to enforce the negative promise, implicit in the arbitration agreement, *not* to bring foreign proceedings: this jurisdiction exists whether or not arbitral proceedings are proposed or underway.

Two cases concerned the conditions relating to service out of the jurisdiction. The first was *VTB Capital plc v Nutritek International Corp and others*.⁴ VTB contended that it had been induced into entering a US\$225m loan agreement on the basis of fraudulent misrepresentations. It sought permission in England and Wales to sue a number of parties involved in the transaction. VTB further argued that where a tort is committed in England and Wales, there is a strong presumption that it is also the *forum conveniens*. The Court unanimously dismissed this point: the ultimate principle is that stated in *The Spiliada*,⁵ which requires that all the circumstances be taken into account. However, the Court divided on the application of the *Spiliada* test to the facts. Lords Mance, Neuberger and Wilson felt that Russia was the correct forum for the dispute: key issues in the case were factual, not legal, and the evidence was likely to be overwhelmingly Russian. Lords Clarke and Reed dissented. They felt that England was the correct forum since the critical ingredients of the tort took place in England, the loan agreement was governed by English law and the agreement also contained a non-exclusive English jurisdiction clause.

The second case concerning service was *Abela v Baadarani*.⁶ This discussed the interpretation of Rule 6.15(2) of the Civil Procedure Rules, which allows a court to order that steps already taken to bring a claim form to a defendant's

³ [2013] UKSC 35.

⁴ [2013] UKSC 5.

⁵ [1987] AC 460.

⁶ [2013] UKSC 44.

attention constitute good service. This order may only be made if there is 'good reason' to do so. The case itself concerned the service of a claim form by Mr Abela on the defendant's lawyers in Lebanon, a method of service that was not authorised by the judge's original order. The Supreme Court unanimously held that there was 'good reason' to grant a declaration in this case. Lord Clarke gave the main reasoned judgment of the Court. In his view, the main factors evidencing a 'good reason' were that the defendant was aware that the form had been served on his lawyers, that he was unwilling to disclose his own address, and that service by other methods had proved impractical in the past and would continue to do so in the future.

Lastly, the Supreme Court handed down an addendum judgment in *Daejan Investments Ltd v Benson*.⁷ This supplemented the main judgment in the substantive case of *Daejan Investments Ltd v Benson*.⁸ The substantive case concerned the failure of a landlord to comply with certain consultation requirements before carrying out services to a block of flats. After judgment was handed down, the parties disagreed as to the terms of the order that was to follow the decision. In its addendum judgment, the Court unanimously responded to eight disagreements between the parties. Lord Neuberger clarified the extent of the costs recoverable by the tenants and the landlord (issues one to four) and the time interest would begin to run on those costs (issues six and seven); ordered that the landlord's costs should not be included in any future service charges (issue five); and directed that the case be remitted to the Leasehold Valuation Tribunal, constituted either by a new panel or by the same panel which heard the original proceedings (issue eight).

⁷ [2013] UKSC 54.

⁸ [2013] UKSC 14.

OVERVIEW: COMPANY AND INSOLVENCY LAW

Angus O'Brien

The Supreme Court decided seven cases concerning company and insolvency law in the legal year 2012–2013.

*Rubin v Eurofinance SA; New Cap Reinsurance Corp Ltd v Grant*¹ concerned the enforceability in England of two foreign judgments, given in default of appearance, avoiding transactions in foreign insolvency proceedings. The principal issue was the applicability of the ordinary common law rule on the recognition and enforcement of *in personam* foreign judgments, which requires the presence of the judgment debtor in the foreign jurisdiction when the proceedings begin or submission to the foreign court's jurisdiction. The judgment creditors argued that the House of Lords' decision in *Cambridge Gas*² supported a special rule of universal recognition for judgments in foreign insolvency proceedings. A majority, led by Lord Collins (with whom Lords Walker and Sumption agreed) held that the ordinary common law rule applied.³ *Cambridge Gas* was wrongly decided.⁴ The common law rule could not be satisfied in *Rubin*, but in *New Cap* the judgment debtor had submitted to the jurisdiction of the foreign court by lodging a proof of debt in the liquidation and attending creditors' meetings.⁵ Lord Mance agreed with Lord Collins but reserved opinion on the correctness of *Cambridge Gas*.⁶ Lord Clarke (dissenting) held that an English court had jurisdiction to enforce an avoidance order made in foreign insolvency proceedings where the foreign court itself had jurisdiction over the insolvency proceedings.⁷

Conflicts of laws issues also arose in *VTB Capital plc v Nutritek International Corp*,⁸ where the Court considered the appropriate forum for a claim by the

¹ [2012] UKSC 46.

² *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

³ [2012] UKSC 46, para 115.

⁴ *Ibid*, para 132.

⁵ *Ibid*, paras 167–169.

⁶ *Ibid*, para 178.

⁷ *Ibid*, para 193.

⁸ [2013] UKSC 5.

appellant bank against three companies and their alleged ultimate beneficial owner, Mr Malofeev, for deceit and conspiracy in connection with a facility agreement entered with a fourth company. A majority (Lords Neuberger, Mance and Wilson; Lords Clarke and Reed dissenting) upheld the conclusion of the Court below that the appellant had not established that England was the appropriate forum.⁹ The Court also considered whether the corporate veil of the fourth company could be pierced so that Malofeev was liable for breach of the facility agreement. Lord Neuberger (the other Justices agreeing or substantially agreeing) held that this was not a case where the company was being used as a 'façade to conceal the true facts'.¹⁰ Nor was it appropriate to treat Malofeev as party to the contract when it was not suggested that the other contracting parties were not liable or that they intended to contract with him.¹¹ Notably, Lord Neuberger appeared sympathetic to the view that the court had no residual power to 'pierce the corporate veil'.¹²

In *Prest v Petrodel Resources Ltd* however,¹³ the Court unanimously confirmed that the separate legal personality of a company could be disregarded in certain circumstances,¹⁴ albeit not on the facts of that case. The specific issue under consideration was whether properties owned by two companies controlled by an ex-husband were properties to which the ex-husband was 'entitled, either in possession or reversion' under the Matrimonial Causes Act 1973, s 24(1)(a). The Justices unanimously held that they were because the companies held the properties on trust for the ex-husband.¹⁵ But they rejected the arguments based on piercing the veil. Giving the leading judgment, Lord Sumption stated that the corporate veil could only be pierced where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control'.¹⁶ The principle could only be invoked where its invocation was necessary; otherwise no policy imperative justified that

⁹ Ibid, paras 71 (Lord Mance), 113 (Lord Neuberger), 151, 154–157 (Lord Wilson).

¹⁰ Ibid, para 142.

¹¹ Ibid, paras 138, 140.

¹² Ibid, paras 121–130.

¹³ [2013] UKSC 34.

¹⁴ Ibid, paras 27 (Lord Sumption), 80 (Lord Neuberger), 91 (Baroness Hale, with whom Lord Wilson agreed), 98 (Lord Mance), 103 (Lord Clarke), 106 (Lord Walker).

¹⁵ Ibid, paras 55 (Lord Sumption), 57 (Lord Neuberger), 84 (Baroness Hale, with whom Lord Wilson agreed), 97 (Lord Mance), 103 (Lord Clarke), 104 (Lord Walker).

¹⁶ Ibid, para 35.

course.¹⁷

In *BNY Corporate Trustee Services Ltd v Eurosail-UK*,¹⁸ the Court considered the cash-flow and balance-sheet insolvency tests. The insolvency of an issuer of loan notes was an event of default under the applicable conditions, with priorities consequences for certain noteholders regarding repayment of the principal. Lord Walker (the other Justices agreeing) held that the cash-flow test is concerned not simply with the debtor's presently-due debt, but also with debts falling due in the 'reasonably near future'. Beyond that time period, the application of the cash flow test is speculative and the balance-sheet test should be applied, the burden of proof lying on the party asserting insolvency.¹⁹ That burden could not be discharged on the facts because the issuer's insolvency depended on several imponderables over the 30-year life of the debt.²⁰

Priority was also at stake in *In re Nortel GmbH (in administration); In re Lehman Bros International (Europe) (in administration)*.²¹ The Pensions Regulator issued a financial support direction under the Pensions Act 2004 requiring two companies in administration to support under-funded pension schemes operated by other companies within their corporate groups. The issue was whether the companies' potential liability under the FSD was an expense of the administration, a provable debt, or neither. The Court unanimously held that it was a provable debt, being a liability to which the companies became subject by reason of an obligation incurred before the date of the administration. Lord Neuberger (Lords Mance, Clarke and Toulson agreeing) held that a company relevantly incurred an obligation where it took or was subject to a step or steps with a legal effect resulting in its vulnerability to the particular liability.²² That test was satisfied because the companies' pension scheme and group arrangements made them precisely the type of entities intended to be rendered liable under the FSD regime.²³ Lord Sumption (Lords Mance and Clarke agreeing) concurred in separate reasons.

In *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands hf*,²⁴ the Court considered whether the administrators of a Scottish

¹⁷ Ibid, para 35.

¹⁸ [2013] UKSC 28.

¹⁹ Ibid, para 37.

²⁰ Ibid, paras 38, 49.

²¹ [2013] UKSC 52.

²² Ibid, para 77.

²³ Ibid, paras 84–85.

²⁴ [2013] UKSC 13.

subsidiary could set its claim against its parent Icelandic credit institution off against the parent's claim despite the subsidiary's claim having been extinguished under Icelandic law. The Court unanimously held that they could. Lord Hope (with whom the other Justices agreed) held that regulation 5(1) of the Credit Institutions (Reorganisation and Winding Up) Regulations 2004, which provides for EEA insolvency measures to have effect in the UK, is concerned only with an EEA insolvency measure in relation to a credit institution located in another EEA state. It did not apply to the administration of the Scottish subsidiary.²⁵

Finally, in *Digital Satellite Warranty Cover Ltd v Financial Services Authority*,²⁶ the question at issue was whether the sale of extended warranty cover under which the providers gave benefits in kind involved carrying out or effecting 'contracts of general insurance' under the Financial Services and Markets Act (Regulated Activities) Order 2001, article 3, in breach of the general prohibition on carrying out regulated activities without authorisation. Lord Sumption (the other Justices agreeing) doubted that the Council Directive to which the Regulated Activities Order relevantly sought to give effect covered contracts of insurance providing for benefits in kind.²⁷ The Directive did not however prevent member states from regulating further activities.²⁸ The Regulated Activities Order was an example of such regulation and applied to the warranty cover sold by the appellants.²⁹

²⁵ *Ibid*, paras 54, 58.

²⁶ [2013] UKSC 7.

²⁷ *Ibid*, para 4.

²⁸ *Ibid*.

²⁹ *Ibid*, paras 16-21.

OVERVIEW: CONSTITUTIONAL LAW

Chintan Chandrachud

The Supreme Court decided ten constitutional law cases in the legal year 2012–13.

In *Walton v Scottish Ministers*,¹ the Appellant appealed under Schedule 2 of the Roads (Scotland) Act 1984 against schemes and orders enabling the construction of a new road network around Aberdeen. He claimed that the schemes and orders were inconsistent with a European Parliament Directive² and were not in compliance with the rules of fairness under the common law. The Court held that the schemes and orders did not constitute a ‘modification’ of a ‘plan’ or ‘programme’³ within the meaning of the Directive and hence the Directive did not apply to them. Further, there was no material before the Court to suggest that the common law principles of fairness had been disregarded.

*Attorney General v National Assembly for Wales Commission*⁴ was a reference⁵ by the Attorney General for Wales on the question of whether Sections 6 and 9 of the Local Government Byelaws (Wales) Bill were within the legislative competence of the National Assembly for Wales. Section 6 sought to remove the power of the Welsh ministers and the Secretary of State to confirm certain byelaws. Section 9 empowered Welsh ministers to add to the list of byelaws which could be made without confirmation. The Court held that Section 6 was not beyond the legislative competence of the National Assembly, since it was ‘incidental to, or consequential on’⁶ other provisions of the Bill. It also held that the wide language of Section 9 of the Bill needed to be read restrictively so as to render the provision valid.

*Ruddy v Chief Constable, Strathclyde Police*⁷ involved a claim for damages against the Respondents for injury to the Appellant in police custody. The two questions before the Supreme Court were as follows. First, could the Appellant

¹ [2012] UKSC 44.

² *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment* [2001] OJ L 197/30.

³ *Ibid*, Art 2(a).

⁴ [2012] UKSC 53.

⁵ Government of Wales Act 2006 s 112.

⁶ *Ibid*, Schedule 7, Part 3, para 6(1)(b).

⁷ [2012] UKSC 57.

bring a claim for damages in respect of a substantive and procedural claim under Article 3 of the European Convention on Human Rights (*ECHR*) by way of an action, or was he required to do so by way of judicial review? Second, could the Appellant raise a common law assault claim and a substantive and procedural Article 3 claim in the same action? The Court rejected the argument that Article 3 claims needed to have been brought by way of judicial review. It also answered the second question in the affirmative, stating that although the claim involved separate wrongs, the Appellant was not asking for a decree for the Respondents to be found liable in a single lump sum. The guiding principle in such cases would be whether the way the action is framed is likely to lead to manifest inconvenience and injustice.

*RM (AP) v The Scottish Ministers*⁸ concerned a case in which the Respondents had failed to make regulations under section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003. This prevented the Appellant from applying to the Mental Health Tribunal for a declaration that he was detained in conditions of excessive security. The Supreme Court unanimously held that the failure of the Respondents to draft and lay the regulations was unlawful. The intention of Scottish Parliament was to ensure that the right to apply for a declaration under section 268 would be available by a certain date, an intention which had not been satisfied in this case.

In *Kinloch v Her Majesty's Advocate*,⁹ police officers used unauthorised surveillance to observe and record the criminal activities of the Appellant in public places. The questions which arose before the Supreme Court were whether the surveillance breached the Appellant's rights under Articles 6 and 8 *ECHR* and if so, whether the evidence procured from such surveillance could be relied upon at trial. The Court decided to consider the issues raised in the appeal even though on the face of it, the appeal was incompetent. It unanimously held that in the circumstances at issue the Appellant had no expectation of privacy in public places. Since the argument that Article 6 was breached rested on the alleged breach of Article 8, that argument also failed.

The question before the Supreme Court in *R (Prudential plc) v Special Commissioner of Income Tax*¹⁰ was whether legal advice privilege extended to legal advice given by accountants in relation to a tax avoidance scheme. The majority held that legal advice privilege did not extend to advice given by

⁸ [2012] UKSC 58.

⁹ [2012] UKSC 62.

¹⁰ [2013] UKSC 1.

non-lawyers, even where the person was qualified to give the advice, and that the extension of legal advice privilege to non-legal professionals should be left to Parliament. In dissent, Lord Clarke and Lord Sumption held that English law took a functional approach to legal advice privilege, and that the legal advice provided by accountants should be understood as falling within its scope.

*Salvesen v Riddell*¹¹ dealt with the question of whether section 72 of the Agricultural Holdings (Scotland) Act 2003 was compatible with the right to property guaranteed under Article 1 Protocol 1 ECHR. The effect of this provision was to deny the benefit of section 73 (which allowed landlords to terminate a tenancy at the end of its term by giving an intimation and serving a notice to quit) in all cases where a tenancy was purportedly terminated within a certain time period. The Supreme Court unanimously held that section 72(10) violated Article 1 Protocol 1 ECHR and was therefore beyond the legislative competence of Scottish Parliament. It went on however to suspend the effect of its finding until the correction of this defect.¹²

*Apollo Engineering v James Scott*¹³ concerned one aspect of the Supreme Court's jurisdiction to hear appeals in Scottish civil cases under section 40 of the Court of Session Act 1988. The Appellant was refused leave to appeal from the orders of the Inner House of the Court of Session. The Supreme Court held that the Appellant could competently appeal to the Court without the leave of the Inner House against that part of the order which dismissed the stated case, as long as the appeal raised a question which could be certified by counsel as reasonable.

*Bank Mellat v Her Majesty's Treasury (No 1)*¹⁴ concerned a challenge to validity of the Financial Restrictions (Iran) Order 2009 which effectively closed down the banking operations of Bank Mellat in the UK. Part of the proceedings challenging the order before the High Court had taken place in the form of a closed hearing, with the Court adopting a so called closed material procedure.¹⁵ The Supreme Court considered whether, in principle, it could itself adopt a closed material procedure in an appeal and if so, whether it was appropriate to do so in the case before it. By a majority of six to three, the Supreme Court held that it would be possible to conduct a closed material procedure in an appeal. Where a closed material procedure had been adopted in proceedings that were the subject of appeal, it would not be just for the Supreme Court to hear the appeal without

¹¹ [2013] UKSC 22.

¹² Scotland Act 1998 s 102(2)(b).

¹³ [2013] UKSC 37.

¹⁴ [2013] UKSC 38.

¹⁵ Counter-Terrorism Act 2008 Part 6.

considering the closed material. The minority considered that Parliament had not empowered the Supreme Court to adopt a closed material procedure, and doing so would breach the common law right to a fair trial. By a slimmer majority of five to four, the Court also found that it was appropriate to adopt closed material procedure in this appeal. The minority held that the Treasury had failed to establish that such a resort was absolutely necessary.

