JUSTICE HUMAN RIGHTS CONFERENCE 2012

STRASBOURG DEVELOPMENTS

1. I am going to tackle a disparate number of matters, which have happened this year.

    a. First, the Court's backlog, Protocol 4 and this year's Brighton declaration – just update you on where we are.

    b. Secondly, developments in relation to the Prisoner voting rights saga

    c. Thirdly, developments in relation to cases on jurisdiction and in particular in relation to soldiers.

    d. Fourthly, cases on protest rights: kettling and the prohibition on long term demonstrations outside Parliament.

The Court's backlog

2. The backlog of cases in Strasbourg (early this year being at around 150k) has provided the basis for an argument that the system needed 'reform.

3. Significant 'stream-lining' changes were in fact made by Protocol 14 to the Convention, which came into force on 1 June 2010. This provided for single judges to declare cases inadmissible and for committees of three judges to make decisions on the merits. Further, it amended the admissibility article of the Convention, Article 35 so as to insert new criteria, allowing cases to be dismissed where the Court considered that they were:

    a. an abuse of the right of individual application; or

b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

4. Protocol 14 undoubtedly had a massive impact on the speed at which the court was able to deal with cases and as Judge Bratza remarked in his speech in Brighton in April 2012, had in the previous year resulted in a 98% increase in the number of cases decided.

5. The new criterion of 'not suffered a significant disadvantage' in Article 35(3)(b) of the Convention is being seen now in many inadmissibility decisions coming out of the court. Indeed, the pressure on the Court appears now to be so great, that it seems more and more cases are being dismissed under this vague provision.

6. A recent example is the decision of 25 September 2012: UHL v Czech Republic 1848/12, in which the applicant complained that he had to provide personal data in order to get a free multifunctional smart card called "Opencard" which allowed access to numerous services offered by the City or other providers, including the Prague public transport system. The alternative was to get an anonymous card without any personal identification information but for this he had to pay 200 Czech korunas (CZK) (8 euros (EUR)) and its use is limited to certain services. In addition the cost of transport using an anonymous card was greater than the cost on the Opencard. The Office for Personal Data Protection concluded its investigation into the Opencard system and found that the City of Prague had not adequately informed users of the future processing of their personal data and that they were therefore in violation of the Personal Data Protection Act (no. 101/2000).

7. It ordered the City of Prague to offer each Opencard user the possibility of using a card without the necessity of consenting to further processing of his or her personal data. In December 2011 a third type of Opencard was introduced in which personal data are printed on the card but not stored or further processed.

8. The applicant did not want to provide his personal details to the City of Prague and consent to processing, and therefore did not apply for an Opencard. He asked whether he could buy a yearly pass for the same price as users of the Opencard system. As he received no reply he paid for the more expensive travel available on the anonymous pass but requested reimbursement for the difference. This claim was rejected by the District Court. The applicant lodged a constitutional appeal alleging a violation of his right to privacy and fair trial, which was dismissed on the basis that the matter was de minimis so could not give rise to a human rights issue, and further his only loss was a minor pecuniary amount and that although the applicant's primary concern the protection of his personal data, the action brought had been for unjust enrichment, which was not a means to protect those rights.

9. The applicant complained under Articles 6 and 8 to Strasbourg.

10. The Court considered that there was no difficulty in the Constitutional Court having applied the *de minimis non curat praetor* rule, especially given that it is a flexible rule that allows for any justified exceptions, noting that the Convention contains a similar admissibility criterion in Article 35 § 3 (b).

11. As regards Article 8, the court noted that the financial loss was not significant (about EUR 50 annually), albeit that a large number of individuals were affected. The Court considered that the amount of loss 47 euros per annum did not amount to a significant disadvantage under Article 35(3)(b) and referring

to previous cases held that this amount did not constitute 'significant disadvantage'.[1]

12. It then went on to consider whether respect for human rights required an examination of the application on the merits, noting that this element of 35 compelled the Court to continue examination of the application, even in the absence of any significant damage caused to the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires. This would arise, it said:

    a. Where there is a need to clarify the States' obligations under the Convention

    b. or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant (see Korolev v. Russia (dec.), 25551/05, 1 July 2010);

    c. where the issue raised has already been dealt with in its case-law, as in that case no need for further examination arises (see Burov v. Moldova, cited above).

