Judicial College Seminar

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Recent Developments in Strasbourg

Jurisdiction

1. Article 1 of the European Convention on Human Rights (ECHR) provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms … in … [the] Convention."

2. In Al-Skeini & Others v United Kingdom (App. No. 55721/07, Judgment of 7 July 2011) the Grand Chamber of the European Court of Human Rights had the opportunity, for the first time since Bankovic v Belgium (2001) 11 BHRC 435, to consider authoritatively the meaning of "jurisdiction" in Article 1. It re-affirmed some basic principles as follows:

   i) Jurisdiction is a threshold criterion. The exercise of jurisdiction is a necessary condition for a contracting state to be able to be held responsible for acts or omissions which give rise to an allegation of an infringement of the Convention rights (para 130).

   ii) A Contracting State's jurisdictional competence under Article 1 is "primarily territorial" (para 131).

   iii) However, acts of a State performed, or producing effects, outside its territory can constitute an exercise of jurisdiction in exceptional cases (paras 131–132).

   iv) At paras 133-137 the Court set out one such exception, which it described as "state agent authority and control".

      i. First, 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).

      ii. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (para 135).

iii. In addition there are certain circumstances in which the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities within its jurisdiction (para 136). In that context the Court made it clear that it did not consider that jurisdiction arose solely from the control exercised by the State over the buildings, aircraft or ships in which the individuals were held. What was decisive in such cases was the exercise of physical power and control over the person in question.

iv. The Court concluded that:

> "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).[1]

3. At paras 138-140 the Court turned to another exception to the territorial principle which is when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights derives from the fact of such control, whether it is exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. In such cases of jurisdiction, the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights in the Convention and those protocols which it has ratified. (para 138). In determining whether effective control exists, the Court will primarily have regard to the strength of the State's military presence in the area but other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (para 139).

4. At paras 143-148 the Court turned to the application of these principles to the facts of the cases before it. At paras 149-150 the Court reached the conclusion that:

> "Following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) 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. In these exceptional circumstances, the Court considers that 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

[1] The Grand Chamber has repeated this point subsequently in *Hirsi Jamaa and Others v. Italy*, (Application no. 27765/09, Judgment 23 February 2012, §74, GC).

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."

5. At paragraph 150 the Court concluded that on the facts of each of the five cases before it, the jurisdictional link between the United Kingdom and the deceased had been established.

6. It remains to be seen whether, and to what extent, the Supreme Court follows the judgment of the Grand Chamber in preference to the decision of the House of Lords in R (Al-Skeini) v Secretary of State for Defence [2008] AC 153 and its own decision in R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1. 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 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).

7. On 19 October 2012 the Court of Appeal in Susan Smith and others v Ministry of Defence, CA [2012] EWCA Civ 1365 decided that although not strictly bound by the Supreme Court judgment in Smith, it would only overturn its decision on jurisdiction if compelled to do so by the ruling of the Grand Chamber in Al-Skeini, which it considered that it was not; the effect of Al-Skeini not being conclusive on the issue. Accordingly, it upheld the Supreme Court's ruling in Smith that soldiers do not remain within their sending State's jurisdiction when serving overseas. The Court of Appeal granted the Appellants permission to appeal to the Supreme Court. The question now is whether it will be Strasbourg or the Supreme Court that decides the question first. The Government is arguing before Strasbourg 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.

Expulsion on grounds of national security and risk of ill-treatment and unfair trial

Othman v United Kingdom (2012) 55 EHRR 1 (Application number 8139/09, judgment of 17 January 2012)

8. This case is sometimes known as the Abu Qatada case and was decided by the Fourth Section of the Court sitting as a Chamber. This is the well-publicised case in which the applicant's deportation to Jordan is being sought on grounds of national security. The applicant had been tried in his absence in Jordan. He was convicted. A memorandum of understanding was reached between the Governments of the United Kingdom and Jordan which was thought to enable the return of individuals such as the applicant in spite of the previous record of the Jordanian authorities, which would have prevented their return because there was a real risk of a violation of Article 3. In the domestic court proceedings the House of Lords held that there was no reason in law to prevent the applicant's deportation to Jordan: [2009] UKHL 10. In particular the House of Lords

rejected both the argument based on Article 3 and the argument based on Article 6.

9. The European Court of Human Rights considered the Article 3 argument at paragraphs 183 to 207 of its judgment. At paragraph 185 the Court confirmed that expulsion by a Contracting State to another state (which may not be a party to the Convention) gives rise to an issue under Article 3 where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion, for example national security.

10. At paragraph 186 the Court accepted that there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security. However, the Court was of the view that it is not for it to rule upon the propriety of seeking assurances or to assess the long-term consequences of doing so. Its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment. At paragraph 187 the Court said that assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. At paragraph 188 the Court said that, in assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances.

11. At paragraph 189 the Court said that more usually, it will assess, first, the quality of assurances given and, secondly, whether, in light of the receiving State's practices, they can be relied upon. In doing so the Court will have regard amongst other things to the following factors:

    (1) Whether the terms of the assurances have been disclosed to the Court.

    (2) Whether the assurances are specific or are general and vague.

    (3) Who has given the assurances and whether that person can bind the receiving State.

    (4) If the assurances have been issued by the central Government of the receiving State, whether local authorities can be expected to abide by them.

    (5) Whether the assurances concern treatment that is legal or illegal in the receiving State.

(6) Whether they have been given by a Contracting State.

(7) The length and strength of bi-lateral relations between the sending and receiving States, including the receiving State's record regarding such assurances.

(8) Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers.

(9) Whether there is an effective system of protection against torture in the receiving State, including whether it is willing to co-operate with international monitoring mechanisms (including international human rights NGO's) and whether it is willing to investigate allegations of torture and to punish those responsible.

(10) Whether the applicant has previously been ill-treated in the receiving State.

(11) Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

12. Applying its reasoning to the facts of the particular case before it, the Court concluded that the memorandum of understanding was sufficient to displace the real risk that would otherwise have existed under Article 3. The Court took into account a number and wide range of factors. These included, at paragraph 194, the fact that the memorandum in question was specific and comprehensive: it addressed directly the protection of the applicant's Convention rights in Jordan and was unique, in the Court's view, in that it had withstood the extensive examination which had been carried out by an independent tribunal in the UK, the Special Immigration Appeals Commission (SIAC). The Court was of the view that the MOU in that case was "superior in both its detail and its formality to any assurances which the Court has previously examined."

13. At paragraph 196 the Court was also of the view that, in the particular circumstances of this case, the applicant's high profile would not place him at a greater risk but rather would make the Jordanian authorities careful to ensure that he was properly treated because they would be aware that ill-treatment would have serious consequences for Jordan's bi-lateral relationship with the UK and "would also cause international outrage."

14. In all the circumstances of the case the Court found that the applicant's deportation to Jordan would not violate Article 3 of the Convention.

