

## Human Rights Update Ben Hooper

1. In this paper I focus principally on recent (*i.e.* 2009 or 2010) cases under Arts. 6 and 8 of the European Convention on Human Rights. These articles provide in relevant part:

### **“Right to a fair trial Article 6**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

### **“Right to respect for private and family life Article 8**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

2. I review the recent Convention cases under five general topic headings:
  - (1) public authority decision-making;
  - (2) disciplinary hearings;
  - (3) employment vetting;
  - (4) cases on using personal/private information; and
  - (5) possession cases.

## **(1) Art. 6 and public authority decision-making: continuing uncertainty**

### **The background**

3. Public authorities are of course vested with a large number of discretionary powers that can be exercised in ways that directly affect individuals. Traditionally, the law only required that such powers be exercised in compliance with the principles of domestic public law: *i.e.* that they be exercised fairly, with due regard to relevant considerations, etc. and that the decisions themselves be *Wednesbury* reasonable. Any dispute as to whether a power had been lawfully exercised could be determined by the High Court in judicial review proceedings. The Court would not seek to re-take the decision for itself but would instead apply the form of limited review which domestic public law required.
4. Art. 6 poses a challenge to this established order. On its face, it imposes the same requirements on all disputes that are governed by “civil” law. In other words, if a “civil right” is at issue, the same guarantees are in place irrespective of whether in our domestic legal order the dispute would be governed by private or public law. It is not difficult to satisfy Art. 6 when the dispute at issue concerns private law. The parties can submit their dispute to a Court, and the Court will have jurisdiction to decide all relevant factual and legal issues in a manner that fully complies with Art. 6.
5. When acting as a public law decision-maker, a public authority will in general be unable to comply with the Art. 6 requirement of independence. Its decision-making will thus not itself comply with Art. 6. This is not surprising. Public authorities do not traditionally constitute themselves as Courts or Tribunals in order to determine how best to exercise their public law powers. But the difficulty is that this deficiency in Art. 6 terms will not necessarily be remedied by the availability of judicial review. Although the Administrative Court is independent and impartial (and thus is an appropriate body to determine disputes for Art. 6 purposes), it will not ordinarily be re-taking the decision for itself, but rather applying more or less intensive forms of review to the decision as taken by the authority.
6. As Strasbourg has widened the scope of Art. 6 (by adopting an increasingly expansive approach to “civil rights and obligations”) this tension in the application of Art. 6 to public law decision-making has increased.
7. In *Begum v. Tower Hamlets Borough Council* [2003] 2 AC 430, the House of Lords sought in effect to defend the established order in English law. Ms Begum was homeless, and Tower Hamlets had had a duty to accommodate her. She was offered

accommodation but turned it down, alleging that the area in question was blighted by drugs and racism, and that she had been attacked shortly after viewing the property. The Council conducted an internal review of the accommodation offered, and concluded that it was suitable for Ms Begum and it would have been reasonable for her to accept it. Ms Begum exercised a right of appeal to the County Court, but s. 204 of the Housing Act 1996 limited that right of appeal to a point of law only. Ms Begum argued that Art. 6 had been breached because no Art. 6-compliant body had grappled with the factual disputes at issue in her case.

8. The House of Lords recognised that the Council officer who undertook the review was incapable of being an “independent” tribunal for Art. 6 purposes. It assumed, but did not decide, that a “civil right” was at issue.<sup>1</sup> However, it went on to hold (in reliance on certain Strasbourg cases) that a lack of independence in the decision-maker was not necessarily fatal for Art. 6 purposes if suitable measures were in place to ensure the fairness of the proceedings and the Court’s jurisdiction on appeal/review was sufficiently extensive to deal with the case as its nature required. Noting that the factual disputes in housing decisions were only preliminary steps in the exercise of broader judgments about the performance of public law duties, and that the internal review was conducted at a senior level and was subject to detailed statutory rules to ensure fairness, the House of Lords concluded that the County Court’s limited appellate jurisdiction was sufficient to ensure Art. 6 compliance overall.
9. *Begum* thus provided English Courts with a means of avoiding the threat that Art. 6 potentially posed to the orthodox domestic position.
10. However, the 14 November 2006 judgment of the European Court of Human Rights (“ECtHR”) in *Tsfayo v. UK* has cast doubt on how widely the *Begum* analysis can be applied.
11. Ms Tsfayo had failed to renew her application for council tax and housing benefit, and had therefore lost her entitlement to both. She submitted a retrospective and prospective claim to her local authority. The Council allowed her prospective claim, but rejected her retrospective claim. Ms Begum appealed on the latter point to the Council’s Housing Benefit and Council Tax Benefit Review Board (a panel of elected councillors, together with a legal advisor). The Board applied the test of whether there was “good cause” for the delay, and rejected the appeal. Ms Begum’s subsequent judicial review failed.