*Smith v Ministry of Defence*¹⁶ dealt with three sets of claims by British servicemen against the Ministry of Defence. Three distinct questions arose in relation to these claims: (i) were the Claimants (who at the relevant time were serving soldiers in Iraq) within the jurisdiction of the UK for the purposes of the ECHR? (ii) If so, to what extent did Article 2 ECHR impose a positive obligation to prevent the death of soldiers in active operations? (iii) Could the allegations of negligence (in relation to another set of claims) against the Respondent be struck out? On question (i), the Court held that the Claimants were within the jurisdiction of the ECHR, as extraterritorial jurisdiction could exist when a state exercised authority and control over an individual. On question (ii), the Court held that the circumstances would need to be inquired into in greater depth to determine if Article 2 was breached. On the third question, the Court held that it would be premature for the claims to be struck out, since the doctrine of 'combat immunity' did not necessarily apply to them.

¹⁶ [2013] UKSC 41.

OVERVIEW: CRIMINAL LAW, EVIDENCE AND PROCEDURE

Jessie Ingle

The Supreme Court considered several diverse issues in criminal law, evidence and procedure throughout the 2012–13 judicial year.

The key issue in *R v Varma* was whether the Crown Court had the power to make a confiscation order after the defendant had received a conditional discharge for his offence.¹ The Court of Appeal's decision in *R v Clarke*²—that no confiscation order may be made in conjunction with an absolute or conditional discharge, because confiscation orders are punitive—was overruled.³ The Supreme Court instead found that section 6 of the Proceeds of Crime Act 2002 imposes a duty upon the Court to make a confiscation order if the criteria of section 6 are met.⁴ Whether such orders are punitive is irrelevant, section 13(4) obliges courts to leave out any confiscation order when deciding upon an appropriate sentence.⁵

The Court returned to the consideration of confiscation orders in *R v Waya*.⁶ The defendant had fraudulently obtained a mortgage, contributing to 60% of the purchase price of a flat, which subsequently increased in value.⁷ Having found that a confiscation order must conform to the test of proportionality so as not to violate Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR),⁸ the Court held that a proportionate order would operate upon the financial benefit derived from the use of the loan—a chose in action, the value of which was the increase in property price, i.e. 60% of the increase in the flat's value over the acquisition price.⁹

¹ [2012] UKSC 42, para 6 (Lord Clarke).

² [2009] EWCA Crim 1074.

³ *Varma*, above n 1, para 50.

⁴ *Ibid*, para 58.

⁵ *Ibid*, para 54.

⁶ [2012] UKSC 51.

⁷ *Ibid*, paras 36–8.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

⁹ *Waya*, above n 6, paras 35, 70, 78.

In several cases the Court examined recent controversial statutory initiatives. In *R (Gujra) v Crown Prosecution Service*, the Court examined the Crown Prosecution Service's contentious post-2009 policy to take over and discontinue private prosecutions that did not meet the evidential sufficiency test used for public prosecutions in the Code for Crown Prosecutors.¹⁰ Lords Wilson, Neuberger and Kerr found that the post-2009 policy did not frustrate the objects of Parliament's reaffirmation of the right to private prosecution in section 6 of the Prosecution of Offences Act 1985.¹¹ However, in a strong dissent, Lord Mance emphasised that the right to private prosecution was a safeguard against authorities failing to pursue prosecutions, and drew a sharp distinction between the power to set standards for public prosecutions and the power to overtake private prosecutions.¹² Lady Hale asserted that the blurring of tests for public and private prosecutions could lead to violations of victims' rights under Articles 3 and 8 of the ECHR.¹³

The Court took the opportunity to discuss the short-lived statutory creation of imprisonment for public protection (IPP) in *R (Sturnham) v The Parole Board of England and Wales and another (No 2)*.¹⁴ The claimant sought judicial review after the Parole Board refused to grant him release, asserting that the Board had incorrectly applied the relevant test.¹⁵ The Court dismissed the appeal, holding that the tests for imposition of an IPP sentence and for release under parole were substantially different.¹⁶ The higher threshold of 'significant risk' for imposing the sentence was not relevant to the test for release, where the Board merely had to be satisfied that detention was 'necessary for the protection of the public'.¹⁷

The Court examined the ambit of section 3ZB of the Road Traffic Act 1998—causing death by driving while unlicensed, uninsured or disqualified—in *R v Hughes*.¹⁸ Allowing the appeal, the Court found that an essential element of legal causation was imported into the offence, that the accused must have done something other than simply putting his vehicle on the road while uninsured in order to be found responsible for a death.¹⁹

The issue of delay in criminal proceedings came before the Court in two cases.

¹⁰ [2012] UKSC 52.

¹¹ *Ibid*, paras 36, 55–7, 83.

¹² *Ibid*, paras 116–17 (Lord Mance, diss).

¹³ *Ibid*, para 133 (Lady Hale, diss).

¹⁴ [2013] UKSC 47 (Lord Mance).

¹⁵ *Ibid*, para 7.

¹⁶ *Ibid*, paras 2, 41, 54.

¹⁷ *Ibid*.

¹⁸ [2013] UKSC 56 (Lord Hughes and Lord Toulson).

¹⁹ *Ibid*, para 36.

In *R (Faulkner) v Secretary of State for Justice*,²⁰ the Court found that detention prolonged by delay from the Parole Board is not false imprisonment nor unlawful detention contrary to Article 5(1) ECHR, but may violate the right to a speedy review guaranteed by Article 5(4) ECHR.²¹ In assessing a violation of Article 6(1) ECHR in *O'Neill v HM Advocate*,²² the Court found that the guarantee of trial within a reasonable time was a separate guarantee from that of a fair hearing and that the date of the activation of these two rights may not be the same.²³ On the secondary issue of apparent judicial bias, the Court held that the judge's severe comments in the first of two related trials were spoken within the context of the proper performance of his duties, that the defendants did not object when the same judge heard their subsequent murder trial and as such, no apparent bias existed.²⁴

The Court pronounced on the relationship between the courts and tribunals in England and Wales in *Jones v First Tier Tribunal and Criminal Injuries Compensation Authority*, emphasising that an appeal court should not venture too readily into cases concerning special statutory schemes by classifying as issues of law issues that are best left to the specialist appellate tribunals.²⁵ The claimant's application for compensation was rejected by the First-Tier Tribunal on the basis that the injury, caused incidentally by another's act of suicide, was not attributable to a criminal offence. The Court emphasised that the finding of fact as to whether the deceased had committed an offence was one for the tribunal itself.²⁶

Several cases turned upon the Court's analysis of statutory construction and the importation of common law and constitutional principles into statutory interpretation. In *Hayes v Willoughby* the Court held that the defence in section 1(3)(a) of the Protection from Harassment Act 1997 imputed a requirement of rationality—the defendant was not rationally pursuing the 'harassment' to prevent and detect crimes, but irrationally held his conviction of the claimant's guilt before directing himself to his alleged purpose of preventing crimes.²⁷ Lord

²⁰ [2013] UKSC 23. The full title of the case is *R (Faulkner) v Secretary of State for Justice and another; R (Faulkner) v Secretary of State for Justice and The Parole Board; R (Sturnham) v The Parole Board of England and Wales and another*.

²¹ *Ibid*, para 13 (Lord Reed).

²² [2013] UKSC 36. The full title of the case is *O'Neill No 2 v HM Advocate (Scotland); Lauchlan v HM Advocate (Scotland)*.

²³ *Ibid*, para 36 (Lord Hope).

²⁴ *Ibid*, paras 53–7 (Lord Hope).

²⁵ [2013] UKSC 19, para 16 (Lord Hope).

²⁶ *Ibid*, para 17 (Lord Hope).

²⁷ [2013] UKSC 17, paras 2, 14–16 (Lord Sumption).

Reed dissented on the basis that Parliament had evinced no intention to import a rationality requirement into the test.²⁸

In *Public Prosecution Service v McKee*, the Court found that Parliament, in enacting legislation requiring fingerprint machines to be approved by the Secretary of State, was well aware of the common law rule that evidence unlawfully obtained is not automatically inadmissible.²⁹ As such, Parliament did not intend that the absence of approval for a device should render fingerprint-based evidence automatically inadmissible.³⁰

Through an assessment of legislative history and public policy, the Court found in *R v Brown (Northern Ireland)* that section 4 (carnal knowledge) of the Criminal Law Amendment Act 1885 (Northern Ireland) did not require proof that the defendant did not know or honestly believe that the girl was over the age of 13,³¹ despite the constitutional presumption that mens rea is needed in order to establish criminal liability.³²

Finally, in *Kapri v Lord Advocate* the Court examined the effect of the Scotland Act 2012 on the Court's jurisdiction in Scottish human rights cases.³³ Section 36(4) amends the definition of a 'devolution issue' to exclude questions arising in criminal proceedings.³⁴ Such questions are now 'compatibility issues', and the Court's power to review these issues is limited.³⁵ However, in this case the Court found that extradition proceedings are not criminal proceedings. As such, human rights questions arising in extradition proceedings are still devolution issues and subject to the full powers of review of the Court.³⁶

²⁸ Ibid, para 25 (Lord Reed, diss).

²⁹ [2013] UKSC 32, para 9 (Lord Hughes). The full title of the case is *Public Prosecution Service v McKee (Northern Ireland); Public Prosecution Service of Northern Ireland v Elliott (Northern Ireland)*.

³⁰ Ibid, para 19 (Lord Hughes).

³¹ [2013] UKSC 43, para 36 (Lord Kerr).

³² Ibid, paras 26–7.

³³ [2013] UKSC 48. The full title of the case is *Kapri v The Lord Advocate representing The Government of the Republic of Albania (Scotland)*.

³⁴ Ibid, para 15 (Lord Hope).

³⁵ Ibid, paras 15, 17 (Lord Hope).

³⁶ Ibid, para 23 (Lord Hope).

OVERVIEW: ECONOMIC AND SAFETY REGULATION

Lilit Nagapetyan

The UK Supreme Court decided four cases involving aspects of economic and safety regulation in 2012–13.

In two cases, the Supreme Court dealt with issues related to product safety. *Imperial Tobacco Ltd v Lord Advocate*¹ was the first case challenging the legislative competence of the Scottish Parliament to regulate in respect of reservations laid down by the Scotland Act 1998². The Appellant argued that the prohibition by the Tobacco and Primary Medical Services Act 2010 (the 2010 Act)³ of tobacco displays and of vending machines for the sale of tobacco products was outside the Scottish Parliament's competence. The Supreme Court applied a purposive approach to the interpretation of the 2010 Act and held that its purpose was to promote public health (which is a devolved matter) by reducing the attractiveness and availability of the products concerned and therefore did not relate to the regulation of the sale and supply of goods to consumers. The Supreme Court also established three principles which should be followed when determining whether the Scottish Parliament has exceeded its competence with regard to reserved matters,⁴ including 'the sale and supply of goods to consumers' and 'product safety'. Furthermore, Lord Hope found a wide interpretation of reserved matters inappropriate, taking into account that the Scottish Parliament had responsibility for Scots private law, which included the sale and supply of goods because they form part of the law of contractual obligations.

With the same reasoning, the Supreme Court rejected the Appellant's second argument, namely that the 2010 Act sought to modify rules of Scottish criminal law through the creation of new offenses which relate to the law on reserved matters. It concluded that there was no connection between them as the 2010 Act did not amend or affect the existing regulations. For these reasons the Supreme Court unanimously dismissed the appeal.

¹ [2012] UKSC 61.

² Scotland Act 1998 s 29.

³ The Tobacco and Primary Medical Services (Scotland) Act 2010 s 1 and s 9.

⁴ *Imperial Tobacco Ltd v Lord Advocate*, paras 12-5 (Lord Hope).

In *Torfaen CBC v Douglas Willis Ltd*⁵ the Supreme Court again dealt with issues of food safety offences under the Food Labelling Regulations 1996⁶. The issue raised on appeal was whether the act of selling food with an expired 'use by' date requires proof that the food was at the time of the offense, highly perishable and likely to constitute an immediate danger to human health. The Supreme Court unanimously allowed the appeal and reaffirmed the conclusion of the Divisional Court that the prosecution only had to show that the food being sold was the subject of a 'use by' label displaying a date which had passed. A different interpretation of the regulation's construction would seriously weaken the regulatory scheme and the protection provided to consumers⁷.

The issue of financial support direction (FSDs) liability was considered by the Supreme Court in *Re Nortel; Re Lehman; Re Lehman (No 2)*⁸. The case concerned FSDs which were issued in respect of company pension schemes after the companies had entered insolvent administration. The issue raised on appeal was how the liability under the FSDs would rank among the companies' other unsecured creditors. The Supreme Court allowed the appeal, overturning the decision of the Court of Appeal and held that externally administered companies within the Lehman Brothers group were not obliged to make financial contributions to a group pension scheme in priority to the companies' other debts. The Supreme Court followed a wide interpretation of 'provable debt' definition and concluded that according to the legislative intent, FSD liabilities should not be treated as expenses of the administration⁹ but rather as provable debts because they satisfy the Insolvency Rules 1986¹⁰ even though they were not issued until after insolvency. Such debts will therefore now rank equally with other statutory liabilities incurred by that company before insolvency.

Finally, in *Teal Assurance Co Ltd v WR Berkeley Insurance Ltd*¹¹ the Supreme Court confirmed the validity of an order in which the losses under a programme of excess liability insurance should be prioritised. The Supreme Court unanimously dismissed the appeal and concluded that where a programme of insurance cover consisted of different layers of excess insurance (including the top and drop cover as *in casu*), each loss had to be met in the order in which the insured's lia-

⁵ [2013] UKSC 59.

⁶ The Food Labelling Regulations 1996 s 44(1)(d).

⁷ *Torfaen CBC v Douglas Willis Ltd*, para 22 (Lord Toulson).

⁸ [2013] UKSC 52.

⁹ *Ibid*, paras 97-105 (Lord Neuberger).

¹⁰ The Insolvency Rules 1986, Rule 13.12(1).

¹¹ [2013] UKSC 57.

bility giving rise to a claim under the insurance was ascertained by agreement, judgment or award. The Supreme Court also concluded that subject to specific exceptions, each layer of excess insurance operates on the same terms and conditions. When each layer is exhausted, the next layer will become the underlying policy, as if it were the primary policy.

OVERVIEW: EMPLOYMENT LAW

*Daniel Brown**

The Supreme Court has dealt with nine cases of relevance to the field of employment in the legal year 2012–13.

In *Birmingham City Council v Abdulla & Others*¹ the Court held that court proceedings under Section 1(1) Equal Pay Act 1970 ('1970 Act') as amended² 'can never'³ be struck out on the ground that they 'could more conveniently be disposed of separately by an Employment Tribunal',⁴ if they would be time-barred in the Employment Tribunal (ET).⁵ Failure to present the claim in the ET is however a matter relevant to costs.⁶ The minority would have held that a court should consider all factors relevant to the interests of justice, including the reason for failing to present the claim 'in time'⁷ to the ET, in deciding whether the claim should be struck out.⁸

The 1970 Act was analysed further in *North v Dumfries and Galloway Council (Scotland)*,⁹ which concerned the meaning of the phrase 'in the same employment'.¹⁰ The Court clarified that, 'it is not the function of the "same employment" test to establish comparability between the jobs done.'¹¹ The object of the requirement is 'simply to weed out those cases in which geography plays a significant part'.¹² The appeal was allowed and the decision of the ET restored.¹³

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¹ *Birmingham City Council v Abdulla & Others* [2012] UKSC 47.

² Sex Discrimination Act 1975 (UK) s. 8(1).

³ *Birmingham City Council v Abdulla & Others* [2012] UKSC 47, para 29 (Lord Wilson).

⁴ Equal Pay Act 1970 (UK) s. 2(3).

⁵ *Birmingham City Council v Abdulla & Others* [2012] UKSC 47, para 29 (Lord Wilson).

⁶ *Ibid*, para 30 (Lord Wilson).

⁷ Equal Pay Act 1970 (UK) s. 2(4)(a) and s. 2ZA.

⁸ *Birmingham City Council v Abdulla & Others* [2012] UKSC 47, paras 46–48 (Lord Sumption, dissenting).

⁹ *North v Dumfries and Galloway Council (Scotland)* [2013] UKSC 45.

¹⁰ Equal Pay Act 1970 s. 1(6).

¹¹ *North v Dumfries and Galloway Council (Scotland)* [2013] UKSC 45, para 35 (Lady Hale).

¹² *Ibid*, para 35 (Lady Hale).

¹³ *Ibid*, para 42 (Lady Hale).

In *Jessy Saint-Prix v Secretary of State for Work and Pensions*,¹⁴ the Court considered whether a French woman who temporarily gave up work in the UK, due to the late stages of pregnancy and the aftermath of childbirth, retained the status of ‘worker’ (and therefore the right to claim income support)¹⁵ in the context of the right to free movement.¹⁶ The following questions were referred to the Court of Justice of the European Union (‘CJEU’):

1. Is the right of residence conferred upon a ‘worker’ in Article 7 of the Citizenship Directive to be interpreted as applying only to those (i) in an existing employment relationship, (ii) (at least in some circumstances) seeking work, or (iii) covered by the extensions in Article 7(3), or is the Article to be interpreted as not precluding the recognition of further persons who remain ‘workers’ for this purpose?
2. (i) If the latter, does it extend to a woman who reasonably gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy (and the aftermath of childbirth)? (ii) If so, is she entitled to the benefit of the national law’s definition of when it is reasonable for her to do so?¹⁷

In *Catholic Child Welfare Society v Various Claimants and Institute of the Brothers of the Christian Schools*,¹⁸ the Institute was held vicariously liable for acts of abuse allegedly committed by its members whilst they were teaching at a school.¹⁹ The test to be applied is a synthesis of two stages; the first requires consideration of whether the relationship between D1 (the abuser) and D2 is capable of giving rise to vicarious liability. Secondly, that relationship must have a sufficient connection with the act or omission of D1.²⁰ On the facts, the alleged abusers were installed as teachers pursuant to the mission of the Institute and their status as members of the Institute was treated as an assurance that they could be trusted.²¹ The case was not on the ‘borderline.’²²

¹⁴ *Jessy Saint-Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.