15. At paragraphs 231 to 235 of its judgment, the Court considered whether there would be a breach of Article 5 if the applicant were deported to Jordan. The Court considered that, in spite of its earlier doubts in Tomic, Article 5 can in principle apply in an expulsion case. At paragraph 233 the Court said:

> "The Court considers that a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at

real risk of a flagrant breach of that Article. However, as with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial."

16. On the facts of the case before it, the Court found that there would not be a flagrant breach of Article 5: see paragraphs 234-235 of the judgment.

17. At paragraphs 258 to 287 of its judgment the Court set out its views on Article 6 in connection with expulsion of people from a Contracting State to a third State. At paragraph 258 it confirmed that an issue might "exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country." At paragraph 299 the Court said that term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied in it. The Court has indicated that certain forms of unfairness could amount to a flagrant denial of justice:

- conviction in a person's absence with no possibility subsequently to obtain a fresh determination of the merits of the charge.

- a trial which is summary in nature and conducted with a total disregard for the rights of the defence.

- detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed.

- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.

18. At paragraph 260 the Court emphasised that the test "is a stringent test of unfairness." A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 occurring within a Contracting State itself. "What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."

19. At paragraph 261 the Court said that the same standard and burden of proof should apply as in Article 3 expulsion cases. It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.

20. At paragraph 263 of its judgment the Court went on to consider the question whether the admission of evidence obtained by torture amounts to a flagrant denial of justice. The Court considered that it would. At paragraph 264 the Court said that international law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence and that there are powerful legal and moral reasons for this. The Court said that:

> "No legal system based on the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."

21. On the facts of the case before it, the Court found that the incriminating statements against the applicant in Jordan had been made by two men who had been subjected to torture: see paragraphs 269-270 of the judgment.

22. The Court was of the view that the standard of proof was "only"... "a real risk that the evidence against the applicant was obtained by torture." It did not accept the Government's argument that the Defendant needed to establish on the balance of probabilities test that the evidence had been obtained by torture, nor indeed did it accept that this was the test that would apply on the basis of the ruling of the majority of the House of Lords in A (No. 2): see paragraphs 272-274.

23. Turning to the facts of the case before it, at paragraphs 281-285, the Court concluded that the applicant had discharged the burden of proof required to demonstrate a real risk of a flagrant denial of justice if he were deported to Jordan. Overall, therefore, it concluded at paragraph 287 that the applicant's deportation would be in violation of Article 6 of the Convention. That conclusion has led to well-publicised efforts by the Government of the United Kingdom to negotiate further assurances from the Jordanian authorities that the offending evidence will not be used in any trial of the applicant in Jordan were he to be returned there. The Court has declined to refer the case to the Grand Chamber.

A real risk of harm and deportation

24. In S.H v United Kingdom (2012) 54 EHRR 4, App. No. 19956/06 the European Court of Human Rights considered the refusal of an application for asylum by a Bhutanese national of Nepalese ethnic origin. Whilst the special adjudicator accepted the claimed ethnic origin (contrary to the finding of the Secretary of State) he considered that there was insufficient evidence in relation to the persecution alleged, albeit that the Secretary of State accepted that individuals of Nepalese origin were frequently subject to discrimination. A further appeal to the IAT was dismissed and the Court of Appeal refused permission to appeal. The Secretary of State refused to hear further submissions.

25. The Court found that whilst there was no evidence from the UNHCR in relation to Bhutan, since the country was a closed country, the evidence there was (from Amnesty, Human Rights Watch and the Human Rights Council of Bhutan) supported the applicant's claim that he would be at risk of imprisonment and ill-treatment, including torture if he was returned because of his ethnic origin. Whilst the expert evidence was found insufficient to be able to predict precisely what might happen to the applicant on return, the Court considered that it did show that there were substantial grounds for believing that there was a real risk that he would be subjected to ill treatment. In those circumstances, in the absence of evidence from the Government to dispel those concerns, it was held that deportation of the applicant would breach Article 3: see paragraphs 71-72 of the judgment.

Extradition where risk involves 'life without parole' and Article 3

26. In Harkins & Edwards v United Kingdom (App. Nos. 9146/07 and 32650/07, judgment of 17 January 2012) the European Court of Human Rights had to consider whether the extradition of a person to the United States where there was a possibility that a life sentence would be imposed without the possibility of parole is compatible with Article 3 of the Convention. In doing so the Court had to consider the correctness of the decision of the House of Lords in R (Wellington) v Secretary of State for the Home Department [2008] UKHL 72.

27. The Court held, first, that the question whether there is a real risk of treatment contrary to Article 3 in a third State cannot depend on the legal basis for removal to that State. Accordingly, the Court considered that there was no distinction in principle between extradition cases and other cases of removal from the territory of a Contracting State: see para 120 of the judgment.

28. Secondly, the Court held that there is no distinction in principle in such cases of extradition or removal between torture and other forms of ill-treatment prohibited by Article 3. As the Court put it at para 122:

> "Where, as in the extra-territorial context, a prospective assessment is required, it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe to qualify as torture. Moreover, the distinction between torture and other forms of ill-treatment can be more easily drawn in cases where the risk of the ill-treatment stems from factors which do not engage either directly or indirectly the responsibility of the public authorities of the receiving State……"

29. Thirdly, the Court was of the view that no distinction can be drawn in principle between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context: see paras 124-128 of the judgment. At para 129 the Court emphasised, however, that in reaching this conclusion, the Court agreed with Lord Brown's observation in Wellington that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting

State. As Lord Brown observed, the Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. At para 131 of its judgment the Court also emphasised that it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3. It has only rarely reached such a conclusion and, save for cases involving the death penalty it has even more rarely found that there would be a violation if an applicant were to be removed to a State which has a long history of respect for democracy, human rights and the rule of law.

30. The Court was prepared to accept that while, in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, a "grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition": see para 133 of the judgment. However, in the same paragraph the Court emphasised that the comparative materials that were before it demonstrate that "gross disproportionality" is a strict test and it will only be on "rare and unique occasions" that the test will be met. The Court was also prepared to accept that, in a removal case, a violation would arise if the applicant could demonstrate that he or she was at a real risk of receiving a grossly disproportionate sentence in the receiving State. The Court considered that it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3.

31. The Court considered that it is necessary to distinguish between three different types of sentence:

    (1) A life sentence with eligibility for release after a minimum period has been served.

    (2) A discretionary sentence of life imprisonment without the possibility of parole.

    (3) A mandatory sentence of life imprisonment without the possibility of parole: see para 135 of the judgment.

32. The Court was of the view that the first type of sentence is clearly reducible and so no issue can arise under Article 3.

33. As to the second type of sentence, the Court observed that normally such sentences are imposed for offences of the utmost severity such as homicide. The Court was of the view that an Article 3 issue will only arise when it can be shown:

        (1) that the applicant's continued imprisonment can no longer be justified on any legitimate grounds (such as punishment, deterrence, public protection or rehabilitation); and

(2) the sentence is irreducible *de facto* and *de jure*: see para 137 of the judgment.