13. Interestingly, whilst holding that the Court had not yet dealt with an issue similar to that raised in the present complaint, which moreover concerns thousands of people living in Prague and using its public transport system, the Court considered that the issue had already been resolved. After an intervention by the Office for Personal Data Protection, the City of Prague introduced a personal Opencard without the requirement to consent to the further storing and processing of personal data. The Court noted that an adult in possession of such a card could now have access to the public transport

[1] See Ionescu v. Romania (dec.), no. 36659/04, 1 June 2010; Rinck v. France (dec.), no. 18774/09, 19 October 2010; Burov v. Moldova (dec.), no. 38875/03, 14 June 2011; and Kiousi v. Greece (dec.), no. 52036/09, 20 September 2011), concludes that the loss of such an amount does not constitute a significant disadvantage.

services under the same conditions as holders of the ordinary Opencard who gave their consent for data processing.

14. This did not of course deal with two matters. First, the question of whether what had happened did constitute a violation of the Convention. Secondly, the question of whether the requirement to provide data even for the new card, albeit that it would not be stored or processed, was also a violation of privacy. The applicant had not wanted to provide his data to get an Open card, even if that data would not be stored or processed.

15. The Court held that it should not examine the case, having regard to its subsidiary role to national systems in safeguarding human rights (see McFarlane v. Ireland [GC], no. 31333/06, § 112, 10 September 2010). The Court held therefore respect for human rights no longer requires an examination of the present complaint (see Ionescu v. Romania, cited above, § 39).

16. In light of the pressure on the Court this case signifies a worrying development. There is a real risk of arbitrariness when it is left to Judges to decide whether matters are worth deciding..., particularly in the context of human rights. It also raises serious problems of legal certainty – how is one to know whether to advise a client that their case is simply not of sufficient significance to merit consideration by the court. This is a highly subjective question.

<u>Brighton</u>

1. Despite massive increases in the number of cases disposed off under the post Protocol 14 system, the continuation of a backlog provided reason for Government to argue that <u>further</u> so called 'reform' was needed. Further attempts to reduce the delays in the Court were discussed during the Interlaken Conference (Declaration 19 February 2010) and the Izmir Conference (Declaration 27 April 2011). I do not believe that either of these looked at the simple question of how a court with an ever increasing case load could be expected to continue without any increase in its resources.

2. From January this year, Britain had the six month Presidency of the Council of Europe this year. In February it produced a Draft for a declaration to be made at a "High Level Conference on the Future of the ECHR", which with modifications eventually became the Brighton Declaration of April 2012. That draft envisaged that the Court would restrict its consideration to "only those cases in which the principle or the significance of the violation warrants consideration by the court": §21. This arose out of a proposal to that effect by the Commission on a Bill of Rights, set up by the Government.

3. Further, the February draft emphasised the importance of the 'margin of appreciation' and noted that it was "the responsibility of democratically elected national Parliaments to decide how to implement the Convention in legislation, and for independent and impartial national courts and tribunals to apply the Convention": §17.

4. It proposed:

    a. a shortening of the admissibility time limit to 2, 3 or 4 months,

    b. a deletion of part of the safety clause in 35(3)(b) relating to whether domestic courts had considered the issue ("the requirement that no case be rejected where a domestic court had not duly considered the issue"),

    c. the addition of reference to subsidiarity and a significant margin of appreciation into the Convention

    d. a new admissibility requirement that the Court should only allow the case thought if the national court had clearly erred in its interpretation or application of the Convention or if the case raised serious questions affecting the interpretation of the Convention.

5. There were serious objections to these proposals. In relation to the margin of appreciation, it was pointed out by the President of the Court that this was a well developed matter of jurisprudence and that the Governments should not

be seen to be interfering with judicial independence on this question; ultimately it was for those judges to review human rights complaints by reference to their view of what the correct margin was in the context at issue.