¹⁵ *Ibid*, paras 4–5 (Lady Hale).

¹⁶ *Ibid*, paras 6–9 (Lady Hale).

¹⁷ *Ibid*, para 22 (Lady Hale).

¹⁸ *Catholic Child Welfare Society v Various Claimants and Institute of the Brothers of the Christian Schools* [2012] UKSC 56.

¹⁹ *Ibid*, para 94 (Lord Phillips).

²⁰ *Ibid*, para 21 (Lord Phillips).

²¹ *Ibid*, paras 83–93 (Lord Phillips).

²² *Ibid*, para 94 (Lord Phillips).

In *X v Mid Sussex Citizens Advice Bureau*²³ the Court unanimously dismissed the appeal of a volunteer legal adviser against the judgment of the Court of Appeal that, as a volunteer, she fell outside the scope of protection against discrimination on the grounds of disability provided by the Disability Discrimination Act 1995. The Court also declined to make a reference to the CJEU.²⁴

*Barts and London NHS Trust v Verma*²⁵ concerned the interpretation of the NHS Terms and Conditions of Service²⁶ which provided pay protection for those undertaking an appointment in a lower grade role for the purpose of obtaining training.²⁷ The issue was whether the terms protected the *rate* or the *amount* of pay.²⁸ In unanimously allowing the appeal, the ‘ordinary principles of construction’²⁹ were applied. The ‘critical words’ clearly referred to the *rate*. The Court commented that, ‘this may be another case where it would have been better to leave the case where it stood following the consideration by the specialist appeal tribunal.’³⁰

In *O’Brien v Ministry of Justice (Formerly the Department for Constitutional Affairs)*³¹ the Court referred questions to the CJEU regarding the employment status of judges and discrimination against part-time judges.³² Subsequently,³³ the Court concluded that O’Brien (who had been a recorder) had enjoyed the requisite employment relationship³⁴ and was entitled to a pension on the same basis (adjusted pro rata temporis) as former full-time judges.³⁵ The less favourable treatment was not objectively justified.³⁶

In *President of the Methodist Conference v Preston*³⁷ the Court held that it could not find or imply a contract of employment between a minister of religion and the church in circumstances where the origin of the minister’s rights and duties ‘is to be found in the constitutional provisions of the Church and not

²³ *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59.

²⁴ *Ibid*, para 57 (Lord Mance).

²⁵ *Barts and London NHS Trust v Verma* [2013] UKSC 20.

²⁶ *Ibid*, para 2 (Lord Carnwath).

²⁷ *Ibid*, para 6 (Lord Carnwath).

²⁸ *Ibid*, paras 10–11 (Lord Carnwath).

²⁹ *Ibid*, para 26 (Lord Carnwath).

³⁰ *Ibid*, para 21 (Lord Carnwath).

³¹ *O’Brien v Ministry of Justice (Formerly the Department for Constitutional Affairs)* [2010] UKSC 34.

³² *Ibid*, para 41 (Lord Walker).

³³ [2013] UKSC 6.

³⁴ *Ibid*, para 42 (Lord Hope and Lady Hale).

³⁵ *Ibid*, paras 75–76 (Lord Hope and Lady Hale).

³⁶ *Ibid*, para 75 (Lord Hope and Lady Hale).

³⁷ *President of the Methodist Conference v Preston* [2013] UKSC 29.

in any arrangement of the kind that could be said to amount to a contract.’³⁸ The minority took the view that ‘[e]verything about [the] arrangement looks contractual.’³⁹ However, the Court unanimously confirmed that there is no general presumption against giving contractual effect to arrangements between a church and its ministers.⁴⁰

Finally, in *Societe Generale, London Branch v Geys*,⁴¹ the Court (favouring the elective theory)⁴² held (Lord Sumption dissenting) that in order to terminate a contract of employment, notification of termination must be given in ‘clear and unambiguous terms’.⁴³ Simply making a payment in lieu of notice is insufficient; an employee should not be required ‘to check his bank account regularly in order to discover whether he is still employed. If he does learn of a payment, he should not be left to guess what it is for and what it is meant to do.’⁴⁴ The minority opinion was that employment contracts ought not to continue where the ‘employment relationship... [is] dead for all practical purposes.’⁴⁵

³⁸ Ibid, para 34 (Lord Sumption).

³⁹ Ibid, para 49 (Lady Hale, dissenting).

⁴⁰ Ibid, para 30 (Lord Hope).

⁴¹ *Societe Generale, London Branch v Geys* [2012] UKSC 63.

⁴² Ibid, para 15 (Lord Hope).

⁴³ Ibid, para 58 (Lady Hale).

⁴⁴ Ibid para 58 (Lady Hale).

⁴⁵ Ibid, para 110 (Lord Sumption, dissenting).

OVERVIEW: EUROPEAN LAW

Laura Mai

Sixteen cases concerning European law came before the Supreme Court in the 2012–13 legal year.

In *Walton v Scottish Ministers*¹ the issue raised concerned whether the defendants had failed to make an environmental impact assessment under Directive 2001/42² when deciding to include an additional strip of road in a construction project. The Supreme Court held that the decision was not a ‘plan’ or ‘programme’ within the meaning of Articles 3(1) and (2) of the Directive since it did not modify the administrative or legal framework which had been set for future development consent.³ Hence, the Directive was not applicable and no assessment was necessary. The appeal was therefore dismissed.

*BCL Old Co Ltd and others v BASF plc and others*⁴ concerned the question of whether the statutory limitation period for a damages claim under the Competition Act 1998⁵ and the Competition Appeal Tribunal Rules 2003⁶ complied with the principles of legal certainty and effectiveness. The Supreme Court dismissed the appeal, holding that the statutory provisions were sufficiently clear, precise and foreseeable to enable individuals to ascertain and exercise their rights and obligations without excessive difficulty.⁷

The question considered in *Birmingham City Council v Abdulla and others*⁸ was whether a claim under s 2(3) Equal Pay Act 1970⁹ could be ‘more conveniently’ disposed of by an Employment Tribunal than by the High Court where the limitation period for presenting the claim to the Tribunal had expired. The majority of the Supreme Court held that where the claim was time barred before

¹ [2012] UKSC 44.

² *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment* [2001] OJ L 197/30.

³ [2012] UKSC 44, paras 59–69.

⁴ [2012] UKSC 45.

⁵ Competition Act 1998 (UK) s 47A.

⁶ Competition Appeal Tribunal Rules 2003 (UK) r 31.

⁷ [2012] UKSC 45, paras 19–22.

⁸ [2012] UKSC 47.

⁹ Equal Pay Act 1970 (UK) s 2(3).

the Tribunal, it could never be more conveniently disposed of by it, regardless of the claimant's reasons for failing to present her claim in time.¹⁰ Lord Sumption and Lord Carnwath dissented on the ground that the majority's interpretation of the word 'conveniently' was too narrow.¹¹

The issue in *Jessy Saint Prix v Secretary of State for Work and Pensions*¹² was whether a woman, who gave up work and stopped seeking work because of the physical constraints of the late stages of pregnancy, was entitled to benefits under English law. The Supreme Court referred to the Court of Justice of the European Union (CJEU) the question of whether Article 7 of Directive 2004/38¹³ could be interpreted so as to include the appellant within the definition of 'worker'.¹⁴

In *Rugby Football Union v Consolidated Information Services Ltd*¹⁵ the Supreme Court dismissed the defendant's appeal and required it to disclose the identities of those who used its website to engage in activities contravening the claimant's terms and conditions. The Supreme Court held that disclosure was not a disproportionate interference with the users' rights under Article 8 of the Charter of Fundamental Rights of the European Union.¹⁶ The negative impact on the latter was offset by the claimant's legitimate interests.¹⁷

In *X v Mid Sussex Citizens Advice Bureau*¹⁸ the Supreme Court held that under Article 3 of Directive 2000/78,¹⁹ voluntary activity did not amount to an occupation since 'access [...] to occupation' was to be understood as access to a sector of the market rather than to a particular type of employment or self-employment.²⁰ Had the carefully drafted Directive been intended to apply to voluntary workers, an express reference would have been made.²¹ X's appeal

¹⁰ [2012] UKSC 47, paras 27-29.

¹¹ [2012] UKSC 47, paras 46-47.

¹² [2012] UKSC 49.

¹³ *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.* [2004] OJ L 158/77.

¹⁴ [2012] UKSC 49, paras 21-22.

¹⁵ [2012] UKSC 55.

¹⁶ *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391.

¹⁷ [2012] UKSC 55, paras 36-37, 45.

¹⁸ [2012] UKSC 59.

¹⁹ *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16.

²⁰ [2012] UKSC 59, paras 29-33.

²¹ *Ibid.*, paras 34, 27-28.

was therefore dismissed.

*Zakrzewski v The Regional Court in Lodz, Poland*²² concerned the question of whether a European Arrest Warrant (EAW) which specified only an original sentence was invalidated by the subsequent issuing of an aggregated sentence. According to European Council Framework Decision 2002/584/JHA²³ and Part I of the Extradition Act 2003,²⁴ courts must generally take the information contained in an EAW at face value. The validity of the EAW therefore depended on whether it complied with legal requirements and not whether the information provided was correct.²⁵ Since Zakrzewski returned to Poland before the judgment was delivered however, the Supreme Court was obliged to formally dismiss the appeal under s 43(4) Extradition Act 2003.²⁶

*O'Brien v Ministry of Justice*²⁷ concerned an appeal by a Recorder that, under clause 2(1) of the Framework Agreement on part-time work,²⁸ he was entitled to a pension on the same basis as full-time judges. The Supreme Court referred the following questions to the CJEU: whether it was for national or European law to determine if judges were workers within the meaning of clause 2(1); and if judges were workers, whether it was permissible for national law to discriminate between judges.²⁹ Upon receiving a response to the preliminary ruling, the Supreme Court held that recorders were indeed workers within the meaning of the Framework Agreement because they had to observe the terms and conditions of their appointment and could be disciplined if they failed to do so.³⁰ Since the discrimination present could not be justified, the appeal was therefore allowed.

*Digital Satellite Warranty Cover Ltd v Financial Services Authority*³¹ concerned the issue of whether extended warranty contracts were insurance contracts and hence subject to regulation by the FSA. The Supreme Court dismissed

²² [2013] UKSC 2.

²³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L 190.

²⁴ Extradition Act 2003 (UK) Part I.

²⁵ [2013] UKSC 2, para 8.

²⁶ *Ibid*, para 17.

²⁷ [2013] UKSC 6.

²⁸ *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work* [1997] OJ L 14/9; *Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland* [1998] OJ L 131/10.

²⁹ [2013] UKSC 6, para 41.

³⁰ *Ibid*, paras 33, 37, 39, 42.

³¹ [2013] UKSC 7.

the appeal, holding that the categories of insurance business listed in Directive 73/239/EEC³² (as amended by Directive 84/641/EEC)³³ could not have been intended to limit the freedom of member states to regulate other categories of business.³⁴

In *Joint Administrators of Heritable Bank plc v Winding-Up Board of Landsbanki Islands hf*,³⁵ the Supreme Court dismissed the appeal by the claimant that it could not set off its claims against the appellant in administration proceedings in Scotland, even though its claims had been extinguished under Icelandic law for the purposes of the latter's winding up. According to Directive 2001/24³⁶ the winding up of Landsbanki was subject to Icelandic law and had effect as if it were part of the general UK insolvency law.³⁷

In *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Ltd*³⁸ the Supreme Court confirmed its previous ruling³⁹ that the respondent loyalty card scheme operator could deduct as input tax the VAT element of service charges paid to companies which redeemed customers' loyalty points for goods as otherwise there would be double taxation.⁴⁰ A further reference to the CJEU was not necessary as no new point of EU law had been raised.

*Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd*⁴¹ concerned the question of whether an exception to Art 5(1) Directive 2001/29⁴² applied to temporary copies of webpages generated by end-users. The Supreme Court held that a license was not required as cached copies were stored and

³² Directive 73/239/EEC of the Council on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of business of direct insurance other than life assurance [1973] OJ L 228.

³³ Directive 84/641/EEC of the Council amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1984] OJ L 339.

³⁴ [2013] UKSC 7, paras 4, 12-13, 15.

³⁵ [2013] UKSC 13.

³⁶ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions [2001] OJ L 125/15.

³⁷ [2013] UKSC 13, para 53.

³⁸ [2013] UKSC 42.

³⁹ [2013] UKSC 15.

⁴⁰ *Ibid*, paras 78, 85.

⁴¹ [2013] UKSC 18.

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

deleted automatically.⁴³ Because of the transnational dimension of the question however, the Supreme Court referred the issue to the CJEU.⁴⁴

In *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*⁴⁵ the appellants submitted an application for judicial review of the air quality plans submitted by the Secretary of State to the European Commission under Art 23 of Directive 2008/50⁴⁶ for the 16 zones in the UK where the maximum levels of air pollutants could not be complied with within the required deadlines. The Supreme Court held that the UK was in breach of its obligation to ensure that maximum levels of air pollutants are not exceeded after the deadline and referred several questions relating to Member State's obligations to seek postponement of the deadline and submit an air quality plan under Art 22 to the CJEU.⁴⁷

In *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc*⁴⁸ the Supreme Court, having received a preliminary ruling from the CJEU,⁴⁹ dismissed the commissioner's appeal, holding that the question of whether a parent company was entitled to cross-border relief for losses incurred by its non-resident subsidiaries was to be assessed at the date of the claim for relief in order to give the taxpayer the opportunity to show that the conditions for cross-border relief were met.⁵⁰

In *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd*⁵¹ the Supreme Court held that the defendant could rely on the fact that he had amended his patent after a claim for damages was brought.⁵² Its appeal was therefore allowed. In doing so the Court overturned a line of contrary cases on the basis that otherwise the fact that after revocation the patent was to be treated as if it had never existed, could not be taken into account.⁵³

In *South Lanarkshire Council v Scottish Information Commissioner*⁵⁴ the

⁴³ [2013] UKSC 18, para 27-33.

⁴⁴ [2013] UKSC 18, para 38.

⁴⁵ [2013] UKSC 25.

⁴⁶ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1.

⁴⁷ [2013] UKSC 25, paras 37-39.

⁴⁸ [2013] UKSC 30.

⁴⁹ Case C-446/03 [2005] ECR I-10837.

⁵⁰ [2013] UKSC 30, paras 30-32.

⁵¹ [2013] UKSC 46.

⁵² *Ibid*, para 35.

⁵³ *Poulton v Adjustable Cover & Boiler Block Co* [1908] 2 Ch 430; *Coflexip SA v Stolt Offshore MS Ltd* [2004] EWCA Civ 213; *Unilin Beheer BV v Berry Floor NV* [2007] EWCA Civ 364.

⁵⁴ [2013] UKSC 55.

Supreme Court dismissed the appeal that disclosure of salary information contravened the Data Protection Act 1998.⁵⁵ On the basis that disclosed data would not reveal employees' identities, their rights under Article 8 European Convention of Human Rights⁵⁶ were not interfered with.⁵⁷ It was therefore sufficient to consider the conditions set out in schedule 2 para 6 Data Protection Act 1998.⁵⁸

⁵⁵ Data Protection Act 1998 (UK).

⁵⁶ European Convention on Human Rights, 4 November 1950, 213 UNTS 221.

⁵⁷ [2013] UKSC 55, para 26.

⁵⁸ [2013] UKSC 55, para 27.

OVERVIEW: FAMILY LAW

Daniel Messenger*

There were six Supreme Court decisions relating to family law issues during the year 2012–13.

In *Re A (A Child)*¹, ‘A’, a child, had staying contact with her father (‘F’) twice a year. ‘X’, a young girl, made allegations to children’s services of historic sexual abuse against F. X, who suffered from mental and physical ill-health, wished her identity to remain anonymous. As a result of the allegations, A’s mother (‘M’) applied to vary contact arrangements. During those proceedings, the question of the disclosure of X’s allegations arose. Due to the likely impact on X’s well-being, the High Court dismissed the applications of M, F and Children’s Guardian (‘CG’) for disclosure; this was overturned by the Court of Appeal.

The Supreme Court, in a unanimous decision, held that the family life and fair trial rights of F, M and CG were sufficient justification for the interference with the privacy rights of X. While local authority records enjoy public interest immunity from disclosure because of the public interest in encouraging members of the public to help them to protect children, such immunity is not absolute and had to be balanced against the public interest in a fair trial.

In *Re L and B (Children)*,² care proceedings were commenced when ‘S’, a child, was taken to hospital with serious injuries. A fact-finding hearing was ordered to determine whether S’s injuries were non-accidental and, if so, who the perpetrator was. In December 2011, the judge gave an oral judgment finding that S’s father was the perpetrator. However, that order was not sealed by the court until 28 February 2012. Before then, on 15 February 2012, the judge handed down a written ‘perfected judgment’ which stated that the court was unable to determine whether it was the child’s father or mother who had caused the injuries.