34. As to the third type of sentence, the Court considered that greater scrutiny is required because the vice of any mandatory sentence is that it deprives the defendant of any possibility of putting forward any mitigating factors before the sentencing Court. This is especially true in the case of a mandatory sentence of life imprisonment without the possibility of parole, a sentence which in effect condemns a defendant to spend the rest of his days in prison, irrespective of his level of culpability and whether the sentencing Court considers the sentence to be justified. However, the Court did not consider that this means that a mandatory sentence of life imprisonment without the possibility of parole is *per se* incompatible with the Convention. The Court concluded that, in the absence of such gross disproportionality, an Article 3 issue will arise for a mandatory sentence in the same way as for a discretionary sentence: see para 138 of the judgment.[2]

35. On the facts of the particular cases before it, the Court found that in neither would there be a violation of Article 3: see paras 140 and 142 of the judgment.

Extradition and prison conditions

36. In the case of Babar Ahmad & others v United Kingdom (App. Nos. 24027/07 & others, judgment of 10 April 2012), the European Court of Human Rights had to consider again a question of extradition of persons to the United States. In particular the issue arose as to whether the conditions in which they might be held, at a so called "super-max prison", ADX Florence in Colorado, were so severe that their extradition would contravene Article 3 of the Convention. Those conditions would involve isolation for very long periods during the day in very secure conditions.

37. At para 201 of its judgment the Court reiterated that, in order to fall under Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum level is relative and depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim. Although the question whether the purpose of the treatment is to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.

38. At para 202 the Court repeated that, for a violation of Article 3 to arise from an applicant's conditions of detention, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. It noted that measures depriving a person of his liberty may often involve an element of suffering or humiliation. However, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the

[2] The whole life sentence (life without parole) provided for in the Criminal Justice Act 2003 was considered in detail by the Court in a judgment given on the same day in the case of Vintner and others v United Kingdom.

manner and method of the execution of the measure does not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

39. At para 206 the Court said that complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. Other forms of solitary confinement, which fall short of complete sensory isolation, may also violate Article 3. Solitary confinement is one of the most serious measures which can be imposed within a prison. At the same time, however, the Court has found that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. At para 209 the Court said that, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. While the Court has not laid down any particular time limit for solitary confinement it cannot be imposed on a prisoner indefinitely.

40. At para 212 the Court emphasised that, in order to avoid any risk of arbitrariness in relation to solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing a prisoner's welfare and the proportionality of the measure. This would include a system of regular monitoring of the prisoner's physical and mental condition and an independent judicial authority to review the merits of, and reasons for, a prolonged measure of solitary confinement.[3]

41. On the particular facts of the various cases before it, the Court found that there would not be any violation of Article 3 on the ground of the likely conditions of detention in the USA: see para 224 of the judgment.

42. Finally, on a procedural note, it should be observed that, at para 258 of the judgment, the Court said that the indications which had earlier been made to the Government under rule 39 of the rules of the Court had to continue in force until the judgment of the Chamber became final or until the panel of the Grand Chamber of the Court accepted any request by one or both of the parties to refer the case to it under Article 43 of the Convention. On 24 September 2012 the Grand Chamber refused an application for it to hear the case. Subsequently, on 5 October, permission to bring judicial review proceedings was refused by the Divisional Court and the applicants have since been extradited to the United States.

[3] See for same point; need for statement of reasons in relation to any prolongation of solitary: *AB v Russia* (2012) 55 EHRR 4 paragraph 108. In that case, three years in solitary for 'vague' purpose of protecting prisoner from risk of life and limb was unjustifiable and violated Article 3.

Mental health of detainees and Article 3

43. Although the decision in MS v United Kingdom (Application Number 24527/08, Judgment of the 4th Section of 3 May 2012) can be viewed as being one on its own facts, in other ways it is instructive of the more general approach taken by the European Court of Human Rights and, in particular, demonstrates how exacting the standards required by Article 3 of the Convention can be.

44. The facts arose from the detention of the applicant, who was suffering from a serious mental illness and had inflicted injuries upon his aunt. The police found him in the early hours of the morning in a public place acting in a highly agitated manner. He was detained under section 136 of the Mental Health Act 1983, which permits detention by a constable of a person who appears to be suffering from mental disorder and to be in immediate need of care or control. The person can then be removed to "a place of safety". A person removed to a place of safety may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner, to be interviewed by an approved social worker and for making any necessary arrangements for his treatment or care. By section 135 (6) a "place of safety" is defined to include a police station.

45. In the circumstances of the applicant's case the applicant was in fact detained at a police station for longer than 72 hours. While he was detained in a police cell, his condition continued to deteriorate, e.g. he stripped naked and was observed drinking water from a toilet bowl. He was eventually transferred to an appropriate medical facility.

46. It is interesting to note that the European Court of Human Rights took into account the code of practice issued under the Mental Health Act which provided at the relevant time that "as a general rule it is preferable for a person thought to be suffering from mental disorder to be detained in a hospital rather than a police station." (para 10.5) The code also stated (at para 10.8.C) that "where a police station is used as a place of safety speedy assessment is desirable to ensure that the person spends no longer than necessary in police custody but is either returned to the community or admitted to hospital": see para 29 of the judgment.

47. It is also instructive to note that, at para 30 of its judgment, the Court had regard to an example of "soft law", i.e. the report to the Government of the United Kingdom on the visit to this country carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in November to December 2008. In that report, at para 148, the CPT expressed its concerns with respect to the availability of appropriate psychiatric care for persons detained by the police. It recommended that detained persons who display severe psychiatric disorders should be transferred without delay to a mental health facility. It also recommended that immediate steps should be taken by the United Kingdom to ensure that detained persons with mental health disorders, held in police stations, are provided with appropriate care and treatment until they are transferred to a mental health facility.

48. Although the Court was clear that there was no intention on the part of the police to treat the applicant in a manner incompatible with Article 3 and that steps were taken, for example, to ensure that he was adequately fed while in detention at a police station, the fact remained that the applicant was in a state of great vulnerability throughout his entire time at the police station, as manifested by the abject condition to which he quickly descended in his cell. The Court was of the view that the applicant was in "dire need of appropriate psychiatric treatment". The Court considered that this situation, which persisted until he was transferred to hospital on the fourth day of detention "diminished excessively his fundamental human dignity." The Court took the view that the applicant was entirely under the authority and control of the state such that the authorities were under an obligation to safeguard his dignity: see para 44 of the judgment.

49. In its conclusion at para 45, the Court found that, even though there was no intention to humiliate or debase the applicant, the conditions he had required endured "were an affront to human dignity and reached the threshold of degrading treatment for the purposes of Article 3." There was therefore a violation of Article 3 of the Convention.

'Whole life orders' and article 3

50. In Vintner and others v United Kingdom, App. Nos. 66069/09, 130/10 and 3896/10, judgment of 17 January 2012, the Court examined the legality of 'whole life orders', imposed by instead of a minimum term in the context of a mandatory life sentence. The consequence of such a whole life order is that the prisoner cannot be released other than at the discretion of the Secretary of State, which is provided for in section 30(1) of the Crime (Sentences) Act 1997. The Secretary of State will only exercise his discretion on compassionate grounds when the prisoner is terminally ill or seriously incapacitated (see Prison Service Order 4700).