6. As finally negotiated, the Brighton declaration proposed the following changes:

    a. That the principle of subsidiarity and margin of appreciation be included in the preamble to the Convention not the Convention itself (and without reference to any 'substantial' margin: 12(b);

    b. The possibility of advisory opinions: §12(d)

    c. A reference to the need for the Court to apply the admissibility criteria in such a way as to ensure that the Court can concentrate on those cases in which the principle or the significance of the violation warrants consideration, noting that this could be done using the manifestly ill founded head of inadmissibility:§14 and 15(d)– DANGEROUS

    d. The amendment of 35(3)(b) to remove the safeguard clause whereby cases should not be dismissed whether the matter has not been duly considered by a domestic court;

    e. An amendment of Article 35(1) (by the end of 2013) to shorten the time limit for an application to the Court from six months to four months: para. 15(a).

    f. Finally, the Court called for a swift and successful conclusion to the work in relation to EU accession to the ECHR: §36.

7. Not satisfactory. Although 20(e) noted need for further judges, the declaration completely failed to tackle the budget issue, which is the key source of the backlog.

8. The Court is in fact astonishingly successful. During 2011 it issued more than 47,000 decisions. Despite a massive increase in workload since 2009 there has

been no increase in budget, which is a paltry 58.96 million euros in 2011. This had in fact been pointed out by the Committee on Legal Affairs and Human Rights in two reports it issued in November 2011. The Rapporteur stated:

> "The yearly cost of a judge at the European Court of Human Rights is higher than the annual contribution made by 15 member states. The total budget of the Court, €58.96 million in 2011, is far less than the budget of the EU Publications Office and less than a quarter of the budget of the Court of Justice of the EU, with a total of 1,230 completed and 2,284 pending cases in 2010, compared to 41,183 applications decided by the Strasbourg Court and 139,650 pending applications. The present situation is simply untenable, not to say suicidal.".

9. Its Report called for urgent attention to be given in member states to the need to provide the Organisation with appropriate financial means: §6.

10. There are 800 million people under the Court's jurisdiction and it costs 80 cents per person per year for the Court. This is the real issue but the one that no one will mention.

11. Interestingly, the Court has opened up a voluntary fund into which payments can be made. The reality is that Protocol 14 provided sufficient basis for speeding up the processing of cases. What is needed now are more lawyers (and therefore a bit more money).

12. Unfortunately, there is the domestic political stage and then there is the international stage and the more important question of what the Court is for. As the Judge Bratza, then President pointed out, the Court provides an observatory onto what is happening in Europe. It is the right of individual petition that is key to that.

CASES

Prisoner voting.

Prisoner voting rights

13. On 22 May 2012 the Court of Human Rights gave its judgment in the case of Scoppola v Italy (no. 3) App. No. 126/05.

14. The case concerned Mr Scoppola's loss of the vote following his criminal conviction for killing his wife and wounding one of his sons. The UK Government had been given leave to make submissions as a third party. The Court held, by a majority, that there had been no violation of Article 3 of Protocol No. 1 (right to free elections) to the Convention. Under Italian law only prisoners convicted of certain offences against the State or the judicial system, or sentenced to at least three years' imprisonment (which allowed for the personal circumstances of the defendant to be taken into account), lost the right to vote. There was, therefore, no general, automatic, indiscriminate measure of the kind that led the Court to find a violation of Article 3 of Protocol No. 1 in the Hirst (no. 2) case.

15. The Court expressly rejected the UK argument that it should resile from its judgment in Hirst (no. 2) v. the United Kingdom (no. 74025/01) of October 2005 and reiterated that general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences was incompatible with Article 3 of Protocol No. 1 (right to free elections). However, it accepted the United Kingdom Government's argument that each State should have a wide discretion as to how a ban is regulated, both as regards the types of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of a law. Importantly, the Court accepted that it was not necessary for a judge to decide whether or not the right to vote should be lost. The Court accepted that this could be decided by the legislature provided the measures adopted were proportionate. Thus, it held at paragraphs 101-102:

"...according to the comparative-law data in the Court's possession ...arrangements for restricting the right of convicted prisoners to vote vary considerably from one national legal system to another, particularly as to the need for such restrictions to be ordered by a court...

This information underlines the importance of the principle that each State is free to adopt legislation in the matter in accordance with "historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision" (see Hirst (no. 2) [GC], cited above, § 61). In particular... States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. It will then be the role of the Court to examine whether, in a given case, this result was achieved and whether the wording of the law, or the judicial decision, was in compliance with Article 3 of Protocol No. 1."