The Supreme Court unanimously held that a judge is entitled to reverse their decision at any time before the order is drawn up and perfected. Thus, until the December order was sealed, the judge in this case did have the power to change

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¹ [2012] UKSC 60.

² [2013] UKSC 8.

her mind and the question for the appeal court was whether she should have exercised it.

In *Re J (Children)*³ care proceedings were brought in respect of three children who were cared for by 'DJ' and 'JJ'. The youngest child was JJ's third child with her former partner 'SW'. The local authority submitted that the three children were likely to suffer significant harm because JJ's first child with SW, 'T-J', had died of non-accidental injuries in 2004. In earlier proceedings a court had found that either JJ or SW had caused the injuries to T-J and that the other had colluded to hide the truth. The issue for the Supreme Court was whether JJ's inclusion in a pool of perpetrators in earlier proceedings involving a different child and a different relationship could form the basis of the threshold criteria for the making of care orders. The main judgment of the Court was given by Lady Hale with whom all the other justices agreed. Lady Hale ruled that a prediction of future harm has to be founded on proven facts; suspicions or possibilities are not enough. A real possibility that a parent has harmed a child in the past is not, by itself, sufficient to establish the likelihood that they will cause harm to another child in the future.

The case of *Re B (a Child)*⁴ concerned the application of the criteria for making a care order when the risk is one of future psychological or emotional harm. The child concerned had been removed from her parents at birth. The mother had criminal convictions for dishonesty and was diagnosed with both somatisation and factitious disorder. The father had convictions for many serious offences. The trial judge found that if placed in her parents' care there was a risk that the child would be presented for unnecessary medical treatment, that she might emulate her mother's behaviour, and that she would be confused by her mother's dishonest presentation of the world. Consequently, there would need to be a multi-disciplinary programme of monitoring and support but that the parents would be unable to co-operate with such a programme because of their dishonest approach towards professionals. Accordingly, the only way the feared harm could be prevented was by way of a care order with a view to adoption.

The Supreme Court, by a majority of 4:1, dismissed the parents' appeal, finding that the High Court was entitled to conclude that not only were the conditions for making a care order satisfied, but also that the making of a care order with a view to adoption was necessary and did not violate the article 8 rights of the child, M, or F. Lady Hale however dissented. She opined that this

³ [2013] UKSC 9.

⁴ [2013] UKSC 33.

was a case based on the mere possibility that the child would suffer psychological harm in the future. Even if this were sufficient to cross the threshold for making a care order, it had not been demonstrated that a care order with a view to adoption was necessary to protect the child, particularly as nothing else had been tried.

The appeal in *Prest v Petrodel Resources Ltd*⁵ arose out of financial proceedings following divorce. The appeal concerned the position of a number of companies belonging to the Petrodel Group which were wholly owned and controlled by the ex-husband. Two of the companies collectively owned seven residential properties in the UK. The issue on appeal was whether the court had power to order the transfer of these properties to the wife, given that they legally belonged not to the husband but to the company.

The Supreme Court unanimously allowed the appeal and declared that the seven disputed properties vested in the companies were held on trust for the husband on the ground that, in the particular circumstances of the case, the properties were held by the husband's companies on a resulting trust for the husband, and were, for the purposes of section 24(1)(a) of the Matrimonial Causes Act 1973, 'property to which the [husband] is entitled, either in possession or reversion'.

In *Re A (Children)*⁶ the parties married in Pakistan in 1999 but lived in England from 2000. In 2008, the mother moved to a refuge with her then three children. In 2009, she returned to Pakistan. While there, she was put under pressure by her family to reconcile with her husband and in February 2010 she became pregnant with their fourth child, Haroon. In May 2011, she returned to England without the children and immediately began proceedings in the High Court for their return. In June 2011, all four children were made wards of court and the father was ordered to return them forthwith. The Court of Appeal, in a majority judgment, allowed the father's appeal in relation to Haroon only, on the ground that habitual residence was a question of fact and required physical presence in the country.

The Supreme Court overturned that decision holding that, habitual residence aside, the court had an inherent jurisdiction to make orders in this case on the basis of Haroon's British nationality. By Article 14 of the Council Regulation (EC) No 2201/2003, the common law rules as to the inherent jurisdiction of the High Court continue to apply if the child is not habitually resident in a Member State. On the question of habitual residence, four of the justices held that presence was

⁵ [2013] UKSC 34.

⁶ [2013] UKSC 60.

a necessary precursor to residence. Lord Hughes, however, gave an additional judgment explaining why he would have held that Haroon was habitually resident in the circumstances of this case.

OVERVIEW: HUMAN RIGHTS LAW

Niccolò Ridi

In the 2012–2013 legal year, the Supreme Court decided seventeen cases relating to human rights law.

Four cases concerned Article 1 of the First Protocol (A1P1) to the European Convention on Human Rights¹ (ECHR), which protects the right to peaceful enjoyment of one's possessions. In *R v Waya*,² the Supreme Court held that courts should only make confiscation orders made under the Proceeds of Crime Act 2002 (POCA) insofar as they are proportionate to the aims of the act,³ in particular to remove proceeds of crimes rather than to serve as an additional punishment.⁴ In *Salvesen v Riddell*⁵ the Supreme Court held that a provision contained in the Agricultural Holdings (Scotland) Act discriminating between landlords who served dissolution notices before or after 4 February 2003 was incompatible with A1P1; as such discrimination was unfair and disproportionate.⁶ *Cusack v London Borough of Harrow*⁷ by contrast concerned the erection of barriers by the highway authority limiting the enjoyment of property. To justify such an action, the authority intended to rely on a provision of the Highways Act 1980 that did not involve compensation, whereas another authorising power did.⁸ The Supreme Court held that in the field of land development the State enjoys a wide margin of appreciation. Thus the authority had no duty under A1P1 to choose the provision carrying greater compensation, but only to make a proportionate balance of public and individual interests.⁹

Three cases related to Article 6 ECHR, which protects the right to a fair trial. In the joint case of *O'Neill v Her Majesty's Advocate (No 2) (Scotland)* and

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

² [2012] UKSC 51.

³ *Ibid*, paras 11–12.

⁴ *Ibid*, paras 21–22.

⁵ [2013] UKSC 22.

⁶ *Ibid*, paras 44, 46–49.

⁷ [2013] UKSC 40.

⁸ *Ibid*, paras 42, 45.

⁹ *Ibid*, paras 44–45.

Lauchlan v Her Majesty's Advocate (Scotland),¹⁰ the appellants argued that their rights under Article 6 ECHR had been breached because of undue delays and the judge's hostile remarks.¹¹ The Supreme Court held that the right to be tried within a reasonable time must be assessed considering the moment when charges are made: informal interviews by contrast do not cross the necessary threshold.¹² It further stated that the judge's apparent bias could only have mattered if he had expressed entirely gratuitous opinions about the appellants' characters.¹³ In *Kapri v Lord Advocate representing Government of the Republic of Albania (Scotland)*¹⁴ the Supreme Court allowed the appeal against extradition of an Albanian national claiming he would suffer a flagrant denial of justice by virtue of widespread corruption in his country's judiciary. It held that such allegations are to be taken seriously and returned the case to the Appeal Court to have the evidence relied upon by the appellant further investigated.¹⁵ *Bank Mellat v Her Majesty's Treasury (No. 1)*¹⁶ concerned measures taken against an Iranian bank allegedly connected with the Iranian nuclear programme. The Supreme Court held that under the Constitutional Reform Act 2005 it had the power to entertain a closed material procedure (CMP) on appeal. This was also considered appropriate to be adopted in the case at issue, as failing to consider the closed material could have led to injustice.¹⁷ Three judges dissented, stating that Parliament did not intend to interfere with the enjoyment of fundamental rights such as that to a fair trial in this context and had not therefore empowered the Supreme Court to conduct such procedures.¹⁸ The minority also maintained that strict requirements for a CMP had not been satisfied in this case.¹⁹

Three cases related to Article 8 ECHR, which protects the right to respect for private and family life. In *Kinloch v Her Majesty's Advocate (Scotland)*²⁰ the question was whether non-authorized surveillance in a public place amounted to a breach of Article 8 of the ECHR and whether admission of evidence thereby obtained could constitute a breach of Article 6. The Supreme Court observed that

¹⁰ [2013] UKSC 36.

¹¹ *Ibid*, para 1-3.

¹² *Ibid*, para 36-38.

¹³ *Ibid*, para 53.

¹⁴ [2013] UKSC 48.

¹⁵ *Ibid*, paras 28-35.

¹⁶ [2013] UKSC 38.

¹⁷ *Ibid*, paras 37-44.

¹⁸ *Ibid* paras 79-88 (Lord Hope), 103 (Lord Kerr), 132-138 (Lord Reed).

¹⁹ *Ibid*, paras 91 (Lord Hope), 128-129 (Lord Kerr), 140 (Lord Reed).

²⁰ [2012] UKSC 62.

a person engaging in criminal activities while in public view has no reasonable expectation of privacy.²¹ It also held that there was no breach of Article 6, as that required the prior breach of Article 8.²² In *Re B (a Child)*²³ the Supreme Court held that a care order under the Children Act 1989 on the basis of potential psychological and emotional harm is proportionate under Article 8 ECHR when any alternative solution is unsatisfactory.²⁴ It further held that, in such cases, appellate courts are only required to review the lower court's decision. Two judges dissented, maintaining that a Court reviewing such an order under Article 8 ECHR should consider the issue on the basis of the material put before it.²⁵ In *South Lanarkshire Council v Scottish Information Commissioner*²⁶ the Supreme Court held that a journalist's request of disclosure of information about how many employees of a local authority received certain wages, but not about their identities,²⁷ pursued legitimate research purposes and thus legitimate interests and was not an interference with the data subjects' rights under Article 8 ECHR.²⁸

Three cases related to Article 5 ECHR, which protects the right to liberty. *R (Faulkner) v Secretary of State for Justice*; *R (Sturnham) v Parole Board of England and Wales*²⁹ concerned the right to a prompt review of detention for prisoners serving an 'indefinite public protection sentence' after the expiry of the 'tariff' under Article 5(4) ECHR. The Supreme Court held that only exceptional circumstances, not mere delays in ensuring review, make the detention arbitrary in the sense of Article 5(1) ECHR.³⁰ The Court also provided guidance on the award of damages for a breach of obligations owed under Article 5(4) ECHR.³¹ In *R (AA) v Secretary of State for the Home Department*³² the Supreme Court held that the detention of a minor in the erroneous, but reasonable, belief that he was an adult is not *per se* unlawful and that the provision of the Immigration Act 1971 allowing detention during age assessment is not incompatible with Article 5 ECHR.³³ One judge

²¹ *Ibid*, paras 15-20.

²² *Ibid*, para 21.

²³ [2013] UKSC 33.

²⁴ *Ibid*, paras 74-78, 82, 130, 135.

²⁵ *Ibid*, paras 115-120, 205.

²⁶ [2013] UKSC 55.

²⁷ *Ibid*, paras 1-3.

²⁸ *Ibid*, paras 20-28.

²⁹ [2013] UKSC 23.

³⁰ *Ibid*, paras 17-23.

³¹ *Ibid*, paras 53, 70, 82-84.

³² [2013] UKSC 49.

³³ *Ibid*, paras 49-50.

dissented on the use of *habeas corpus* in this context.³⁴ *R (Modaresi) v Secretary of State for Health*³⁵ concerned a psychiatric patient who applied for a review of her detention for medical assessment. The competent tribunal was wrong to decline the application. The Secretary of State for Health refused to exercise his discretion to refer the case to the tribunal: the patient was now detained for treatment and she could have filed a new application on that basis. The Supreme Court upheld this conduct, holding that Article 5(4) ECHR is not breached when the possibility of taking proceedings for the prompt review of the lawfulness of the detention is ensured.³⁶ One judge expressed doubts as to whether this interpretation is consistent with Article 5(4) ECHR.³⁷

*Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah*³⁸ concerned a Pakistani citizen captured by UK forces in Iraq, transferred to US military custody and detained in Afghanistan without a trial.³⁹ The UK Court of Appeal issued a writ of *habeas corpus* requiring the UK to seek his return, but found a letter of refusal by the US to be a sufficient response.⁴⁰ The Supreme Court held that actual custody is not necessary to exercise control over the release of a detainee. When there is a reasonable prospect of securing control, the writ may be issued.⁴¹ Two judges dissented on whether the US letter was a sufficient response and maintained that the Court should have required the resubmission of a request in firmer terms.⁴²

*Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department*⁴³ related to one of the 'exclusion clauses' contained in the 1951 Refugee Convention,⁴⁴ concerning 'acts contrary to the purposes and principles of the United Nations.' The Supreme Court held that the provision only covers acts meeting a high threshold of gravity in an international dimension, regardless of their qualification as terrorism under domestic law, and that attacks against UN-mandated forces are in principle covered by the clause.⁴⁵

³⁴ Ibid, paras 56-59 (Lord Carnwath).

³⁵ [2013] UKSC 53.

³⁶ Ibid, paras 19-21.

³⁷ Ibid, paras 27-37 (Lady Hale).

³⁸ [2012] UKSC 48.

³⁹ Ibid, paras 3-5.

⁴⁰ Ibid, paras 76.

⁴¹ Ibid, paras 42-48.

⁴² Ibid, paras 125-131 (Lord Carnwath, Lady Hale).

⁴³ [2012] UKSC 54.

⁴⁴ 189 UNTS 150.

⁴⁵ Above n 43, paras 16, 36-40, 66-68.

In *Rugby Football Union v Consolidated Information Services Ltd (Formerly Viagogo Ltd) (In Liquidation)*⁴⁶ the Supreme Court held that in order to assess whether the grant of a *Norwich Pharmaceutical* order amounts to a disproportionate interference with the rights of the probable wrongdoers under Article 8 of the Charter of Fundamental Rights of the European Union,⁴⁷ which guarantees the protection of personal data, reference must be made not only to the particular benefit that obtaining the information relating to an individual data subject might bring, but also to other legitimate objectives of the applicant.⁴⁸

In *Ruddy v Chief Constable, Strathclyde Police (Scotland)*⁴⁹ the Supreme Court held that seeking damages at common law against the responsible for treatment contrary to Article 3 ECHR and damages under the Human Rights Act 1998 for failure to carry out an effective investigation did not violate the principle whereby one pursuer cannot sue two defenders for separate causes of action and conclude for a lump sum against them jointly and severally.⁵⁰

In *Smith v Ministry of Defence; Ellis v Ministry of Defence; Allbutt v Ministry of Defence*⁵¹ the Supreme Court considered whether failure to adopt preventive measures to protect soldiers in Iraq could be a breach of Article 2 ECHR which protects the right to life. The Court affirmed the UK's jurisdiction for the purposes of the ECHR,⁵² but expressed doubts as to whether the allegations were within the reach of Article 2 ECHR itself if linked to policy issues. In the view of the Court, it was necessary to avoid imposing unrealistic obligations on the State.⁵³ Two judges dissented in part as they did not consider the cases suitable to be resolved by a court.⁵⁴

⁴⁶ [2012] UKSC 55 .

⁴⁷ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

⁴⁸ Above n 46, paras 11, 33-40.

⁴⁹ [2012] UKSC 57.

⁵⁰ *Ibid*, paras 24-25.

⁵¹ [2013] UKSC 41.

⁵² *Ibid*, paras 42-52.

⁵³ *Ibid*, para 76-81.

⁵⁴ *Ibid*, paras 125-152 (Lord Mance), 153-188 (Lord Carnwath).

OVERVIEW: IMMIGRATION LAW

Ronald Criscuolo

In the 2012–13 legal year, the UK Supreme Court decided six cases relating to immigration law.

*Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department*¹ focused on Article 1F(c) of the Geneva Convention on the Status of Refugees 1951,² which excludes from refugee status any person found to be guilty of acts contrary to the purposes and principles of the United Nations. In *Al-Sirri*, the Supreme Court held that terrorist attacks must possess an international dimension in order to fall within Article 1F(c).³ The appeal was unsuccessful in the sense that the Court corrected instructions for remittal to the Tribunal in light of the test prescribed. *DD* focused on whether alleged armed attacks against the United Nations International Security Assistance Force (ISAF) could justify exclusion from refugee status under Article 1F(c). The Court dismissed the appeal by which *DD* sought to establish that his acts did not fall under this provision. Despite differences between armed UN forces and non-armed peacekeeping missions, the Court asserted that an attack against ISAF is capable of being an ‘act contrary to the purposes and principles of the United Nations’.⁴

In *B (Algeria) v Secretary of the State for the Home Department*⁵ the Supreme Court analyzed the prison sentence of an Algerian national for failure to provide particulars of his true identity. The sentence was imposed by the Special Immigration Appeals Commission (SIAC) and subsequently upheld by the Court of Appeal. Though SIAC’s reasoning was flawed, it was permissible for the Court of Appeal to affirm the same sentence. SIAC’s error was found in its appraisal that *B* would not lapse back into psychosis. The sentence’s length, however, was not based on this conclusion, but rather on the seriousness of the contempt. Thus, it was acceptable for the Court of Appeal to evaluate that sentence under the

¹ [2012] UKSC 54 (*Al-Sirri; DD*).

² Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150.

³ *Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department* [2012] UKSC 54, paras 38–40.

⁴ *Ibid*, paras 64–68.