51. In all three cases, the applicants had been given whole life orders: in the first applicant's case this order was made by the trial judge under the current practice (whole life orders for repeat offences); in the case of the second and third applicants, who were convicted and sentenced prior to the entry into force of the 2003 Act, the orders were made by the High Court. All three applicants maintained that these whole life orders, as they applied to their cases, were incompatible inter alia with Articles 3 and 5 § 4 of the Convention.

52. The imposition of a whole life order had been held by the Court of Appeal in the case of R v. Bieber [2009] 1 WLR 223 not of itself to breach article 3, in particular, because of the possibility of compassionate release by the Secretary of State. Further, the Court of Appeal had held that an irreducible life sentence would not itself constitute a violation of Article 3, but rather that a violation could only potentially arise after the offender had been detained beyond the period that could be justified on the ground of punishment and deterrence.

53. The Court of Human Rights agreed with that approach, holding that if a discretionary life sentence without the possibility of parole is imposed by a court after due consideration of all relevant mitigating and aggravating factors,

an Article 3 issue does not arise at the moment when it is imposed but only when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) the sentence is irreducible de facto and de jure: see paragraph 92 judgment.

54. However, in the case of a mandatory life sentence without parole, it considered that greater scrutiny was required than in the case of a discretionary life sentence, the defendant being deprived of any possibility of putting mitigating factors or special circumstances before the sentencing court. That impossibility was particularly important where no parole was available, since such a sentence condemns a defendant to spend the rest of his days in prison, irrespective of his level of culpability and irrespective of whether the sentencing court considers the sentence to be justified.

55. The Court nevertheless rejected the contention that these considerations render a mandatory sentence of life imprisonment without the possibility of parole per se incompatible with the Convention, despite the trend in Europe being clearly against such sentences. It held instead that these considerations meant that such a sentence was much more likely to be grossly disproportionate than any of the other types of life sentence, especially if the sentencing court is in effect required to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems: see paragraph 93 of the judgement.

56. The Court concluded that in the absence of gross disproportionality of sentence, which would itself give rise to a violation of article 3, whether a mandatory sentence of life imprisonment without the possibility of parole violated article 3 should be considered in the same way as for a discretionary life sentence, namely that article 3 will be violated when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible de facto and de jure.

57. The Court went on to examine the facts of each of the cases, holding that the sentences were "in effect, discretionary sentences of life imprisonment without parole" albeit that the imposition of a life sentence in each of the cases was mandatory.

58. The Court noted that the Secretary of State's policy on compassionate release, which only allowed for release when the prisoner was terminally ill or physically incapacitated, was much narrower than the Cypriot policy on release which was considered in Kafkaris. The policy conceivably meant that a prisoner could remain in prison even if his continued imprisonment could not be justified on any legitimate penological grounds. It further noted that no explanation had been provided for why the twenty-five year review that had existed under the previous system had not been included in the system of whole life sentences introduced by the 2003 Act. Finally, the Court expressed doubts as to whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all that it meant was

that a prisoner dies at home or in a hospice rather than behind prison walls: see paragraph 94 judgment.

59. Despite these views, the Court rejected the claim that the applicants' incarceration involved a violation of their rights under article 3. This was because having regard to the period of time they had served and the severity of their crime, the whole life orders imposed were not grossly disproportionate. Further, none of the applicants had demonstrated that their continued incarceration failed to serve a "legitimate penological purpose" and that having regard to the length of sentence served, the Court was satisfied that the purpose of punishment and deterrence were served by their continued incarceration: see paragraph 95 of the judgment.

60. The case was referred to the Grand Chamber on 9 July 2012 and the case is to be heard before the Court on 28 November 2012.

Indeterminate sentences for public protection: IPP sentences

61. On 18 September 2012 the Court gave its judgment in the case of James, Wells and Lee v. the United Kingdom, App. Nos. (Applications nos. 25119/09, 57715/09 and 57877/09). This case concerned IPP sentences, introduced by section 225 of the Criminal Justice Act 2003 ("the 2003 Act"); which provided for a judicially decided (punitive) tariff period after which the prisoner is only released on the direction of the Parole Board where it is assessed that he no longer poses a danger to the public. In the year following the entry into force of the relevant provisions the median tariff for IPP prisoners was thirty months, and seventy per cent of IPP sentences imposed involved tariffs of three years or less.

62. Initially, IPP sentences were mandatory in all cases where an individual was convicted of a "serious offence" and was deemed by the sentencing judge to be at risk of committing a further "specified offence". Risk was to be assumed in cases where the individual in question had previously been convicted of a "relevant offence", unless the sentencing judge considered it unreasonable to conclude that there was a risk of further specified offences being committed. The terms "serious offence", "specified offence" and "relevant offence" were defined in the 2003 Act. Pursuant to section 28 of the Crime (Sentences) Act 1997 ("the 1997 Act"), the Parole Board was given the power to direct the release of indeterminate sentence prisoners to whom the section applied if it was satisfied that detention was no longer necessary for the protection of the public. Subsequently, the IPP scheme was amended by the Criminal Justice and Immigration Act 2008 ("the 2008 Act") to deal with in particular lack of resources available to provide for the consequent imprisonment involved. The IPP sentence became discretionary and only applicable where the tariff period would be fixed at more than two years, subject to certain limited exceptions.

63. In James, the Court of Appeal (Lord Phillips of Worth Matravers CJ) considered the primary object of the IPP sentence to be clear from the wording of sections 224 and 225 of the 2003 Act, namely to detain in prison serious offenders who posed a significant risk to members of the public of causing serious harm by the commission of further serious offences until they no longer posed such a risk.

He noted that in a previous case the Secretary of State had conceded that it would be irrational to have a policy of making release dependent upon the prisoner undergoing a treatment course without making reasonable provision for such courses, and that his position in the present case was that the concession stood. Lord Phillips noted that the Secretary of State had decided to bring into force the provisions introducing IPP sentences without having first ensured that there existed the necessary resources to give effect to the policy that would ordinarily have given IPP prisoners a fair chance of demonstrating to the Parole Board, once the time for review arrived, that they were no longer dangerous, namely relevant courses. He continued:

> "40. ... This cannot simply be regarded as a discretionary choice about resources, which is pre-eminently a matter for the government rather than the courts. We are satisfied that his conduct has been in breach of his public law duty because its direct and natural consequence is to make it likely that a proportion of IPP prisoners will, avoidably, be kept in prison for longer than necessary either for punishment or for protection of the public, contrary to the intention of Parliament (and the objective of Article 5 of which Parliament must have been mindful)."

64. However, having established that the Secretary of State had breached his public law duty in failing to provide the necessary courses, Lord Phillips held that since the 2003 Act made express statutory provision for the circumstances in which IPP prisoners could be released, it was not possible to describe a prisoner who remained detained in accordance with these provisions as 'unlawfully detained' under common law, and that in any event the common law had to give way to the express requirements of the statute.