16. Interestingly, the Court issued a Press Release in relation to the implications of case, in which it explained the position in relation to the UK, and in particular its judgment in Greens and M.T. v. the United Kingdom (nos. 60041/08 & 60054/08) of 23 November 2010. In that case the Court had noted that there had been no amendment to the law in the UK since Hirst (no. 2). This had led to a situation where approximately 2,500 similar applications had been lodged at the Court, with the number continuing to grow. Whilst the Court had stated that it did not consider it appropriate to give guidance as to the content of future legislative proposals, it considered that the lengthy delay demonstrated the need to set a timetable for the introduction of proposals to amend the electoral law. The Court had therefore held in Greens that the UK Government should bring forward legislative proposals within 6 months (expiring 11

October 2011). The UK sought an extension of time on the basis that it should be able to wait until the Grand Chamber had given its judgment in Scoppola (No. 3), which was considered by the Court on 30 August 2011. The Court decided that no further unnecessary delay could be contemplated, having regard to the time which had already passed since the Court's ruling in Hirst (no. 2) but nevertheless granted an extension of six months, to start running from the date of the Grand Chamber judgment in Scoppola (no. 3). Accordingly, legislative proposals to comply with Hirst (no. 2) must be brought forward by 22 November 2012 (6 months from the judgment in Scoppola (no.3)).

17. Today on the BBC news web-site it says that the UK is in discussions with the Committee of ministers about the possibility of a draft bill but 'sources in government' whatever that means, apparently say "over our dead body..." There may well yet be a show down on this issue, even if only to secure purely domestic political capital – the opposition also supporting a complete ban.

Jurisdiction cases – Article 1

18. In 2011 the Court produced its important judgment in Al-Skeini, which confirmed that 'state agent authority' – that is control by a state agent - did give rise to jurisdiction within Article 1 of the Convention, even if exercised outside of a territory over which it has 'effective control'. Contrary to popular opinion, this did not amount to a departure from its previous case law. It was well established going back right to the beginning of the Convention and applying principles of international law that the exercise of state authority, whether legal or physical, producing effects outside of the State territory constitutes an exercise of jurisdiction under the Convention.

19. These well established principles became distorted by the reference in the Court's admissibility decision in Bankovic (the case that concerned NATOs bombing of Belgrade) that Convention rights could not be 'divided and tailored' – put another way, if individuals were held to be within a State's

jurisdiction, that state was responsible for providing the individual with all Convention rights.

20. This led to backwards reasoning, whereby the domestic courts found that since it was quite impossible for the UK to provide those in Iraq with Convention rights, even individuals whose rights were affected by State actions should be found not to be under UK jurisdiction (unless detained).

21. The Court in Al-Skeini has at last put to rest this error and explained that there is no such 'divided and tailored rule'. It stated:

> "Whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under…….the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'…." (para 137).

22. At para. 134 the Court noted that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when those agents exert authority and control over others (para 134).

23. At para 135 the Court also recognised that extra- territorial jurisdiction could be exercised where, through the consent, invitation or acquiescence of the Government of that territory, the occupying state exercises all or some of the public powers normally to be exercised by that Government (para 135).

24. Importantly, the Court held that the UK had some sort of control of the area (although it is unclear whether this is effective control of an area so great as to demand that Convention rights be provided within that territory). The Court noted that at the relevant time until the accession of the Interim Government, the United Kingdom (together with the United States) had assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign

Government. In particular the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq.

25. The Court held that in these exceptional circumstances, the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

26. Whilst explicitly linking public control with individual actions so as to bring the victims in Al-Skeini within UK jurisdiction, it is not clear whether in fact that the Court held that there was full 'effective control of the relevant area".

27. Al-Skeini in Strasbourg was decided after Smith in the Supreme Court, in which it was held that British soldiers operating overseas were not within UK jurisdiction. It is unclear whether the SC in Smith would have decided the case differently if it had had the benefit of Al-Skeini.

28. The Court of Appeal in its judgment last week in Susan Smith and others v Ministry of Defence, CA [2012] EWCA Civ 1365 (19 October 2012) took the view that nothing in Al-Skeini compelled it to overturn the Supreme Court's judgment in Smith on jurisdiction, albeit that that decision was not strictly binding on it. In brief, its view was that Al-Skeini was not conclusive on the question of whether British soldiers fall within UK jurisdiction when operating abroad; it did not see any contradiction between a victim of a shooting by a British soldier being 'brought within UK jurisdiction by that soldier's act and the soldier not being within the jurisdiction himself. Accordingly, it upheld the Supreme Court's ruling in Smith that soldiers do not remain within their sending State's jurisdiction when serving overseas but granted the Appellants permission to appeal to the Supreme Court.