⁵ [2013] UKSC 4.

manifestly excessive standard. The Supreme Court dismissed the appeal, stating that remitting the case would only be appropriate if a ‘fresh investigation of new facts’ was necessary.⁶

*SL v Westminster City Council*⁷ considered whether a failed asylum-seeker was entitled to accommodation from the local authority under Article 21(1)(a) of the National Assistance Act 1948. The Supreme Court allowed the Council’s appeal, overturned the Court of Appeal’s decision, and reinstated the lower court’s conclusion that SL was not in need of care and attention. Any supposed care was held to be available otherwise than by the provision of accommodation. Care and attention requires far more than monitoring of a condition.⁸ SL needed mental health services for depression and other ailments. Even if this counseling was deemed ‘care and attention’, it was not dependent upon his need for accommodation as it was available throughout the country and without regard to living arrangements.⁹

In *R (AA) v Secretary of State for the Home Department*¹⁰ the Supreme Court addressed whether detention pursuant to paragraph 16 of the Immigration Act 1971 of a minor, erroneously assessed to be over the age of 18, was unlawful under section 55 of the Borders, Citizenship and Immunity Act 2009. Section 55 requires the Secretary of State to ensure that immigration requirements are discharged so as to ‘safeguard and promote’ the welfare of the child. This responsibility entails the creation and administration of proper mechanisms for reliably assessing a child’s age. The Court explained that the detention was lawful because the guidelines used for the age assessment complied with the Secretary’s obligation and had been properly administered. Accordingly, the appeal was dismissed.

*R (New London College Limited) v Secretary of State for the Home Department; R (West London Vocational Training College v Secretary of State for the Home Department*¹¹ concerned the lawfulness of the Sponsor Guidance under Tier 4 of the points-based immigration system, which included criteria for suspension of a sponsor’s license and refusal to grant Highly Trusted Sponsor status.¹² The Guidance had not been laid before Parliament; both institutions asserted that

⁶ Ibid, para 24.

⁷ [2013] UKSC 27.

⁸ Ibid, para 44.

⁹ Ibid, paras 45–48.

¹⁰ [2013] UKSC 49.

¹¹ [2013] UKSC 51.

¹² Ibid, paras 2–5.

such action was required under section 3(2) of the Immigration Act 1971. The Supreme Court dismissed both appeals, holding that the criteria did not fall within section 3(2) because those measures do not raise the bar for admission against migrants themselves. Instead, the Guidelines represent an exercise of the ‘ancillary and incidental administrative powers’ inherent in the statutory authority.¹³ Lord Carnwath agreed with the outcome, but asserted that the incidental powers approach was too broad.

*In the matter of A (children)*¹⁴ analyzed the Court’s jurisdiction to order the return of a child who had never lived in the country. The mother, who had leave to remain in the UK, travelled to Pakistan with her three children, each of whom had dual British and Pakistani nationality. Her former husband coerced her to stay in Pakistan, during which time she gave birth to the child in question (‘Haroon’). Upon her return to the UK, a custody battle ensued. Originally, the Court of Appeal ordered the return of the older children, but not Haroon, on the basis of habitual residency. The Supreme Court explained that the question of Haroon’s habitual residency would need to be referred to the Court of Justice of the European Union (CJEU). There was, however, another possible basis for jurisdiction. The Crown holds *parens patriae* jurisdiction over those owing allegiance, irrespective of location. Lady Hale emphasized that the Court of Appeal must be ‘extremely circumspect’ in deciding whether to exercise this jurisdiction over a child who had never been present in the UK.¹⁵ Lady Hale allowed the appeal and remitted the case as a matter of urgency to determine whether the *parens patriae* jurisdiction should be exercised under the circumstances. If such jurisdiction is not exercised, the parties can apply to the Supreme Court for reference to the CJEU on the issue of habitual residency.

¹³ Ibid, paras 28–29.

¹⁴ [2013] UKSC 60.

¹⁵ Ibid, paras 62–63.

OVERVIEW: INTELLECTUAL PROPERTY LAW

Anna Grunseit

The Supreme Court decided four cases involving intellectual property in the 2012–13 judicial year.

In *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd*,¹ the Supreme Court referred to the Court of Justice of the European Union (CJEU) the question of whether copies of a webpage made on a user's screen and cache fell within the temporary copies exception in Art 5.1 Information Society Directive,² or whether such use amounted to a copyright infringement in the absence of rights-holder authorisation. The question arose in the context of whether customers of the appellant's news monitoring service required a licence to view reports on the appellant's website. The reports contained opening words of the respondents' online articles, several words surrounding customer-selected keywords and a hyperlink to the article on the source website.³ While the lower courts ruled that Art 5.1 did not apply,⁴ Lord Sumption, having reviewed the CJEU jurisprudence, made clear the Supreme Court's view that Art 5.1 extends in principle to temporary copies made for the purpose of browsing by an unlicensed end-user.⁵ Art 5.1 was thereby characterised as treating viewing (as opposed to downloading or printing) of copyright material on the internet in the same way as its viewing in physical form, something which has never been an infringement.⁶ Despite its seemingly settled view, the Court nonetheless referred the matter to the CJEU for a preliminary ruling, in recognition of the need for a uniform approach to a question which could affect the legality of use of a basic technical facility by millions of people across the European Union.⁷

¹ [2013] UKSC 18 (Lord Sumption, with Lords Neuberger, Kerr, Clarke and Carnwath agreeing) (*PRCA*).

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10.

³ *PRCA*, above n 1, para 3.

⁴ *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2011] EWCA Civ 890; [2010] EWHC 3099.

⁵ *PRCA*, above n 1, para 37.

⁶ *Ibid*, para 36.

⁷ *Ibid*, para 38.

In *Vestergaard Frandsen A/S (now MVF3 APS) v Bestnet Europe Ltd*,⁸ the Supreme Court confirmed that the action for breach of confidence is not one of strict liability, but rather one based ultimately on conscience, requiring knowledge for a finding of (direct or secondary) liability. Dismissing the appeal, the Court upheld the reversal⁹ of a finding by Arnold J¹⁰ that Mrs Sig, a former employee of long-lasting insecticidal net manufacturer Vestergaard, was liable for misuse of trade secrets by reason of her involvement in competitor company Bestnet. Sig's Bestnet co-founders were found to have knowingly used Vestergaard's trade secrets in development of their product 'Netprotect', but Sig was found to have not appreciated that Netprotect was conceived in that manner until proceedings were commenced.¹¹ Vestergaard's tripartite argument for Sig's liability could therefore not succeed as Sig never acquired the confidential information and was unaware of its (mis)use. Thus, her contractual confidentiality clause could not apply and no implied duty could arise or be breached; there was no common design as Sig did not share the feature of the design rendering it wrongful; and, absent a finding of dishonesty, Sig's risk-taking in embarking on the new venture did not amount to blind-eye knowledge of the breach.¹²

In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)*,¹³ the Supreme Court analysed principles of *res judicata* and estoppel in finding an entitlement to rely on the revocation or amendment of a patent to answer a claim for damages arising from a previous court finding that the patent was valid and infringed. The appellant was seeking recovery of over £49 million in damages flowing from a finding of infringement of its patent for flat-bed airline seating by the Court of Appeal.¹⁴ However, subsequent to that finding, the Technical Board of Appeal of the European Patent Office had found the infringed patent claims to be invalid by reason of prior art and amended the patent accordingly with retrospective effect. Allowing the appeal, the Court observed that it would be positively unjust and contrary to public interest for a (former) patentee to recover damages for infringement of a patent, which by reason of

⁸ [2013] UKSC 31 (Lord Neuberger, with Lords Clarke, Sumption, Reed and Carnwath agreeing) (*Vestergaard*).

⁹ *MVF3 APS (formerly Vestergaard Frandsen A/S) and others v Bestnet Europe Ltd and others* [2011] EWCA Civ 424.

¹⁰ *Vestergaard Frandsen v Bestnet Europe Ltd* [2009] EWHC 657 (Ch).

¹¹ *Vestergaard*, above n 8, para 15.

¹² *Ibid*, paras 20–1, 30–1, 34, 42–3.

¹³ [2013] UKSC 46 (Lord Sumption, Lady Hale and Lords Clarke and Carnwath agreeing) (*Virgin*).

¹⁴ *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2009] EWCA Civ 1062.

revocation or amendment, was to be treated as if it never existed.¹⁵ The fact of the patent's amendment was considered to be a new uncontroversial fact which could be relied upon and not an impermissible challenge to a conclusion of the court.¹⁶ However, it was left open that (unspecified) exceptional facts could arise whereby it would not be wrong to prevent reliance on subsequent revocation or amendment to avoid infringement liability.¹⁷

In *Schütz (UK) Ltd v Werit (UK) Ltd*,¹⁸ the Supreme Court set out the principles applicable to determining what constitutes the infringing act of 'making' for the purposes of s 60(1)(a) Patents Act 1977. Lord Neuberger explained, drawing on jurisprudence from Europe and the UK, that 'makes' is not a term of art with precise meaning, but rather should be given an ordinary meaning and interpreted in a practical way as a matter of degree considering the facts and in view of the particular characteristics of patent law, including the need for clarity and certainty, application to a wide range of patentable products, and the balance of monopoly with reasonable competition.¹⁹ This focus on fact and degree was directed at avoiding an erroneous finding of infringement flowing from any replacement of part of a patented article.²⁰ Allowing the appeal, the Court concluded that Werit's practice of inserting new bottles into pallet-based cages to form a rigid composite 'intermediate bulk container' for transport of liquids was not 'making' and therefore not an infringement. This conclusion followed from observations that: the bottle was a free-standing, replaceable, relatively perishable component of the patented article and had no connection with the claimed inventive concept (the cage welds) and was therefore not the main component of the article; and no additional work beyond repair was involved in the replacement.²¹ The costs restrictions in s 68 Patent Act 1977 were also discussed in *obiter dicta*.²²

¹⁵ *Virgin*, above n 13, para 62.

¹⁶ *Ibid*, para 52.

¹⁷ *Ibid*, paras 52, 55.

¹⁸ [2013] UKSC 16 (Lord Neuberger, Lady Hale and Lords Walker, Mance and Kerr agreeing).

¹⁹ *Ibid*, paras 26–7.

²⁰ *Ibid*, para 57.

²¹ *Ibid*, para 78.

²² *Ibid*, para 81–107.

OVERVIEW: INTERNATIONAL LAW

Zsófia Deli

The Supreme Court decided four international law related cases in the 2012–13 legal year.

The judgment in *Rubin v Eurofinance SA* arose from two conjoined appeals.¹ The issue concerned whether courts in England and Wales would enforce foreign judgments brought in insolvency-related avoidance proceedings, if the defendant was not subject to the *in personam* jurisdiction of the foreign court. In *Rubin*, the Supreme Court allowed the appeal by a majority of 4:1, with Lord Collins giving the leading judgment. Lord Collins confirmed the traditional *Dicey* Rule, according to which a judgment *in personam* would not be enforced if the defendant had not submitted to the jurisdiction of the foreign court². While the Court of Appeal had tried to depart from the *Dicey* Rule, the Supreme Court reversed its decision, denying that a more liberal approach should be taken in the interest of universality of bankruptcy and similar procedures. Lord Collins considered the question as ‘one of policy’, and could not see a valid reason for distinguishing between insolvency cases and others.³ He argued further that a liberal approach in avoidance proceedings would develop new jurisdictional rules.⁴ The Court of Appeal’s conclusion therefore represented a ‘radical departure from substantially settled law’, which in his view was ‘a matter for the legislature and not for judicial innovation’.⁵ Lord Clarke’s dissent upheld the *Cambridge Gas* case⁶ as well-founded and would have led to the rejection of the appeal.⁷ In *New Cap*, the appeal was dismissed unanimously as the Syndicate had submitted to the jurisdiction of Australia.

Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah involved a Pakistani citizen, who had been detained by UK forces in an area

¹ *Rubin v Eurofinance SA* [2012] UKSC 46 (*Rubin*; *New Cap*).

² *Ibid*, paras 7–10.

³ *Ibid*, paras 115–6.

⁴ *Ibid*, paras 117, 121.

⁵ *Ibid*, paras 128–9.

⁶ *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (*Cambridge Gas*).

⁷ *Rubin*; *New Cap* [2012] UKSC 46, paras 191–2 (Lord Clarke, diss).

of Iraq under US control, and had been transferred to US forces.⁸ The US forces transferred Mr Rahmatullah to Afghanistan, where he was allegedly treated in violation of the Geneva Conventions.⁹ According to a Memorandum of Understanding, a non-binding UK-US diplomatic agreement, the UK could request the return of Mr Rahmatullah to Iraq. The granting of a writ of *habeas corpus* claimed on Mr Rahmatullah's behalf was unanimously upheld by the Supreme Court. The leading judgment, given by Lord Kerr, stated that *habeas corpus* is an imperative remedy issued 'as a matter of right' in any case where detention cannot be justified.¹⁰ As it is flexible in nature, the UK did not need to have actual custody of Mr Rahmatullah for it to be invoked.¹¹ The mere reasonable prospect of being able to exert control over his custody was enough.¹² As there was 'ample reason to believe' that the UK's request would be granted by the US on the basis of the Memorandum of Understanding and the Geneva Conventions,¹³ the control-test was passed. Furthermore, since there was clear *prima facie* evidence that the detention was unlawful under the Geneva Conventions,¹⁴ the UK, which was conscious of these apparent violations, was bound to take steps to correct the situation and issue the writ. Mr Rahmatullah's cross-appeal was rejected by a majority of 5:2. The Court upheld that an adequate request and a sufficient return to the writ was made by the US when rejecting the transfer. Lady Hale and Lord Carnwath dissented, however, stating that a more precisely based request should be resubmitted by the UK.¹⁵

In *Al-Sirri v Secretary of State for the Home Department*, the Supreme Court unanimously dismissed the appeals (*Al-Sirri; DD*) of two appellants who had been denied refugee status.¹⁶ The denial of refugee status had been based on the appellants' alleged acts contrary to the purposes and principles of the United Nations, in the light of Article 1F(c) of the Geneva Convention 1951.¹⁷ The judgment

⁸ *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48 (*Rahmatullah*).

⁹ Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

¹⁰ *Rahmatullah* [2012] UKSC 48, paras 41–2.

¹¹ *Ibid*, paras 42–3.

¹² *Ibid*, para 45.

¹³ *Ibid*, para 64.

¹⁴ *Ibid*, para 53.

¹⁵ *Ibid*, paras 125–31 (Lady Hale and Lord Carnwath, diss).

¹⁶ *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54 (*Al-Sirri; DD*).

¹⁷ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150.

stated that Article 1F(c) should be interpreted restrictively, observing certain factors (gravity, organization, international impact and long-term objectives of the act, as well as its implications for international peace and security), and should only be applied when 'serious reasons' imply the person's individual responsibility.¹⁸ 'Serious reasons' is stronger than 'reasonable grounds', resting on strong or clear and credible evidence and considered judgment.¹⁹ In relation to *DD*, the Court stated that attacking the International Security Assistance Force (*ISAF*) was an act contrary to the purposes and principles of the United Nations,²⁰ as the appellant's aim was to frustrate the main objective of *ISAF*, namely to maintain international peace and security in accordance with the UN Charter.²¹

In *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, the Supreme Court, by unanimously dismissing the appeal, upheld the English courts' long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration was on foot or proposed.²² The case arose from a concession agreement regarding a hydroelectric power plant in Kazakhstan, containing an arbitration clause to direct disputes to the International Chamber of Commerce (London). On this basis, an anti-suit injunction was issued by the English Commercial Court against the appellant's proceedings initiated in Kazakhstan. The judgment stated that the English courts' 'inherent power' to declare rights and enforce the negative aspect of an arbitration agreement by injunctioning foreign proceedings is not in any way restricted by the Arbitration Act 1996 in the lack of arbitral proceedings.²³ The preclusion of such power cannot be inferred from the Arbitration Act, which lacks an express provision to this effect.²⁴ The appeal challenging the injunction was thus rejected.

¹⁸ *Al-Sirri; DD* [2012] UKSC 54, para 16.

¹⁹ *Ibid*, para 75.

²⁰ Charter of the United Nations, 24 October 1945, 1 UNTS 16, Art 1 (*UN Charter*).

²¹ *Al-Sirri; DD* [2012] UKSC 54, para 68.

²² *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, paras 22–3 (*Ust-Kamenogorsk*).

²³ Arbitration Act 1996; *Ust-Kamenogorsk* [2013] UKSC 35, para 19.

²⁴ *Ibid*, para 56.

OVERVIEW: JURISDICTION AND DEVOLUTION ISSUES

Sondre Torp Helmersen

1 Introduction

In the 2012–2013 legal year, eight cases from the Supreme Court concerned jurisdiction and devolution issues. Three concerned the competencies of devolved legislatures, two the right to appeal from Scottish courts, and three the jurisdiction of English courts.

2 Devolved competencies

In *Local Government Byelaws (Wales) Bill 2012—Reference by the Attorney General for England and Wales*,¹ the question raised was whether clauses 6 and 9 of the Local Government Byelaws (Wales) Bill 2012 (Wales) were in conformity with the Government of Wales Act 2006.² These clauses removed the need for consent by the Secretary of State for Wales to the adoption of Welsh byelaws under certain enactments, and allowed Welsh ministers to add to the list of such enactments. In two separate opinions, the Supreme Court unanimously upheld both clauses.³

*Imperial Tobacco Limited v The Lord Advocate (Scotland)*⁴ concerned the conformity of the Tobacco and Primary Medical Services (Scotland) Act 2010 s 1 and 9 with the Scotland Act 1998.⁵ The sections prohibit the display of tobacco products and the sale of tobacco from vending machines. The 1998 Act reserves ‘the sale and supply of goods to consumers’ and ‘product safety’ to the UK Parliament. The Supreme Court unanimously upheld both provisions.⁶

¹ [2012] UKSC 53.