65. In Walker, the Court of Appeal (Laws LJ) held that the legality of the post-tariff element, which fulfilled the aim of public protection, could only be ascertained on a continuing basis, by periodic assessment. Laws LJ emphasised that section 225(1)(b) of the 2003 Act required the sentencing court to assess the presence or absence of danger, and its extent, at the time of sentence, and not at any other time. Accordingly, when sentence was passed it was not to be presumed against the prisoner that he would still be dangerous after his tariff expires, let alone months or years later. To the extent that the prisoner remained incarcerated after tariff expiry without any current and effective assessment of the danger he posed, his detention could not be justified and was therefore unlawful. Granting Mr Walker's application for judicial review, Laws LJ concluded:

> "48. ... The Crown has obtained from Parliament legislation to allow – rather, require: the court has no discretion – the indefinite detention of prisoners beyond the date when the imperatives of retributive punishment are satisfied. But this further detention is not arbitrary. It is imposed to protect the public. As soon as it is shown to be unnecessary for that purpose, the prisoner must be released (see ss.28(5)(b) and 28(6)(b) of the 1997 Act). Accordingly there must be material at hand to show whether the prisoner's further detention is necessary or not. Without current and periodic means of assessing the prisoner's risk the regime cannot work as Parliament intended, and the only possible

> justification for the prisoner's further detention is altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful....
>
> Whether or not the prisoner ceases to present a danger cannot be a neutral consideration, in statute or policy. If it were, we would forego any claim to a rational and humane (and efficient) prison regime. Thus the existence of measures to allow and encourage the IPP prisoner to progress is as inherent in the justification for his continued detention as are the Parole Board reviews themselves; and without them that detention falls to be condemned as unlawful as surely as if there were no such reviews."

66. In Wells and Lee Lord Justice Moses found that the continuing of the individuals was not in breach of Article 5(1) but that the failure to provide the relevant courses breached their rights under Article 5(4).

67. The cases were all joined before the House of Lords, which unanimously dismissed the appeals in relation to Article 5(1) and 5(4) (in the case of James).

68. Before the Court in Strasbourg, the applicants did not complain about their detention during the judicially imposed tariff period, which they accepted was lawful under article 5(1)(a). The question for the Court was whether the post-tariff detention for the public protection was compatible with Article 5(1).

69. The Court emphasised that the use of the words 'after conviction' in Article 5(1)(a) means not simply that the detention must follow the conviction in point of time but that there must be a sufficient causal connection between the conviction and the deprivation of liberty. This causal link might eventually be broken if the decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives. The Court recalled that compliance with national law is not determinative of whether the detention is "lawful"; 'lawfulness' also requires that the individual be protected from arbitrariness in relation to his continued detention, including bad faith or deception on the part of the authorities, a lack of genuine connection between the order to detain and the purpose of the restrictions permitted by Article 5(1); a lack of suitable conditions to meet the specific purpose set out in the relevant sub-paragraph of Article 5(1) and/or a lack of proportionality in the detention measures adopted having regard to their necessity. The Court noted that:

> "194. In the context of Article 5(1)(a), a concern may arise in the case of persons who, having served the punishment element of their sentences, are in detention solely because of the risk they pose to the public if there are no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences... in assessing whether the place and conditions of detention are appropriate, it would be unrealistic, and too

> rigid an approach, to expect the authorities to ensure that relevant treatment or facilities be available immediately: for reasons linked to the efficient management of public funds, a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable... Accordingly, a reasonable balance must be struck between the competing interests involved. In striking this balance, particular weight should be given to the applicant's right to liberty, bearing in mind that a significant delay in access to treatment is likely to result in a prolongation of the detention"

70. Whilst the Court accepted that all the applicants' sentences were based on 'their conviction' for the purposes of Article 5(1)(a), it considered that their continued detention nevertheless breached that provision because it suffered from arbitrariness resulting from the fact that initially at least, IPP sentences were based on various presumptions, such that the sentencing judge had no power to assess whether the individual was a real risk: §204. Further, whilst there was no bad faith; indeed, as the Court noted the problems posed by lack of resources for courses to enable release had been partially addressed by amendments to the legislation, this did not assist the appellants who had been convicted, sentenced and detained prior to the new provisions entering into force. The Court noted that the 'dangerousness' of the applicants was largely a product of the statutory assumption contained in section 229(3), and that it was far from clear that the sentencing judges would have imposed an IPP sentence had they enjoyed judicial discretion at the relevant time (indeed neither Mr Wells nor Mr Lee could have received an IPP sentence under the amended provisions). Accordingly, the Court rejected the Government's argument that a violation of Article 5(1)(a) should not be found as it would result in the release of dangerous prisoners. The Court concluded:

> "218. ...the right to liberty is of fundamental importance. While its case-law demonstrates that indeterminate detention for the public protection can be justified under Article 5 § 1 (a), it cannot be allowed to open the door to arbitrary detention. ...[W]here a Government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed. As Lord Phillips observed, courses are provided to prisoners because experience shows that they are usually necessary if dangerous offenders are to cease to be dangerous (see paragraph 30 above). While Article 5 § 1 does not impose any absolute requirement for prisoners to have immediate access to all courses they may require, any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case, bearing in mind that whether a particular course is made available to a particular prisoner depends entirely on the actions of the authorities (see paragraphs 30 and 102 above). It is therefore significant that the failure of the Secretary of State to anticipate the demands which would be placed on the prison system by the introduction of the IPP sentence was the subject of

universal criticism in the domestic courts and resulted in a finding that he was in breach of his public law duty.

Right to independent and impartial tribunal – bias; police officer as juror.

71. In Hanif and Khan v United Kingdom (2012) 55 EHRR 16, App. Nos. 52999/08 and 61779/08, judgment 20 December 2011 the Court was concerned with the question of whether the prosecution of the applicants for conspiracy to supply heroin breached article 6 on the basis that the makeup of the jury involved an appearance of bias. That appearance of bias was said to arise from the fact that a member of the jury (who also acted as the foreman) was a police officer who not only knew one of the police officers (MB) called as a witness for the prosecution, but who had also been involved in recent drug operations and the criminal trials.