29. The jurisdictional question in Smith (whether British soldiers operating overseas under the command and control of the United Kingdom are subject to UK jurisdiction for the purposes of the Convention) is currently however, being considered by the Court in Strasbourg in the case of Pritchard v UK App. No 1573/11 (judgment expected in the next 6 months). The question now is whether it will be Strasbourg or the Supreme Court that decides the question first. The Government is arguing in Pritchard that the Supreme Court should be allowed to decide the point again in Susan Smith, in the light of Al-Skeini, before the Court decides Pritchard. The Applicant is arguing the contrary. The irony in its position however, is that it argued in the first Smith in the SC that only Strasbourg can decide this issue and this persuaded the majority not to rule in favour of jurisdiction.

Deprivation of liberty and "kettling"

30. The European Court of Human Rights, sitting as a Grand Chamber, gave its judgment in Austin & Others v United Kingdom (2012) 55 EHRR 14 (App. Nos. 39692/09, 40713/09 and 41008/09) on 15 March 2012. The cases arose out of the well-known demonstration in Oxford Circus on 1 May 2001 which resulted in the development of the phenomenon of "kettling" as a technique of policing in this country. The applicants were not all members of the demonstration but they had all become caught up within a police cordon for up to 7 hours. They complained that this was a deprivation of liberty and contrary to Article 5 of the Convention. The domestic Courts, including the House of Lords, had held that there was no deprivation of liberty and no breach of Article 5.

31. The Court took the view that it was appropriate to interpret Article 5 having regard to Article 2 of Protocol No. 4, which guarantees the right to liberty of movement, even though the United Kingdom has not ratified that Protocol. On this basis, the Court said:

    a. That Article 5 should not be interpreted in such a way as to incorporate the requirements of Protocol No. 4 in respect of States which have not

ratified it, including the United Kingdom. Article 2(3) of Protocol No. 4 permits restrictions to be placed on the right to liberty of movement where necessary, among other things, for the maintenance of public order, the prevention of crime or the protection of the rights and freedoms of others.

b. That regard should be had to the fact that Articles 2 and 3 impose positive obligations on the authorities to take preventative operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals. Article 5 should not be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.

c. Mere restrictions on liberty of movement are governed by Article 2 of Protocol No. 4. This is not the concern of Article 5 which deals with "deprivations of his liberty." To decide whether there is such a deprivation, one needs to look at a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of, and restriction upon, liberty is one of degree or intensity and not one of nature or substance.

d. Whilst strictly speaking the purpose of the restriction of liberty is not relevant to the question of whether there is a deprivation, regard may be had to the "type" and "manner of implementation" of the measure in question when looking at restrictions on liberty that do not constitute classic forms, such as confinement in a cell. The Court considered that situations can arise which require the public to endure restrictions on freedom of movement in the interests of the common good and that these would not constitute deprivations on liberty, e.g. travel by public transport or on the motorway or attendance at a football match. Provided such restrictions are unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real

risk of serious injury or damage and are kept to the minimum required for that purpose, they will not fall under Article 5: see para 59 of the judgment.

e. The Court did not exclude the possibility that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty however – the question was context and fact specific.

32. In applying these principles to the facts, the Court noted that the Convention scheme is intended to be "subsidiary to the national systems safeguarding human rights": see para 61 of the judgment. In view of that, it expressed caution in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a case. The Court noted that there had been a trial at first-instance lasting three weeks before Tugendhat J. and that absent any obvious shortcomings, it should take the facts as fond.

33. The Court considered that the nature of the containment within the cordon, its duration and its effects on the applicants, in terms of physical discomfort and inability to leave Oxford Circus, all pointed to there having been a deprivation of liberty. However, the Court was ultimately of the view that, taking into account the type and manner of implementation of the measure in question, there had not in fact been such a deprivation: see paras 64-68 of the judgment. It emphasised that its conclusion was based on the specific and exceptional facts of the case and underlined that measures of crowd control should not be used by national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies. The Court ended by saying:

> "Had it not remained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the "type" of the measure would have been different and its coercive and restrictive nature might have been sufficient to bring it within Article 5."