² *Ibid.*, para 1 (Lord Neuberger).

³ *Ibid.*, paras 66 (Lord Neuberger) and 101 (Lord Hope).

⁴ [2012] UKSC 61.

⁵ *Ibid.*, para 1 (Lord Hope).

⁶ *Ibid.*, para 46 (Lord Hope).

In *Salvesen v Riddell, Lord Advocate intervening (Scotland)*⁷ the appellant argued that s 72 of the Agricultural Holdings (Scotland) Act 2003 was contrary to Article 1 Protocol 1 (A1P1) of the European Convention on Human Rights (ECHR)⁸. Under the Scotland Act 1998 s 29, this would place it outside the competence of the Scottish Parliament.⁹ Section 72 allowed two partners in a partnership, who had leased Salvesen's farm from the previous landlord, to become joint tenants.¹⁰ The Supreme Court found a violation of A1P1 ECHR, but suspended the effect of its finding.¹¹

3 Appeals from Scotland

*O'Neill v Her Majesty's Advocate (No 2) (Scotland); Lauchlan v Her Majesty's Advocate (Scotland)*¹² was brought by two defendants who in 2010 were found guilty of murder by the High Court of Justiciary in Glasgow.¹³ They alleged that their cases had suffered from delay and bias sufficient to lead to a violation of Article 6 ECHR.¹⁴ This raised 'devolution issues' under the Scotland Act 1998 Sch 6 Para 13, which, under the Scotland Act 2012 s 36(4), were 'compatibility issues' appealable to the Supreme Court under the Scotland Act 1998 s 288AA.¹⁵ The Court unanimously however found no violation of the ECHR in either case.¹⁶

In *Apollo Engineering Ltd v James Scott Ltd (Scotland)*,¹⁷ the appellant sought to appeal two decisions from the Court of Session.¹⁸ The Supreme Court unanimously allowed the appeal against the dismissal of the case, distinguishing the case from *John G McGregor (Contractors) Ltd v Grampian Regional Council*.¹⁹ The Court considered this 'a judgment on the whole merits of the cause'.²⁰

⁷ [2013] UKSC 22.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 262.

⁹ *Ibid*, para 2 (Lord Hope).

¹⁰ *Ibid*, para 5 (Lord Hope).

¹¹ *Ibid*, para 58 (Lord Hope).

¹² [2013] UKSC 36.

¹³ *Ibid*, para 1 (Lord Hope).

¹⁴ *Ibid*, para 3 (Lord Hope).

¹⁵ *Ibid*, paras 9 and 11 (Lord Hope).

¹⁶ *Ibid*, para 58.

¹⁷ [2013] UKSC 37.

¹⁸ *Ibid*, paras 7–9 (Lord Hope).

¹⁹ [1991] SC (HL) 1; *Apollo Engineering*, paras 10–15 (Lord Hope).

²⁰ *Ibid*, para 27 (Lord Hope).

4 Jurisdiction of English courts

*Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah*²¹ concerned Mr Rahmatullah, an individual who was captured by UK forces in Iraq, transferred to US custody, and then held in prison in Afghanistan without trial.²² Unusually, he claimed *habeas corpus* despite being outside the Court's jurisdiction. Three Justices subsequently held that a writ could nonetheless be issued,²³ but that a rejected UK request to the US was sufficient to satisfy the right.²⁴ Two Justices dissented, in particular over the sufficiency of the request and also of the response.²⁵

In *VTB Capital plc v Nutritek International Corp*,²⁶ the appellant sued four other companies for fraud,²⁷ raising the question of whether English courts were the appropriate forum. The case was governed by English law and certain agreements had English jurisdiction clauses, but the relevant facts were connected to Russia.²⁸ In three concurring opinions the Supreme Court held that England had not been shown to be the correct forum.²⁹ The possibility of piercing the corporate veil was also rejected,³⁰ and a freezing order was lifted.³¹ Two justices dissented, holding that England was an appropriate forum for the action to be brought.³²

*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*³³ concerned an arbitration agreement that stipulated England as the relevant arbitral venue.³⁴ The appellant had suggested arbitral proceedings in Kazakhstan but none had yet been initiated.³⁵ The question that was appealed to the Supreme Court was whether the English Courts could prevent such proceedings from occurring.³⁶ The Court unanimously held that proceedings

²¹ [2012] UKSC 48.

²² *Ibid*, paras 3–5 (Lord Kerr).

²³ *Ibid*, paras 45–64 (Lord Kerr) and 122–3 (Lord Carnwath and Lady Hale, diss).

²⁴ *Ibid*, paras 76 and 85 (Lord Kerr), 107 (Lord Phillips), and 108 (Lord Reed).

²⁵ *Ibid*, paras 116–32 (Lord Carnwath and Lady Hale, diss).

²⁶ [2013] UKSC 5.

²⁷ *Ibid*, paras 1–3 (Lord Mance).

²⁸ *Ibid*, paras 45–66 (Lord Mance).

²⁹ *Ibid*, paras 71 (Lord Mance), 98–112 (Lord Neuberger), and 151 (Lord Wilson).

³⁰ *Ibid*, paras 72 (Lord Mance), 148 (Lord Neuberger), and 158 (Lord Wilson).

³¹ *Ibid*, para 73 (Lord Mance), 150 (Lord Neuberger), and 159 (Lord Wilson).

³² *Ibid*, paras 236 (Lord Clarke, diss) and 242 (Lord Reed, diss).

³³ [2013] UKSC 35.

³⁴ *Ibid*, para 7 (Lord Mance).

³⁵ *Ibid*, para 4 (Lord Mance).

³⁶ *Ibid*, para 18 (Lord Mance).

were barred.³⁷ The Arbitration Act 1996 was found to have no bearing on the matter.³⁸ An anti-suit injunction issued under the Senior Courts Act 1981 s 37 was thus legal and proceedings in a foreign State contrary to the arbitral agreement could be barred.³⁹

³⁷ *Ibid*, para 61 (Lord Mance).

³⁸ *Ibid*, para 60 (Lord Mance).

³⁹ *Ibid*, para 62 (Lord Mance).

OVERVIEW: LOCAL GOVERNMENT LAW

Jessica Staples

The Supreme Court decided six cases concerning local government issues during 2012–2013.

In *Sharif v London Borough of Camden*,¹ the Supreme Court considered whether the local council's obligation to provide accommodation to a homeless person² and his/her family under section 176 of the Housing Act 1996, required the family to be housed in a single unit of accommodation. The Supreme Court held that the ordinary meaning of section 176 permits a local council to house a family in two units of accommodation, provided that the location of these units allows the family to 'live together' in a practical sense. Lord Carnwath, writing for the majority, emphasised that this decision related to a narrow point of law and did not dilute the authorities' duty to ensure that homeless persons and their families are accommodated together in a true sense. Lord Kerr disagreed with the majority, taking the view that the legislation contemplates that a family must be housed in a single unit of accommodation in order to avoid undermining the Housing Act's objective of keeping families together.

Local authorities' obligations to provide housing to indigent persons was also at issue in *SL v Westminster City Council*.³ In this case, the appellant claimed that due to depression and a previous attempted suicide, he required monitoring. Therefore, he qualified as being in need of 'care and attention' under section 21(1)(a) of the National Assistance Act 1948, triggering the local council's obligation to provide accommodation. The Supreme Court distinguished this case on the facts from *R (Westminster City Council) v National Asylum Support Service*.⁴ The Supreme Court referred with approval to Lady Hale's interpretation of section 21(1)(a) in *R (M) v Slough Borough Council*,⁵ where it was stated that this provision was not so broad as to mean 'doing something' which the person being cared for cannot expect to do for himself. The Supreme Court dismissed the

¹ [2013] UKSC 10.

² Defined in Housing Act 1996 s 175(1).

³ [2013] UKSC 27.

⁴ [2002] UKHL 38.

⁵ [2008] UKHL 52.

appeal, confirming that the appellant was not entitled to accommodation as the duty relating to those requiring 'care and attention' contemplates circumstances where more than monitoring is required. It also noted in an *obiter dictum* that 'care and attention' for purposes of section 21(1)(a) must be accommodation-related.

*Cusack v London Borough of Harrow*⁶ concerned an appeal brought by a local council in relation to a claim for compensation under the Highways Act 1980. The claimant's access to his front garden (which he had converted into a parking area) had been restricted when the local council erected barriers. The Court of Appeal had ruled that the council ought to have proceeded in terms of section 66(2) of the Highways Act 1980, which required payment of compensation for this restriction. The council had proceeded under section 80, which does not require payment of compensation. The Supreme Court upheld the appeal by the Council, holding that it was not an abuse of power to proceed under section 80 and that the failure to pay compensation did not violate the claimant's right to peaceful possession under Article 1 of Protocol 1 of the European Convention on Human Rights. Lord Neuberger agreed with the majority, noting that the council was entitled to proceed under either section 66(2) or section 80 and that it was unnecessary to seek an interpretation minimising the overlap in the application of these provisions.

The question before the Supreme Court in *Uprichard v Scottish Ministers*⁷ was whether the Scottish Ministers had given adequate reasons for rejecting the appellant's objections to their modifications to a plan prepared by Fife Council for the development of St Andrews. After examining the relevant documents, the Supreme Court held that the Ministers had given adequate reasons which did not raise concerns that they had failed to take into account any material objections. The Supreme Court rebuked the litigants for an inappropriate use of the court's time as the case turned on the construction of documents rather than on an arguable point of law.⁸

In *North v Dumfries and Galloway Council*,⁹ the appellants were classroom assistants and nurses employed at various schools operated by the local authority. They wished to refer to various manual workers employed by the same local authority as comparators under section 1(6) of the Equal Pay Act 1970 in order to

⁶ [2013] UKSC 40.

⁷ [2013] UKSC 21.

⁸ Due to section 40(3) of the Constitutional Reform Act 2005, an appeal lies to the Supreme Court directly from any Scottish court where an appeal lay previously from that court to the House of Lords.

⁹ [2013] UKSC 45.

establish a claim for equally favourable employment terms under the Act.¹⁰ After reviewing relevant case law, the Supreme Court confirmed that the appellants were only required to show that it was likely that the comparators would be employed on similar terms and conditions (it was unnecessary to show that this was a ‘real possibility’) and that the difference in pay was attributable to a single source, such as a common employer, capable of rectifying the inequality. The Supreme Court upheld the appeal as the difference in treatment between the appellants and the comparators was attributable to the local authority, which had the ability to rectify this discrepancy.

The Supreme Court was called on to consider the requirements for establishing a contravention of Regulation 44(1)(d) of the Food Labelling Regulations 1996¹¹ in *Torfaen Country Borough Council v Douglas Willis Ltd*,¹² in circumstances where the respondent was being prosecuted for selling frozen meat past its ‘use by’ date. The Supreme Court held that it was not necessary to show that the food was in a highly perishable state at the date of labelling—to establish a contravention it was only necessary to demonstrate that the respondent had in its possession food for sale, which was labelled with a ‘use by’ date that had passed. Having clarified the law, the matter was remitted to the lower courts for rehearing on the facts.

¹⁰ This case was decided under the Equal Pay Act 1970, which has now been replaced by the Equality Act 2010.

¹¹ Promulgated under the Food Safety Act 1990.

¹² [2013] UKSC 59.

OVERVIEW: PRIVATE LAW

Alexander Psaltis

Real property cases once again dominated the Supreme Court's private law business in 2012–2013.

Statutory interpretation was the issue in *Day v Hosebay Ltd; Howard de Walden Estates Ltd v Lexgorge Ltd*.¹ The appeal concerned two cases which considered whether certain properties were 'houses ... reasonably so called' for the purposes of section 2(1) of the Leasehold Reform Act 1967 (LRA).² If the properties were houses, the lessees would have been entitled, under the LRA, to compel the owner to transfer the freehold title to them.³ The Court interpreted 'houses ... reasonably so called' as a description of the building's use rather than its external appearance.⁴ In this case the relevant buildings looked like houses, but one was used for commercial purposes⁵ and the other was a 'self-catering hotel'⁶. They could not therefore be described as houses and the lessees could not enliven the relevant provisions of the LRA.⁷

In *Morris v Rae*,⁸ an appeal from the Extra Division,⁹ the Court considered the conveyancing practice of warrandice¹⁰. In order to invoke warrandice, a purported purchaser must demonstrate that there is a person—with an unquestionable competing title to the property—threatening eviction of the purported seller from the property.¹¹ On a preliminary point, the Court unanimously held that

¹ [2012] UKSC 41 (Lord Carnwarth with Lords Walker, Mance, Clarke, Wilson, Sumption and Phillips agreeing).

² *Ibid*, para 1 (Lord Carnwarth).

³ *Ibid*.

⁴ *Ibid*, para 41 (Lord Carnwarth).

⁵ *Ibid*, para 43 (Lord Carnwarth).

⁶ *Ibid*, para 45 (Lord Carnwarth).

⁷ *Ibid*, para 46 (Lord Carnwarth).

⁸ [2012] UKSC 50 (Lord Hope and Lord Reed with Lords Walker, Sumption and Carnwarth agreeing).

⁹ Extra Division, Inner House, Court of Sessions, Scotland.

¹⁰ 'Warrandice' is a Scottish conveyancing practice by which a seller warrants that they have good title to the real property they are contracting to convey to the purchaser: see [2012] UKSC 50, para 1 (Lord Hope).

¹¹ *Ibid*, paras 1–2 (Lord Hope).

where the person threatening eviction did not actually have a competing title to the property, provided they could demonstrate an immediate right to obtain good title to the property, the claimant could bring an action in warrantice.¹²

The majority decision of *Daejan Investments Ltd v Benson*¹³ concerned the role of the Leasehold Valuation Tribunal (LVT). The particular issue raised was the construction of the relevant principles of the Landlord and Tenant Act 1985 conferring a discretion on the LVT retrospectively to exempt a landlord from notice requirements for carrying out works on leased premises.¹⁴ The significance of this decision lies in the differing approaches taken by the court to reviewing decisions of the LVT. For the majority, Lord Neuberger accepted that the Court could review the LVT's discretionary decision and accordingly displaced its decision with his own.¹⁵ In dissent, Lords Wilson and Hope held that the use of the word 'reasonable' in describing the LVT's discretion meant that parliament intended it to have wide discretion and courts should therefore exercise restraint in their review function.¹⁶ In particular their Lordships were concerned not lightly to permit appeals to proceed.¹⁷

The Court confirmed that in construing deeds, a liberal approach is to be adopted in *Lloyds TSB Foundation for Scotland v Lloyds Group Plc*.¹⁸ This case arose out of the acquisition of HBOS by Lloyds in the aftermath of the Global Financial Crisis. The Court interpreted the phrase 'group profit before taxation [...] shown in the audited accounts' in a deed as gaining its meaning from the parties' intentions at the time of entry into the deed.¹⁹ The use of the phrase 'shown in the audited accounts' was not to be read as confining the meaning by reference to a particular entry in the company's accounts.²⁰ In obiter, Lord

¹² Ibid, para 32 (Lord Hope), para 57 (Lord Reed), para 61 (Lords Sumption and Carnwarth); Lord Walker agreed in the decision but held concerns about the evidence and pleadings underpinning the decision (para 60).

¹³ [2013] UKSC 14 (Lord Neuberger with Lords Clarke and Sumption agreeing and Lords Wilson and Hope, diss); the Court also gave judgment in respect of costs in *Daejan Investments Limited v Benson* [2013] UKSC 54.

¹⁴ Ibid, paras 1-2 (Lord Neuberger).

¹⁵ Ibid, para 85 (Lord Neuberger).

¹⁶ Ibid, paras 88, 89, 93 (Lord Hope, diss), para 116 (Lord Wilson, diss), they drew support from comments made by Hale LJ in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, paras 15-17 that courts should exercise judicial restraint in reviewing decisions of specialist tribunals.

¹⁷ Ibid, para 116 (Lord Wilson).

¹⁸ [2013] UKSC 3 (Lord Hope with Lords Mance, Clarke, Reed and Carnwarth agreeing).

¹⁹ Ibid, paras 24, 25, 31 (Lord Mance), para 34 (Lord Hope, Lords Clarke, Reed and Carnwarth agreeing).

²⁰ Ibid, para 24 (Lord Mance).