72. Following the Auld Review, it became possible for police officers to sit on juries in England and Wales pursuant to sections 321 and Sch 3 of the Criminal Justice Act 2003, which amended the Juries Act 1974 to remove the automatic disqualification of those involved in the administration of justice from jury duty. Notably, the Scottish Government decided not to remove the disqualification, and in Northern Ireland, as recently as 1996 it was decided to exclude police officers from jury service.[4] Further, in none of the jurisdictions surveyed by the Court save for Belgium and New York could police officers serve on juries and in those jurisdictions special provisions applied to allow a challenge to be made by the defendant: see paragraphs 144, 103 and 121 of the judgment. In that regard, the Court noted that the rejection of police serving on juries had in several jurisdictions followed extensive consideration by law reform commissions. It noted that the Law Reform Commission of Western Australia had highlighted the rigorous vetting procedures for juries in the United States, which did not exist in England or in Australia. Further, that other reports had commented on studies demonstrating the existence of a police culture of group loyalty and a tendency to assume guilt and on the problems encountered in England since the amendment of the 1974 Act. The Court stated that it was "therefore persuaded that the effect on the applicants of the change in the law require[d] particularly careful scrutiny". However, because the applicants were not challenging the possibility of police officers serving on juries but rather the appearance of bias in their case, the Court confined its examination to the specific facts of the case: see paragraphs 144 – 145 judgment, whilst nevertheless setting out a full review of the position in relation to jury composition in other jurisdictions.

73. Accordingly, the Court proceeded to examine the specific facts of the two cases, expressly leaving open the question as to whether it could ever be compatible with article 6 for a police officer to serve on a jury. It stated:

> "148...leaving aside the question whether the presence of a police officer on a juror (*sic*) could ever be compatible with Article 6, where there is an important conflict regarding police evidence in the case and a police

[4] Art 3(3) of the Juries (Northern Ireland) Order 1996 that refers to persons listed in Schedule 2 as ineligible, which includes police officers.

officer who is personally acquainted with the police officer witness giving the relevant evidence is a member of the jury, jury directions and judicial warnings are insufficient to guard against the risk that the juror may, albeit subconsciously, favour the evidence of the police. In the present case, A.T. had known M.B. for ten years and although not from the same station, had on three occasions worked with him in the investigation of the same incident (see paragraph 12 above). Further, the other witnesses who supported M.B.'s account of events were also police officers (see paragraph 11 above).

74. The Court rejected as irrelevant the Court of Appeal's finding that the first applicant's defence witness was not a witness of good character and that his explanation for the records of the use of his mobile phone and the discovery of heroin in his car "bordered on the farcical", noting that it was not for it to assess the evidence presented at trial and, in particular, the first applicant's explanation for the evidence against him. Such assessment was for the members of the jury, who were required pursuant to Article 6 to be impartial: see paragraph 148 judgment.

75. In light of the fact that the defendants were co-defendants, the Court held in relation to the second applicant only that "it would be artificial" for it to reach a different conclusion as to the lack of apparent impartiality in relation to the second applicant: see paragraph 150 judgment.

76. The Court rejected a claim for non-pecuniary damages and noted that it did not follow from the violation of article 6 that the applicants were wrongly convicted: see paragraph 154 judgment.

Hearsay evidence and article 6(3)(d).

77. In Al-Khawaja v United Kingdom and Tahery v United Kingdom (2012) 54 EHRR 23 App. Nos. 26766/05/06 judgment 15 December 2011 the Grand Chamber of the Court considered two convictions in which witness evidence had been relied on by the prosecution where the witness was not available to the defence for cross examination.

78. In its Chamber judgment of 20 January 2009 the Court had held that in both cases the reliance on such statements contravened the Defendants' right under article 6(3)(d) of the Convention: "to examine or have examined witnesses against him" because their convictions had been based solely or decisively on such witness evidence: "the sole or decisive rule". This judgment was considered by the Court of Appeal and Supreme Court in *R v Horncastle* [2010] 2 AC 373. Both the Court of Appeal and the Supreme Court rejected the 'sole or decisive rule' as overly prescriptive, holding that regard had to be given to the entirety of the facts of the case to determine whether the defendants' inability to cross examine a witness had been so prejudicial as to breach their fair trial rights as guaranteed by article 6. They had concluded that the procedural protections provided in relation to the admission of hearsay in the Criminal Justice Act 2003 were sufficient to prevent such unfairness.

79. In re-considering the Chamber judgment in Al Khawaja, the Grand Chamber set out at paragraphs 118-151 of its judgment the general principles, which can be summarised as follows:

(1) The guarantees of 6(3)(d) of article 6 constitute a specific aspect of the overall fairness guarantee in article 6(1) and evaluation of the latter is the Court's primary concern, the regulation of the admissibility of evidence being a matter for regulation by national law and national courts: see paragraph 118 judgment.

(2) Exceptions to the principle enshrined in 6(3)(d) that before an accused can be convicted all evidence against him must normally be produced in his presence in public are possible but must not infringe the rights of defence, which generally requires the opportunity to challenge witnesses: see paragraph 118 judgment.

(3) Having regard to this, there are two minimum requirements if the rights of defence are not to be infringed:

i. There must be a good reason for the non-attendance of the witness. This was so even where the admission of the evidence would not breach of the 'sole or decisive rule' since "as a general rule witnesses should give evidence during the trial and...all reasonable efforts [should] be made to secure their attendance": see paragraphs 119-120 judgment; and

ii. A conviction should not be based solely or decisively on the statement of a witness who is not available to the defence for cross examination (whether during the investigation or the trial): see paragraph 119 of the judgment.

80. The Court then went on to examine these two latter points.

81. As to the first, 'a good reason for absence', where the witness had died, such a good reason self- evidently existed. However, where absence was due to 'fear' more careful scrutiny was required. In that regard, the Court noted that in any case, when a witness has not been examined at any prior stage of the proceedings, "allowing the admission of a witness statement *in lieu* of live evidence at trial must be a measure of last resort" and all alternatives, such as witness anonymity and other special measures must be considered: see paragraph 125 judgment.

82. Notably, the Court considered that a distinction should be drawn between cases where the witness' fear derived from acts of the defendant or approved by the defendant. In such cases, the Court considered that it would be "appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – <u>even</u> if such evidence was the sole or decisive evidence against the defendant" since it "would be incompatible with the rights of victims and witnesses" to "allow the defendant to benefit from the fear that he has engendered." The Court concluded that where a defendant had engendered fear

in witnesses he had "waived his right to question such witnesses under art. 6(3)(d)", which was also the case where the fear derived from acts carried out on behalf of the defendant "or with his knowledge and approval". The Court simply rejected the view of the Supreme Court in Horncastle that determining whether such fear had been engendered by a defendant was notoriously difficult, stating that such difficulties were "not insuperable": see paragraph 123 judgment. It is unclear how the obligation stated at paragraph 125 of the judgment only to allow the admission of a witness statement *in lieu* of live evidence as a measure of last resort applies in this context, i.e. where the Court has held that the defendant has waived his right under 6(3)(d). It would seem likely that the obligation remains, possibly viewed from the perspective of 6(1).

83. Where the fear was 'general', deriving for example from the notoriety of the defendant or his associates, including fear relating to financial loss as well as death or injury of another person, the Court held that whilst this could still provide justification for non-attendance of the witness, the national court would need to conduct enquiries to establish the existence of objective grounds for the fear, which would need to be supported by evidence: see paragraph 124 judgment. However, the existence of objective grounds for the fear was not enough; the Court still needed to consider whether the sole and decisive rule applied and if so, whether the admission of such evidence automatically gave rise to a breach of Article 6(1) and/or 6(3)(d). Thus, at paragraph 118 the Court stated that it would consider whether this rule (the sole or decisive rule) was absolute.