34. The Court also emphasised that it had not been called upon to consider any complaint under Article 10 or Article 11 of the Convention. In other cases in the future the right to freedom of expression and the right to peaceful assembly may well be invoked. The question of whether policing techniques are justified would then have to be considered under paragraph 2 of Articles 10 and/or 11, to assess whether the restriction on those rights was necessary and proportionate.

Demonstrations outside Parliament

35. In May the High Court heard a challenge to the provisions of Part 3 of the Police Reform and Social Responsibility Act 2011. Maria Gallastegui had carried out a peace campaign for 6 years on the pavement opposite Parliament, under SOCPA authorisations, which allotted her a space (but not a particular area) on the pavement around Parliament square. In 2011 Westminster had started proceedings to remove her under the Highways Act but did not pursue them actively. The PRSA then came into force on 19 December 2011 rendering the placing in Parliament Square of any structures enabling an individual to stay in any place for any period a 'prohibited activity' under section 143. Accordingly, the Claimant was from that date at risk of being directed to remove her structures, which if she refused to do would constitute a criminal offence and render her structures/tent, liable to seizure. The Claimant was granted an urgent interim injunction on 21 December 2011, which was extended in January and a hearing expedited to March.

36. Maria Gallastagui submitted that:

    a. the decision to invoke the provisions of Pt 3 was unlawful as it was contrary to the authorisation granted to her under s.134;

    b. she was entitled to a declaration of incompatibility in relation to s.143 and s.145, as the prohibitions contained in them infringed her rights under art.10 and art.11.

37. All the Defendants: the S/S, Westminster and the Police Commissioner, accepted that the legislation involved an interference in her freedom of expression/protest rights that needed to be justified.

38. However, the High Court accepted the S/S's argument that the prohibition in section 143 was not in fact a prohibition at all because the activity only became criminal when the police or an authorised officer decided to exercise the power to make a direction requiring the individual to cease the 'prohibited activity' in the case of s.143 or a seizure in the case of s.145 (paras 42-48). Thus, the Court accepted the argument that there was a discretionary power whether or not to direct, which could be exercised in such a way as not to interfere with freedom of expression rights. The Court did not tackle two fundamental problems with such an approach.

    a. Neither Westminster nor the Police Commissioner was able to identify a single situation where they considered that it would be appropriate for them NOT to direct that the prohibited activity cease. Indeed, the Commissioner accepted that he would be likely to be subject to judicial review by the Mayor if he decided not to enforce the prohibition. In reality, the only way that the 'discretion' could be exercised lawfully was for a direction to be issued – it was a duty not a discretion.

    b. Secondly, it did not take into account the fact that even if a discretion, the existence of a prohibition clearly had a chilling effect on the exercise of protest/expression rights, which required to be justified.

39. The Court's attempt to answer this involved it saying that appropriate remedies were available if a person empowered to act under the sections acted in breach of a demonstrator's art.10 and art.11 rights (paras 49-52). In light of the fact that the Court also held that overall Parliament had struck the right balance under Article 10/11 in prohibiting demonstrations involving equipment that allows individuals to stay in Parliament square, a Court would however, have to hold that the issue of a direction was lawful (even assuming

legal aid could be obtained to bring such a case). More to the point, remedies are ex post facto and Strasbourg has made clear that this provides no answer in relation to Articles 10/11, which require to be protected prior to and during their exercise – ex post facto remedies for breaches of Article 10/11 do not constitute protection of those rights.

40. The basis for the Court's decision really seems to have been its view that the provisions in s.143 and s.145 were of limited effect, relating as they did only to items associated with sleeping. It considered that this being so, they did not impede, let alone prevent, any other form of demonstration or protest in Parliament Square at any time of day or night. The Court stated that for many people who wished to protest in Parliament Square, the use of a tent or sleeping equipment was not central or essential to the exercise of their Convention rights.

41. Importantly, however, the Court did not follow the Court of Appeal judgment of Laws LJ in Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23, Times, February 25, 2009 considered (paras 72-76), in which almost identical byelaws in relation to the AWE had been struck down as in breach of Article 10.

42. Permission has been granted (by Laws LJ) to the Court of Appeal and the hearing is listed in December.

End.