Hope concluded that under Scots law a court could not equitably adjust a contract for the reason that performance was no longer what the parties intended.²¹ His Lordship said this would offend the maxim *pacta sunt servada*.²²

Principles of construction were in issue in *Teal Assurance Co v WR Berkley Insurance*.²³ Here, Lord Mance confirmed that liability as between an insurer and the insured does not arise until the liability of the insured to the third party is 'established and quantified by judgment, arbitration, award or settlement', rather than when the claim is actually paid.²⁴ Thus an insurer cannot choose to apply liability for claims to a policy in an order different to the order in which the insurer's liability arises with respect to those claims²⁵ (unless a claim is withdrawn or abandoned).²⁶

The Court considered the issue of vicarious liability for child sexual abuse in *Various Claimants v the Catholic Child Welfare Society*.²⁷ The issue for determination was whether a Christian brotherhood providing brothers to staff a school was vicariously liable for sexual abuses of those brothers during their employ. The court articulated a two stage test for determining whether it is 'fair, just and reasonable' to impose vicarious liability as: (i) considering the relationship between the tortfeasor and the defendant to determine whether it is capable of giving rise to vicarious liability; and (ii) examining the connection between the relationship between the defendant and the tortfeasor and the relevant act or omission.²⁸ The Court found that the brotherhood fulfilled both stages of the test and was therefore vicariously liable because the relationship was 'akin to that between an employer and employee'²⁹ and in fact by its unique nature went further than merely one of employer and employee.³⁰

Res judicata and special rules relating to patents arose in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*.³¹ The Court overturned what it considered to be an erroneous line of Court of Appeal reasoning with respect to parallel proceedings

²¹ *Ibid*, para 47 (Lord Hope).

²² '[A]greements must be kept', see *Ibid*, para 47 (Lord Hope).

²³ [2013] UKSC 57 (Lord Mance with Lords Neuberger, Clarke, Sumption and Toulson agreeing).

²⁴ *Ibid*, paras 13, 21 (Lord Mance).

²⁵ *Ibid*, para 17, 19 (Lord Mance).

²⁶ *Ibid*, para 19 (Lord Mance).

²⁷ [2012] UKSC 56 (Lord Phillips with Lady Hale and Lords Kerr, Wilson and Carnwarth agreeing).

²⁸ *Ibid*, paras 21-22, 34 (Lord Phillips).

²⁹ *Ibid*, paras 47, 56 (Lord Phillips).

³⁰ *Ibid*, paras 57-58 (Lord Phillips).

³¹ [2013] UKSC 46 (Lord Sumption with Lady Hale and Lords Clarke and Carnwarth agreeing, Lord Neuberger wrote a separate judgment, also agreeing).

in the English Courts and the European Patent Office (EPO).³² The Court found that, despite the doctrine of *res judicata*, ‘where judgment is given in an English court that a patent [...] is valid and infringed, and the patent is subsequently retrospectively revoked or amended (whether in England or at the EPO), the defendant is entitled to rely on the revocation or amendment’ on an inquiry as to damages in the first proceeding.³³ However, the Court left open the question of the relevance of subsequent invalidation once an order for damages has been made or damages have been paid.³⁴ In the latter case, Lord Neuberger opined that a restitutionary claim may be necessary to recover the amount paid.³⁵

Lord Neuberger considered secondary liability for use of confidential information in *Vestergaard Frandsen A/S v Bestnet Europe Ltd*.³⁶ This case concerned the use of confidential information by former employees of the plaintiff in connection with a competing business. The respondent herself did not obtain the information nor did it relate to her employment.³⁷ The Court found that, in the absence of strict liability under her employment contract for her business’ use of such information, she could only be liable if she knew (within the knowledge test established in *Royal Brunei Airlines Sdn Bhd v Tan*³⁸) that the relevant information was confidential and was being used.³⁹

In *Benedetti v Sawaris*⁴⁰ the Court provided further comment on the developing law of unjust enrichment. In this decision the Court held that in ascertaining the enrichment of a defendant at the plaintiff’s expense, it is impermissible for the plaintiff to seek subjectively to overvalue the defendant’s enrichment above the market value.⁴¹ In obiter, Lord Clarke confirmed that a defendant was permitted subjectively to devalue the benefit.⁴² However, Lord Reed preferred not to embark on subjective analysis at all and advocated an approach where the value of the enrichment is ascertained ‘even-handed[ly] between [the claimant and de-

³² The line of reasoning commenced with *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430; and was followed in *Coflexip SA v Stolt Offshore MS Ltd (No 2)* [2004] FSR 708; and *Unilin Beheer BV v Berry Floor NV* [2007] Bus LR 1140: see [2013] UKSC 46, paras 28-29 (Lord Sumption).

³³ [2013] UKSC 46, para 35 (Lord Sumption), paras 48-49, 58, 61 (Lord Neuberger).

³⁴ *Ibid*, para 36 (Lord Sumption), para 67 (Lord Neuberger).

³⁵ *Ibid*, para 67 (Lord Neuberger).

³⁶ [2013] UKSC 31 (Lord Neuberger with Lords Clarke, Sumption, Reed and Carnwarth agreeing).

³⁷ *Ibid*, paras 21, 28 (Lord Neuberger).

³⁸ [1995] 2 AC 378.

³⁹ *Ibid*, paras 26, 42 (Lord Neuberger).

⁴⁰ [2013] UKSC 50 (Lord Clarke with Lords Kerr and Wilson agreeing, Lords Reed and Neuberger wrote separate judgments agreeing as to the outcome of the appeal but with different reasoning).

⁴¹ [2013] UKSC 50, paras 29, 34 (Lord Clarke), para 195-196 (Lord Neuberger).

⁴² [2013] UKSC 50, paras 26, 34 (Lord Clarke).

fendant]’.⁴³ Despite this, each considered that in most cases the two approaches would reach the same result.⁴⁴

Finally, *Futter v HMRC; Pitt v HMRC*⁴⁵, involved two fiduciary power cases heard together. *Pitt* concerned a court-appointed receiver (receiver) who, on legal advice, settled monies on trust for her incapacitated husband, which—upon his death—created an inheritance tax liability.⁴⁶ *Futter* concerned capital gains tax consequences of dispositions made by trustees on advice that such tax would not be payable.⁴⁷ Lord Walker identified the issues as whether the: (i) trustees/receiver⁴⁸ could set aside the relevant transactions under the ‘so-called rule in *Hastings-Bass*’;⁴⁹ and (ii) receiver⁵⁰ could equitably set aside the settlement on the basis of mistake as to the taxation consequences.

In relation to the first issue, Lord Walker departed from an accepted practice that the rule in *Hastings-Bass* allowed trustees to apply to the Court’s supervisory jurisdiction to set aside legitimate transactions with unintended consequences, without any question of breach of trust.⁵¹ Instead, holding that court intervention was only possible where there had been a breach of trust.⁵² Because the trustees/receiver had each relied upon professional advice, they were not in breach and therefore the transactions were not liable to be set aside.⁵³

As to mistake, Lord Walker accepted that the receiver was mistaken, but he purported to limit the definition of mistake to situations where the claimant made a causative mistake of sufficient gravity to make it unconscionable for relief to be denied.⁵⁴ Unfortunately, Lord Walker did not provide guidance on when a mistake might fulfil his test. He also suggested that it was not possible to clarify his test as anything more than an exercise in objectively determining, based on

⁴³ Ibid, para 123 (Lord Reed).

⁴⁴ Ibid, para 138 (Lord Reed), para 26 (Lord Clarke); Lord Neuberger expressed no preference as it was unnecessary so to decide, but His Lordship also considered that the two approaches would not yield different results (para 189).

⁴⁵ [2013] UKSC 26 (Lord Walker with Lord Neuberger, Lady Hale and Lords Mance, Clarke, Sumption and Carnwarth agreeing).

⁴⁶ Ibid, para 53 (Lord Walker).

⁴⁷ Ibid, para 47 (Lord Walker).

⁴⁸ In each appeal.

⁴⁹ A reference to a rule said to arise in the Court of Appeal’s decision of *Re Hastings Bass* [1975] Ch 25, which Lord Walker describes as being a ‘misnomer’: Ibid, para 1 (Lord Walker).

⁵⁰ In the *Pitt* appeal.

⁵¹ Ibid, para 69, 71 (Lord Walker).

⁵² Ibid, paras 40-41, 73 (Lord Walker).

⁵³ Ibid, paras 95-98 (Lord Walker).

⁵⁴ Ibid, paras 123, 126 (Lord Walker).

the relevant facts, whether the mistake was so grave as to make it unconscionable to refuse relief.⁵⁵ In this case, the mistake was grave enough to warrant reversal.⁵⁶

⁵⁵ Ibid, para 126 (Lord Walker).

⁵⁶ Ibid, para 142 (Lord Walker).

OVERVIEW: SOCIAL WELFARE LAW

Nikita Appaswami

In 2012–13, the UK Supreme Court dealt with cases requiring interpretation of social welfare legislation encompassing key areas such as gender inequality in employment and homelessness as well as analysis of commencement provisions.

In *Jessy Saint Prix v Secretary of State for Work and Pensions*,¹ the Supreme Court looked into whether the appellant, who had temporarily discontinued work due to her pregnancy, remained a ‘worker’ for receiving income support under Article 7(1)(a) of Directive 2004/38/EC (hereafter, the Directive)² and its relationship with Article 45 of the Treaty on the Functioning of the European Union.³ Neither provision defines ‘worker’. Article 7(3) of the Directive states an EU citizen, who is no longer in employment, retains the status of worker in certain specified circumstances, including illness or accident. Gender discrimination resulting from a narrow interpretation of the provision whereby pregnant women are rendered jobless and destitute was a strong argument put forth. The Court referred two questions for clarification to the Court of Justice of European Union: Whether ‘worker’ in Article 7 extended beyond Article 7(3) and if so, is a pregnant woman who reasonably gives up work, or seeking work, because of late stages of pregnancy, considered a ‘worker’ to receive benefits under the law.

An asylum-seekers right to be granted accommodation under the National Assistance Act 1948 (hereafter, the Act) was considered by the Supreme Court in *SL v Westminster City Council*.⁴ SL sought asylum in UK as he feared persecution in Iran for his sexual orientation, but was refused. Following a suicide attempt, SL was admitted in a hospital and later discharged. He was diagnosed as suffering from depression and post-traumatic stress disorder yet capable of independent self-care. Residential accommodation under section 21(1)(a) of the Act is granted to those, ‘...who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.’ The

¹ [2012] UKSC 49.

² The right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the ‘Citizenship Directive’).

³ Free Movement of Persons, Services and Capital.

⁴ [2013] UKSC 27.

Council argued that it owed no duty to provide SL with accommodation, as SL was not in need of 'care and attention'. The assistance needed is 'otherwise available' regardless. Overturning the decision of the Court of Appeal, the Supreme Court stated that it was wrong to read the word 'available' in section 21(1)(a) as meaning 'reasonably practicable and efficacious' and the Council could exercise discretion over the matter.

In *Sharif (FC) v The London Borough of Camden (Council)*⁵, the Court considered what 'accommodation' implied in section 176 of the Housing Act, 1996 (hereafter, the Act), which states that accommodation is considered to be available if it can accommodate the homeless together with family. Ms. Sharif and her family were allotted a private three-bedroom accommodation but were subsequently moved to two separate quarters within the same building. Ms. Sharif petitioned that she was unable to take care of her ailing father who was living by himself in one quarter. She unsuccessfully appealed to the London Central County Court against the Council's dismissal on the ground that the accommodation was not 'suitable'. While the Court of Appeal allowed the appeal, the Supreme Court, the Council reiterated that the accommodation must be such that it is 'sufficiently proximate' to fulfil the social purpose⁶. Lord Carnwath emphasised that the object of the legislation can be achieved even through two units of accommodation if they are located at a distance that enables the family to be 'together' for practical purposes.⁷ Lord Hope added that the intention of the legislature was to grant discretion to decide what is reasonable in fulfilment of the main objective. Lady Hale in her concurring judgement opines that the law does not state a standard for accommodation which in reality will be difficult to adhere to. Lord Kerr, delivering the dissenting judgement, stated that local authorities would exploit this discretion.

Sections 264⁸ to 273 (Chapter 3) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (hereafter, the Act) deal with detention of patients in conditions of excessive security. The legislation stated that Chapter 3 was to 'come into force' on 1st May 2006. Under this legislation, until regulations were made, 'qualifying patients' detained under the Act in hospitals other than the 'qualifying hospitals', could not apply to the Mental Health Tribunal for a declaration that they were held in conditions of excessive security as it was not clear who the 'qualifying patients' were, and what constituted a 'qualifying

⁵ [2013] UKSC 10.

⁶ *Ibid*, para 14.

⁷ *Ibid*, para 17.

⁸ Detention in conditions of excessive security: state hospitals.

hospital' as regulations defining 'qualifying patient' and "qualifying hospital" were not passed. In *RM v Scottish Ministers*⁹, the appellant was a patient in a non-state hospital and wished to be transferred to an open ward, which he believed would hasten his release from detention. He could not apply to the Tribunal for a declaration in the absence of relevant regulations. On appeal from the Court of Session to the Supreme Court, the Scottish Ministers emphasised that whilst Chapter 3 did not 'operate', it was 'in force'. This therefore did not defeat the intention of the Parliament and was not unlawful.¹⁰ This argument was however dismissed by the Court on the grounds that it was the intention of the legislature that rights under section 268 should be in operation by that date. Lord Reed stated that administrative law principles did not allow discretionary powers to frustrate the object of the Act.¹¹ Therefore, the failure to draft and lay regulations under section 268(11) and (12) of the Act was declared to be unlawful.

⁹ [2012] UKSC 58.

¹⁰ *Ibid*, para 20.

¹¹ Relying on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

OVERVIEW: TAX LAW

Ana Júlia Maurício

Six cases concerning tax law came before the Supreme Court in the 2012–13 legal year.

The main issues in *Société Générale, London Branch v Geys* related to the terms of Mr Geys' employment contract and circumstances of his dismissal, namely, those of the termination of the contract and associated payments.¹ Although the Supreme Court did not allow Mr Geys' appeal unanimously, its decision was unanimous on the issue regarding tax law.² The Court held that Mr Geys could claim damages for wrongful dismissal and for breach of the tax efficiency provisions.³ On a proper construction of the contract in question, Mr Geys had not waived such claims.

R (Prudential plc and another) v Special Commissioner of Income Tax and another concerned the scope of legal advice privilege.⁴ The company in question had received a statutory notice from a tax inspector to produce tax-related documents. The Supreme Court examined whether the company could refuse to produce the documents on the basis that they were protected by legal advice privilege when the legal advice had been given by accountants in relation to a marketed tax avoidance scheme. The Court dismissed the appeal by a majority of five to two.⁵ It held that legal advice privilege should not be interpreted to include advice given by professionals other than lawyers.⁶

The two *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* cases involved the 'Nectar' loyalty card scheme conducted by LMUK.⁷ LMUK paid a service charge

¹ *Société Générale, London Branch v Geys* [2012] UKSC 63.

² *Ibid*, paras 142–4 (Lord Sumption, diss).

³ *Ibid*, paras 31–40.

⁴ *R (Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1.

⁵ *Ibid* (Lords Clarke and Sumption, diss).

⁶ *Ibid*, paras 51–75.

⁷ *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* [2013] UKSC 15 (LMUK); *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* [2013] UKSC 42 (LMUK No 2).

to retailers ('redeemers') for allowing customers to exchange 'points' for goods or services. LMUK tried to deduct the VAT element of the service charge as input tax by referring to EU legislation.⁸ The issue of how to characterise the service charge under EU law was considered in a preliminary reference procedure, in which the Court of Justice of the European Union (CJEU) considered that the service charge amounted partly to third party consideration.⁹ Nonetheless, the Supreme Court decided by majority of three to two that LMUK could deduct the VAT element of the charge.¹⁰ The Supreme Court held that, considering all the relevant facts of the case, which were not available to the CJEU, the service charge was paid to the redeemers for a service supplied to LMUK for the purpose of its business.¹¹ As for the second decision of the Supreme Court on this case, it unanimously refused the need for a further preliminary reference to the CJEU.¹²

WHA Limited and another v Her Majesty's Revenue and Customs concerned the effectiveness of a scheme designed to minimise the VAT liability of a group of companies (*Oriel*) that provided motor breakdown insurance (*MBI*).¹³ The supply of insurance is exempt from VAT. Insurers do not charge VAT on premiums, and the insurance business does not account to the Commissioners for Her Majesty's Revenue and Customs (*HMRC*) for VAT. Insurers cannot deduct the VAT element of their costs on goods and services that are chargeable to VAT. Therefore, MBI insurers cannot deduct the amount of VAT relating to costs with garages to conduct car repairs as input tax. MBI insurers considered that this was a competitive disadvantage in relation to businesses that offered uninsured warranties. The scheme in question sought to minimise this disadvantage by enabling two members of *Oriel* to recover the VAT element of the repair costs. HMRC refused to repay tax to those members on the basis of, *inter alia*, a lack of a taxable supply of services and a breach of the abuse of rights doctrine. The Supreme Court unanimously dismissed the appeal. Having fully analysed the specific facts of the case, the Court concluded that there was no supply of repair services by the garages to the relevant company member of *Oriel*, which was the

⁸ Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonisation of the Laws of the Member States relating to Turnover Taxes—Common System of Value Added Tax: Uniform Basis of Assessment [1977] OJ L 145/1, as implemented by the Value Added Tax Act 1994 (UK).

⁹ Joined Cases C-53/09 and C-55/09, *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd and Baxi Group Ltd* [2010] ECR I-9187.

¹⁰ *LMUK*, above n 7 (Lords Carnwath and Wilson, diss).

¹¹ *Ibid*, paras 55–6, 77–82.

¹² *LMUK No 2*, above n 7, paras 4–7.