84. In doing so it emphasised at paragraph 126 of its judgment that it was concerned "only" with the application of that rule to evidence from "absent witnesses whose statements were read at trial" and not with "the operation of the common law rule against hearsay *in abstracto* nor...generally whether the exceptions to that rule which now exist in English criminal law are compatible with the Convention." In particular, it emphasised that it was not considering the question of the concealment of the identity of witnesses (anonymous witnesses). The significance of this appears limited however, since it went on to note that in both situations (absent and anonymous witnesses) the same principles applied, namely that:

> "the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him [which]...requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage in the proceedings": see paragraph 127 of the judgment.

85. The Court recalled that it was that principle, which had led to the development of what had become known as the "sole or decisive rule", namely, that if the conviction is based solely or mainly on evidence provided by witnesses that the defendant had not had an opportunity to question at any stage of the proceedings, there would have been an undue restriction on the rights of defence: see paragraph 128 judgment.

86. The Court rejected the Government's objections to the sole and decisive rule. In particular, it did not accept that there was anything in the argument that the common law system in England rendered the rule less relevant, noting that what the Court was concerned with was not the common law exclusion of hearsay but with exceptions to that exclusion. Whether the safeguards applicable to those exceptions were sufficient to safeguard defendants' rights, required the Court to examine them under 6(1) and 6(3)(d); the legal system from which the case emanates was of little relevance to such an examination: see paragraph 130 judgment.

87. Nor did the Court accept that the 'sole and decisive rule' was insufficiently precise, decisive meaning no more than 'probative'. It emphasised that 'decisive' meant more than that without the evidence, the chances of conviction would recede and the chances of acquittal advance, since this would lead to virtually all evidence being excluded. The stronger the corroborative evidence, the less likely the relevant evidence would be considered 'decisive': see paragraph 131 judgement.

88. Nor did the Court accept the argument that in a common law system it was excessively difficult for a trial judge to apply the sole or decisive rule. In that regard the Court noted that at the end of the prosecution case it was open to the defendant to raise the claim that there was no case to answer and that this offered the judge the opportunity to consider the significance and weight of the untested evidence against the background of all the evidence in order to decide whether it was decisive: see paragraph 134 judgment. The Court also noted that in the context of anonymous witnesses, the House of Lords in R v Davis [2008] 1 AC 1128, had had no apparent difficulty in applying the sole and decisive rule and indeed, Lord Bingham had observed that it was "the view traditionally taken by the common law" that convictions based solely or decisively on statements or testimony of anonymous witnesses were unfair.

89. Finally, the Court emphasised the fundamental reason underpinning the sole and decisive rule, namely that experience had shown that however compelling inculpatory evidence might appear, searching examination could undermine it, such that the defendant should not be placed in a position where such examination cannot be carried out, particularly where that evidence is potentially decisive in his conviction: see paragraph 142 of the judgment. Despite this, the Court introduced a new element of flexibility to the rule, holding that whether there was a breach of 6(3)(d) had to be examined in the light of the requirement of fairness in 6(1) and that breach of the sole and decisive rule would not automatically breach that fairness requirement, albeit that most careful scrutiny was required in such a case. The Court held that in each case:

> "the question...is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place."

90. Thus, a conviction could only be based on such evidence, where there were has been a proper assessment of its reliability: see paragraph 147.

91. The Court then went on to examine the procedural safeguards contained in the 1988 and 2003 Acts. The Court considered it to be of particular significance that under the 2003 Act the trial judge was required to stop the proceedings if satisfied at the close of the prosecution that any conviction would be based "wholly or partly" on hearsay evidence and that the statement in question is so unconvincing, considering its importance in the case, that a conviction would be unsafe: see paragraph 149 judgment. It concluded that the safeguards provided in the Acts, as well as in section 78 of the Police and Criminal Evidence Act and common law were "strong safeguards designed to ensure fairness": see paragraph 150-151.

92. The Court then turned to examine the application of these safeguards to the facts of the two cases. In the first case, Al Khawaja, a consultant physician, was convicted of indecent assault of two female patients, ST and VU. ST committed suicide before the trial but had made a statement to the police and had spoken to two friends about the assault. The judge allowed her statement to be read to the jury. During summing up, the Judge reminded the jury that the evidence had not been tested in cross examination and should therefore be afforded less weight than might otherwise have been the case. The applicant's appeal to the Court of Appeal on the basis that S.T.'s statement should not have been read to the jury was rejected. The Court held that S.T.'s statement was decisive in his conviction but noted that in accordance with approach explained above, that was not conclusive. The Court then went on to carry out a relatively light touch review of the procedural protections as applied (including the direction given to the jury) and the corroborative evidence that supported the reliability of S.T.'s statement. It concluded that "there were sufficient counterbalancing factors to conclude that the admission in evidence of S.T.'s statement did not result in a breach of art 6(1) read in conjunction with art. 6(3)(d) of the Convention.": see paragraph 158 judgment.

93. By contrast, in the second case, Tahery, there was no evidence to corroborate the relevant witness statement. In that case, the defendant was accused of having stabbed S. The only evidence was a statement by T, given two days after the stabbing. The Judge allowed that statement to be read on the basis that T was too afraid to give evidence having received visits and calls, none of which were said to have been by the applicant. The Court of Human Rights did not accept the findings of the domestic courts that the prejudice in admitting this evidence was counterbalanced by the ability of the applicant to give evidence and/or call witnesses and by the warning given by the trial judge to the jury, albeit "full and carefully phrased" that it was necessary to approach the evidence with care. As to this, the Court noted that:

> "such a warning, however clearly or forcibly expressed, could be a sufficient counterbalance where an untested statement of the only prosecution eyewitness was the only direct evidence against the applicant",

that is, where all other evidence was wholly circumstantial: see paragraph 164 and also 161. Accordingly, the Court concluded that "the decisive nature of T's statement in the absence of any strong corroborative evidence in the case meant the jury [had been] unable to conduct a fair and proper assessment of the

reliability of T's evidence." According 6(1), read in conjunction with 6(3)(d) was found to have been breached by the admission of T's statement: see paragraph 165 of the judgment.

94. To sum up, the Grand Chamber has added a degree of flexibility to the 'sole and decisive rule'.

(1) First, it has reiterated that there is no absolute right under 6(3)(d) to cross examine witnesses and that inability to do so does not automatically constitute a breach of article 6; rather, regard must be had to whether that inability rendered the proceedings unfair under 6(1).

(2) Secondly, it has held that absent corroborative evidence, where witness evidence is the sole or decisive prosecution evidence, its admission will be likely to breach article 6(1). It is unclear however, whether that will also be the case where the relevant witness is absent due to fear engendered by the defendant, which the Court has stated is a special category.