¹³ *WHA Limited and another v Her Majesty's Revenue and Customs* [2013] UKSC 24.

requirement for the operation of the scheme in question.¹⁴

The principal issues in *Futter and another v The Commissioners for Her Majesty's Revenue and Customs* involved equity and trust law.¹⁵ Both cases concerned the *Hastings-Bass* rule on the issue of trustees who make decisions without taking into consideration all the relevant elements which they ought to.¹⁶ In *Futter*, the trustees of two settlements made deeds of enlargement and advancement without considering the effect of section 2(4) of the Taxation of Chargeable Gains Act 1992. In *Pitt*, a trust had been established to settle the damages suffered by Mr Pitt due to head injuries, but there was no reference to inheritance tax. Therefore, the trust was not established without an immediate inheritance tax liability. The Supreme Court unanimously dismissed the *Hastings-Bass* portion of the appeals. The inadequate deliberations of the trustees were not sufficiently serious to be considered a breach of fiduciary duty, so the Court could not intervene.¹⁷ The *Pitt* appeal raised the additional issue of setting aside a voluntary disposition on the ground of mistake. The Court allowed this part of the appeal, setting aside the trust on the basis of a causative mistake of sufficient gravity.¹⁸

Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc raised issues regarding the availability of cross-border group relief and the method of quantifying such relief in respect of losses sustained by two subsidiaries of Marks and Spencer (M&S).¹⁹ The Supreme Court unanimously dismissed the appeal, adopting the approach for which M&S contended. The analysis should be essentially factual on the basis of the circumstances existing at the date of the claim for cross-border relief. Unless prevented by the subsidiaries' domestic law, it was not permissible to exclude entirely the possibility that the losses in question might be utilised in the Member State of the surrendering company.²⁰ This had been confirmed by the CJEU.²¹

¹⁴ Ibid, paras 18, 26–7, 33, 35–8, 56–8.

¹⁵ *Futter and another v The Commissioners for Her Majesty's Revenue and Customs; Pitt and another v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26 (*Futter; Pitt*).

¹⁶ *In re Hastings-Bass, decd* [1975] Ch 25 (*Hastings-Bass*).

¹⁷ *Futter; Pitt*, above n 15, paras 43, 73, 80–3, 91–8.

¹⁸ Ibid, paras 104–9, 122–34.

¹⁹ *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2013] UKSC 30.

²⁰ Ibid, paras 30–3.

²¹ Case C-123/11, *Proceedings brought by A Oy* [2013] 2 CMLR 40.

APPENDIX A: COMPOSITION OF THE SUPREME COURT

Composition of the Court on 1 October 2012

President of the Supreme Court
Lord Neuberger of Abbotsbury

Deputy President of the Supreme Court
Lord Hope of Craighead

Justices of the Supreme Court
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance
Lord Kerr of Tonaghmore
Lord Clarke of Stone-cum-Ebony
Lord Wilson of Culworth
Lord Sumption
Lord Reed
Lord Carnwath of Notting Hill

Appointments to the Court during the 2012–13 legal year

Lord Hughes of Ombersley
9 April 2013—Assumed Office

Lord Toulson
9 April 2013—Assumed Office

Lord Neuberger of Abbotsbury
Succeeded Lord Phillips of Worth Matravers as President of the Supreme Court on 1 October 2012

Baroness Hale of Richmond
*Succeeded Lord Hope of Craighead as Deputy President of the Supreme Court on 28
June 2013*

Offices vacated during the 2012-13 legal year

Lord Walker of Gestingthorpe
17 March 2013—Retired

Lord Hope of Craighead
26 June 2013—Retired

APPENDIX B: STATISTICS

TABLE 1: GENERAL STATISTICS

	2012–13	2011–12	2010–11
Case Volume			
Total number of judgments handed down	94 (100%)	57 (100%)	58 (100%)
—Michaelmas Term 2012	25 (26.60%)	18 (31.58%)	18 (31.03%)
—Hilary Term 2013	18 (19.15%)	13 (22.81%)	16 (27.59%)
—Easter Term 2013	19 (20.21%)	9 (15.79%)	7 (12.07%)
—Trinity Term 2013	32 (34.04%)	17 (29.82%)	17 (29.31%)
Voting Patterns*			
—Total appeals decided	103 (100%)	59 (100%)	62 (100%)
—Full unanimity	49 (47.57%)	18 (30.51%)	14 (22.58%)
—Qualified unanimity	33 (32.04%)	26 (44.07%)	32 (51.61%)
—Divided	21 (20.39%)	15 (25.42%)	16 (25.81%)
Disposal of appeals			
—Total number	94 (100%)	57 (100%)	58 (100%)
—Appeal allowed, including in part	40 (42.55%)	22 (38.60%)	28 (48.28%)
—Appeal dismissed	42 (44.68%)	31 (54.39%)	26 (44.83%)
—References to the Court of Justice of the European Union	3 (3.19%)	1 (1.75%)	3 (5.17%)

* The total includes nine cross-appeals in addition to ninety-four main appeals. The disposition of each case was coded as one of six categories: (i) appeal allowed; (ii) appeal allowed in part; (iii) appeal dismissed (iv) referred to the CJEU; (v) reference on a devolution issue; (vi) other (hearing on a jurisdiction issue or appeal moot). For each category of disposition there is a further descriptor of (i) unanimous—all judges agreed on the disposition with the same legal reasoning (ii) unanimous in result; division on reasons—all judges voted for the same disposition of the appeal but varied somewhat in their legal reasoning to achieve that result (where any substantive legal reasoning by a judge whatsoever is counted as new legal reasoning even if the judge claims to join other opinions); and (iii) by majority; dissenting judges—meaning that at least one judge disagreed on the disposition advocated by the majority of the judges (the majority of judges in such a case could themselves be unanimous or split on their legal reasoning, but this information is not recorded). Cross-appeals are recorded in the same way but tabulated separately.

TABLE 1: GENERAL STATISTICS (CONTINUED)

	2012–13	2011–12	2010–11
—Devolution issue	3 (3.19%)	3 (5.26%)	—
—Appeal moot	5 (6.38%)	—	1 (1.72%)
Disposal of cross-appeals			
—Total number	9 (100%)	2 (100%)	4 (100%)
—Cross-appeal allowed, including in part	2 (22.22%)	1 (50%)	2 (50%)
—Cross-appeal dismissed	7 (77.78%)	1 (50%)	2 (50%)
Panel Size			
—9	3 (3.19%)	1 (1.75%)	7 (12.07%)
—7	11 (11.70%)	13 (22.81%)	12 (20.69%)
—5	79 (84.04%)	42 (73.68%)	39 (67.24%)
—3	1 (1.06%)	1 (1.75%)	0 (0%)
—Panels including Acting Justices [†]	30 (31.91%)	15 (26.32%)	4 (6.90%)

[†] The category 'Acting Justice' includes members of the Court who were once Full Justices (for example, Lord Phillips) and those who later became Full Justices (for example, Lord Hughes). The categorisation is determined by the judge's status at the date the judgment was given.

TABLE 2: STATISTICS FOR INDIVIDUAL JUSTICES[‡]

	Cases decided	Within Majority	Within Minority	Judgments Written
Lord Phillips	10	10 (100.00%)	0 (0%)	4 (40.00%)
Lord Hope	39	36 (92.31%)	3 (7.69%)	29 (74.36%)
Lord Walker	27	27 (100.00%)	0 (0%)	7 (25.93%)
Lady Hale	49	46 (93.88%)	3 (6.12%)	18 (36.73%)
Lord Mance	43	39 (90.70%)	4 (9.30%)	18 (41.86%)
Lord Kerr	44	42 (95.45%)	2 (4.55%)	9 (20.45%)
Lord Clarke	40	37 (92.50%)	3 (7.50%)	10 (25.00%)
Lord Dyson	8	6 (75.00%)	2 (25.00%)	4 (50.00%)
Lord Wilson	39	35 (89.74%)	4 (10.26%)	9 (23.08%)
Lord Collins	2	2 (100.00%)	0 (0%)	2 (100.00%)
Lord Neuberger	45	44 (97.78%)	1 (2.22%)	18 (40.00%)
Lord Judge	1	1 (100.00%)	0 (0%)	0 (0%)
Lord Sumption	42	39 (92.86%)	3 (7.14%)	17 (40.48%)
Lord Reed	40	36 (90.00%)	4 (10.00%)	18 (45.00%)
Lord Carnwath	49	45 (91.84%)	4 (8.16%)	21 (42.86%)
Lord Toulson	13	13 (100.00%)	0 (0%)	3 (23.08%)
Lord Hughes	10	10 (100.00%)	0 (0%)	5 (50.00%)
Lord Carloway	1	1 (100.00%)	0 (0%)	0 (0%)

[‡] The information here includes Acting Justices. The data in this table have been constructed in the following manner. First, each judge on a panel is recorded as being part of one of two groups: either the majority or the minority, based on the judge’s vote on the disposition of the case and the number of other judges on the panel concurring in the result (but not necessarily the legal reasoning). Where a judge dissents from part of an appeal only, the vote is classified as a dissent. Second, each judge is determined either to have authored his or her own opinion or to have joined that of another judge or group of judges. Any substantive legal reasoning whatsoever by a judge is counted as a new legal opinion, even if the judge claims to join other opinions. Each judge receives authorship credit for judgments that list multiple authors. Judges are considered to have joined, and not written, an opinion that lists the judge as in agreement, or if the judge simply writes that he or she agrees with another judge and does not add any substantive legal reasoning.

TABLE 3: COMPARATIVE VOTING STATISTICS

Lord Hope	Lord Hope	Lord Walker	Lady Hale	Lord Mance	Lord Kerr	Lord Clarke	Lord Wilson	Lord Neuberger	Lord Sumption	Lord Reed	Lord Carnwath	Lord Toulson	Lord Hughes
P: 15 M: 15 D: 0	P: 15 M: 15 D: 0	P: 18 M: 15 D: 0	P: 12 M: 9 D: 3	P: 17 M: 15 D: 4	P: 17 M: 15 D: 4	P: 12 M: 8 D: 4	P: 14 M: 11 D: 11	P: 6 M: 4 D: 2	P: 17 M: 12 D: 5	P: 21 M: 21 D: 0	P: 28 M: 23 D: 5	P: 4 M: 4 D: 0	P: 3 M: 3 D: 0
Lord Walker	Lord Hope	Lord Mance	Lord Kerr	Lord Clarke	Lord Wilson	Lord Neuberger	Lord Sumption	Lord Reed	Lord Carnwath	Lord Toulson	Lord Hughes		
P: 15 M: 15 D: 0	P: 18 M: 15 D: 0	P: 12 M: 9 D: 3	P: 17 M: 15 D: 4	P: 12 M: 8 D: 4	P: 14 M: 11 D: 11	P: 6 M: 4 D: 2	P: 17 M: 12 D: 5	P: 21 M: 21 D: 0	P: 28 M: 23 D: 5	P: 4 M: 4 D: 0	P: 3 M: 3 D: 0		
Lord Mance	Lord Kerr	Lord Clarke	Lord Wilson	Lord Neuberger	Lord Sumption	Lord Reed	Lord Carnwath	Lord Toulson	Lord Hughes				
P: 12 M: 9 D: 3	P: 17 M: 15 D: 4	P: 12 M: 8 D: 4	P: 14 M: 11 D: 11	P: 6 M: 4 D: 2	P: 17 M: 12 D: 5	P: 21 M: 21 D: 0	P: 28 M: 23 D: 5	P: 4 M: 4 D: 0	P: 3 M: 3 D: 0				
Lord Kerr	Lord Clarke	Lord Wilson	Lord Neuberger	Lord Sumption	Lord Reed	Lord Carnwath	Lord Toulson	Lord Hughes					
P: 17 M: 15 D: 3	P: 12 M: 9 D: 3	P: 14 M: 11 D: 11	P: 6 M: 4 D: 2	P: 17 M: 12 D: 5	P: 21 M: 21 D: 0	P: 28 M: 23 D: 5	P: 4 M: 4 D: 0	P: 3 M: 3 D: 0					
Lord Clarke	Lord Wilson	Lord Neuberger	Lord Sumption	Lord Reed	Lord Carnwath	Lord Toulson	Lord Hughes						
P: 12 M: 8 D: 4	P: 14 M: 11 D: 11	P: 6 M: 4 D: 2	P: 17 M: 12 D: 5	P: 21 M: 21 D: 0	P: 28 M: 23 D: 5	P: 4 M: 4 D: 0	P: 3 M: 3 D: 0						

The data indicate the number of instances in which two Justices participated in the same case (P), the number of times two Justices were part of either the same majority or the same minority (M) and the number of times one Justice was part of the majority while the other was part of the minority (D). The table excludes Acting Justices except those who were Full Justices in at least some of the judgments.

Statistics

TABLE 3: COMPARATIVE VOTING STATISTICS (CONTINUED)

Lord Hope	P: 14 M: 11 D: 3	Lord Walker	P: 10 M: 7 D: 3	Lady Hale	P: 26 M: 20 D: 6	Lord Mance	P: 10 M: 9 D: 1	Lord Kerr	P: 20 M: 17 D: 3	Lord Clarke	P: 12 M: 11 D: 1	Lord Wilson	P: 14 M: 13 D: 1	Lord Neuberger	P: 14 M: 13 D: 1	Lord Sumption	P: 12 M: 9 D: 3	Lord Reed	P: 16 M: 15 D: 1	Lord Carnwath	P: 18 M: 17 D: 1	Lord Toulson	P: 6 M: 6 D: 0	Lord Hughes	P: 6 M: 6 D: 0
Lord Hope	P: 6 M: 4 D: 2	Lord Walker	P: 7 M: 7 D: 0	Lady Hale	P: 23 M: 20 D: 3	Lord Mance	P: 27 M: 26 D: 1	Lord Kerr	P: 21 M: 19 D: 2	Lord Clarke	P: 25 M: 22 D: 3	Lord Wilson	P: 14 M: 13 D: 1	Lord Neuberger	P: 24 M: 22 D: 2	Lord Sumption	P: 24 M: 22 D: 2	Lord Reed	P: 17 M: 14 D: 3	Lord Carnwath	P: 18 M: 17 D: 1	Lord Toulson	P: 7 M: 6 D: 0	Lord Hughes	P: 5 M: 5 D: 0
Lord Hope	P: 21 M: 21 D: 0	Lord Walker	P: 6 M: 6 D: 0	Lady Hale	P: 17 M: 15 D: 2	Lord Mance	P: 13 M: 11 D: 2	Lord Kerr	P: 20 M: 18 D: 2	Lord Clarke	P: 16 M: 13 D: 3	Lord Wilson	P: 16 M: 15 D: 1	Lord Neuberger	P: 17 M: 14 D: 3	Lord Sumption	P: 11 M: 6 D: 5	Lord Reed	P: 11 M: 6 D: 5	Lord Carnwath	P: 24 M: 21 D: 3	Lord Toulson	P: 2 M: 2 D: 0	Lord Hughes	P: 4 M: 4 D: 0
Lord Hope	P: 28 M: 23 D: 5	Lord Walker	P: 16 M: 13 D: 3	Lady Hale	P: 23 M: 18 D: 5	Lord Mance	P: 18 M: 18 D: 0	Lord Kerr	P: 20 M: 15 D: 5	Lord Clarke	P: 18 M: 18 D: 0	Lord Wilson	P: 18 M: 17 D: 1	Lord Neuberger	P: 18 M: 17 D: 1	Lord Sumption	P: 25 M: 24 D: 1	Lord Reed	P: 24 M: 21 D: 3	Lord Carnwath	P: 25 M: 24 D: 1	Lord Toulson	P: 2 M: 2 D: 0	Lord Hughes	P: 1 M: 1 D: 0
Lord Hope	P: 4 M: 4 D: 0	Lord Walker	P: 0 M: 0 D: 0	Lady Hale	P: 3 M: 3 D: 0	Lord Mance	P: 6 M: 6 D: 0	Lord Kerr	P: 6 M: 6 D: 0	Lord Clarke	P: 6 M: 6 D: 0	Lord Wilson	P: 6 M: 6 D: 0	Lord Neuberger	P: 7 M: 7 D: 0	Lord Sumption	P: 6 M: 6 D: 0	Lord Reed	P: 2 M: 2 D: 0	Lord Carnwath	P: 2 M: 2 D: 0	Lord Toulson	P: 4 M: 4 D: 0	Lord Hughes	P: 4 M: 4 D: 0

The data indicate the number of instances in which two Justices participated in the same case (P), the number of times two Justices were part of either the same majority or the same minority (M) and the number of times one Justice was part of the majority while the other was part of the minority (D). The table excludes Acting Justices except those who were Full Justices in at least some of the judgments.

TABLE 3: COMPARATIVE VOTING STATISTICS (CONTINUED)

Lord Hughes	P: 3 M: 3 D: 0	Lord Walker	P: 1 M: 1 D: 0	Lady Hale	P: 6 M: 6 D: 0	Lord Mance	P: 4 M: 4 D: 0	Lord Kerr	P: 6 M: 6 D: 0	Lord Clarke	P: 1 M: 1 D: 0	Lord Wilson	P: 6 M: 6 D: 0	Lord Neuberger	P: 5 M: 5 D: 0	Lord Sumption	P: 1 M: 1 D: 0	Lord Reed	P: 4 M: 4 D: 0	Lord Carnwath	P: 1 M: 1 D: 0	Lord Toulson	P: 4 M: 4 D: 0	Lord Hughes	P: 4 M: 4 D: 0
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The data indicate the number of instances in which two Justices participated in the same case (P), the number of times two Justices were part of either the same majority or the same minority (M) and the number of times one Justice was part of the majority while the other was part of the minority (D). The table excludes Acting Justices except those who were Full Justices in at least some of the judgments.