95. The effect of Al-Khawaja on the admission of hearsay evidence was considered by the Court of Appeal Criminal Division in R. v Ibrahim (Dahir) [2012] EWCA Crim 837, [2012] 4 All E.R. 225 and then in R v Riat and others [2012] EWCA 1509. In the latter case, the Court held that:

(1) The common law prohibition on the admission of hearsay evidence remained the default rule. The Criminal Justice Act 2003, although widening the categories of hearsay which might be admitted, did not elevate hearsay to the same level as first-hand evidence. Horncastle was not to be construed as meaning that hearsay evidence had to be shown to be reliable or independently verified before it could be admitted or left to the jury. For the purposes of a Crown Court dealing with such cases on a day-to-day basis, five propositions deriving from Horncastle and subsequent case law were central: (a) the law was as stated in the Act, to which there was a six-step approach, namely:

iii. Is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence (s 116-118) ?

iv. What material is there which can help to test or assess the hearsay (s 124) ?

v. Is there a specific 'interests of justice' test at the admissibility stage ?

vi. If there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s 114(1)(d)) ?

vii. Even if prima facie admissible, ought the evidence to be ruled inadmissible (s 78 PACE and/or s 126 CJA) ?

viii. If the evidence is admitted, then should the case subsequently be stopped under section 125 ?

(2) Iin case of conflict between Horncastle and Al-Khawaja v United Kingdom, a domestic court was obliged to follow the former;

(3) although the importance of the hearsay evidence to the case was a vital consideration, there was no overarching rule that hearsay evidence which was "sole or decisive" was automatically inadmissible;

(4) Crown Court judges generally needed to look no further than the Act and Horncastle;

(5) neither the Act nor Horncastle permitted hearsay evidence to be automatically admissible as if it were first-hand evidence,

(6) With regard to the statutory gateways permitting the admission of hearsay evidence, it was clear from s.116 of the Act that a reason for resorting to second-hand evidence had to be shown, for example, a witness's illness or death. Absence abroad would only suffice if it was not reasonably practicable to bring the witness to court in person or by video link. If a witness was lost, reasonably practicable steps must have been taken, not only to find him, but also to keep in touch with him before he disappeared. Where a witness was in fear of giving evidence, s.116(4)(c) required consideration of special measures.

96. The Court also noted that where a specific gateway for admission was passed, the court had then to consider the reliability of the evidence and the practicability of the jury testing its reliability, to which s.124 was critical. Where a specific gateway was not passed, there was a general residual power to admit hearsay evidence under s.114(1)(d) subject to the non-exhaustive considerations in s.114(2). Even if hearsay evidence was prima facie admissible, it had not to be simply "nodded through"; it could still be ruled inadmissible under s.126 of the Act or under the Police and Criminal Evidence Act s.78 (paras 19-25). The evidence could also be stopped under s.125 of the 2003 Act.

Prisoner voting rights

97. 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.

98. 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.

99. 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...
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> 102. 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, with a view to securing the rights guaranteed by Article 3 of Protocol No. 1 (see Hirst (no. 2) [GC], cited above, § 84, and Greens and M.T., cited above, § 113), the Contracting 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."

100. Interestingly, in its Press Release in relation to the implications of case, the Court expressly stated that its judgment had implications for the judgment 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 that the UK Government should bring forward legislative proposals to amend the law within six months of Greens and M.T becoming final, which occurred on 11 April 2011. The UK government 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). On 30 August 2011 that application was examined by the Court. The Court expressed the view that further unnecessary delay could not 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)).

Deprivation of liberty and "kettling"

101. 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.

102. The Court first set out its general principles on Article 5. First, at para 53, the Court reiterated the doctrine that the Convention is a "living instrument" which must be interpreted in the light of present day conditions and of the ideas prevailing in democratic States today. However, the Court went on to emphasise that this does not mean that it can create a new right, or that it can whittle down an existing right, or create a new exception or justification which is not expressly recognised in the Convention.

103. Secondly, at para 54, the Court stated that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions. In particular, 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. This led the Court to the following views:

    (1) Article 5 should not in principle 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. At the same

time 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. The Court noted that, in certain well-defined circumstances, Articles 2 and 3 of the Convention imposed 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 cannot 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, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness: see para 56 of the judgment.

(2) Article 5(1) is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5(1) the starting-point must be his concrete situation and account must be taken of 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.

(3) The purpose behind the measure in question has not previously been mentioned in the Court's case law as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed it is clear from the previous case law that an underlying public interest motive has no bearing on the question of whether that person has been deprived of his liberty: see para 58 of the judgment. However, the Court was of the view that the requirement to take account of the "type" and "manner of implementation" of the measure in question does enable it to have regard to the specific context and circumstances surrounding types of restriction when these are not classic forms of deprivation of liberty, such as confinement in a cell. Like the domestic courts the Court took the view that there can commonly be situations where the public may be called on to endure restrictions on freedom of movement in the interests of the common good but which would not be regarded as a deprivation on liberty, e.g. travel by public transport or on the motorway or attendance at a football match. The Court took the view that such commonly recurring restrictions on movement are not deprivations of liberty so long as they are rendered 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: see para 59 of the judgment.

(4) However, 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. In each

> case Article 5(1) must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public.

104. When the Court turned to apply those principles to the facts of the case before it, it had regard to the principle that the Convention scheme is intended to be "subsidiary to the national systems safeguarding human rights": see para 61 of the judgment. The Court said that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts. Although the Court is not bound by the findings of those courts and remains free to make its own appreciation of the facts in the light of all the material before it, in normal circumstances it requires cogent reasons to depart from the findings of fact reached by domestic courts. In the present context the Court noted that there had been a trial at first-instance lasting three weeks before Tugendhat J.

105. 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 of liberty: see paras 64-68 of the judgment.

106. At para 68 the Court emphasised that its conclusion was based on the specific and exceptional facts of the case. It also wished to underline 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."

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.

Brighton Declaration

107. The future of the European Court of Human Rights was the subject of a High Level Conference, chaired by the Government of the United Kingdom, held in Brighton on 19-20 April 2012. This conference produced the Brighton Declaration, which can be found at http://www.coe.int/en/20120419-brighton-declaration

108. Of particular interest may be the following recommendations in the Declaration:

(1) A reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention; and the Committee of Ministers is invited to adopt the necessary amending instrument by the end of 2013: para 12(b).

(2) The Committee of Ministers is invited (by the end of 2013) to draft the text of an Optional Protocol to the Convention which would enable a request to be made for an advisory opinion in the context of a specific case at the domestic level: para 12(d).

(3) Article 35(1) of the Convention should be amended (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).

Postscript: Charter of Fundamental Rights of the European Union

109. Although it is strictly speaking outside the scope of this paper, as it concerns Luxembourg and not Strasbourg, it should be noted that on 21 December 2011 the Court of Justice of the European Union, sitting as a Grand Chamber, gave judgment in Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department (a reference by the Court of Appeal). In that case the Court noted that the EU Charter is applicable when a Member State implements EU law: see Article 51 (para 64 of the judgment). The Court held that Protocol (No. 30), sometimes inaccurately referred to at the time as an "opt-out" from the Charter, "explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions."

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