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<sup>1</sup> This is worth noting, as it suggests that the Supreme Court may in the future be willing to adopt a restrictive approach to the meaning of “civil rights and obligations” in order to preserve at least aspects of the *status quo*, should the *Begum* analysis cease to be sustainable.

12. In Strasbourg, the UK Government accepted that Ms Begum's "civil rights" were at issue and that Art. 6 was therefore applicable. It argued that Art. 6 had been complied with by advancing the analysis that the House of Lords had adopted in *Begum*. The Court disagreed:
  - 12.1 Ms Tsfayo's case was not like *Begum*. The resolution of the factual issue (*i.e.* whether Ms Tsfayo had "good cause" for delay) didn't require specific professional knowledge or experience, and turned simply on issues of credibility. Nor was the determination of the factual issue a step in some wider policy judgment. (*Tsfayo*, at §46)
  - 12.2 Further, the applicable procedural safeguards didn't overcome the fundamental lack of objective impartiality in the Board (consisting of members directly connected to one of the parties in the dispute). (§47)
  - 12.3 Art. 6 was therefore violated. As the Court noted at §48 - having regard to the limited scope for judicial review - "...in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."
13. *Tsfayo* therefore suggests that *Begum* may need to be modified, and that the "solution" endorsed by the House of Lords in *Begum* may not be as widely applicable as *Begum* might itself suggest.
14. As yet, there has not been a definitive assessment by the House of Lords (or Supreme Court) of the impact of *Tsfayo*.
15. In *Ali v. Birmingham City Council* [2008] EWCA Civ 1228 the Court of Appeal held that *Tsfayo* had not undermined *Begum* in the housing field, and rejected an Art. 6 complaint notwithstanding that the individuals concerned alleged that their case turned on a pure question of fact (as to whether or not certain letters had been received). *Ali* was heard by the Supreme Court in November 2009, but judgment has not yet been given.

***R (A) v. Croydon London Borough Council***

16. In the meantime, however, the Supreme Court has given a useful indication of what its view in *Ali* might be in the separate case of *R (A) v. Croydon LBC* [2009] 1 WLR 2557.

17. The appellants in *A* were asylum seekers who claimed to be children. The local authority respondents had assessed them to be over 18, and thus refused to provide them with accommodation under the Children Act 1989 (s. 20(1)). The appellants sought judicial review, and took the Art. 6 point.
18. In the event, the Supreme Court decided the case on different grounds. The factual issue as to whether the appellants were children was a question of precedent fact, and was thus to be determined as necessary by the Courts. But Baroness Hale (who gave the leading judgment) and Lord Hope both considered the two issues that arose under Art. 6: (i) whether Art. 6 was applicable and (ii) whether it would have been complied with on the facts.
19. Baroness Hale considered the various arguments for and against the right to accommodation being a “civil right” for Art. 6 purposes, but reached no concluded view. However, as to whether Art. 6 would have been complied with (assuming the age of the appellants had not been a question of precedent fact) she made clear that she would not accept the “judicialisation” of claims to welfare services “unless driven by Strasbourg authority to do so” (§44). She then set out - as a matter of principle - why such judicialisation would be unfortunate:

“ 44. ....Every decision about the provision of welfare services has resource implications for the public authority providing the service. Public authorities exist to serve the public. They do so by raising and spending public money. If the officers making the decisions cannot be regarded as impartial, and the problem cannot be cured by the ordinary processes of judicial review based upon the usual criteria of legality, fairness and reasonableness or rationality, then tribunals will have to be set up to determine the merits of claims to children’s services, adult social services, education services and many more. Resources which might be spent on the services themselves will be diverted to the decision-making process. Such a conclusion would be difficult, if not impossible, to reconcile with the decision of the House in *Runa Begum*. The degree of judicialisation required of an administrative decision, in the view of Lord Hoffmann in *Alconbury* [2003] 2 AC 295, para 87, depends upon the ‘nature of the decision’ (repeated in *Runa Begum* [2003] 2 AC 430, para 33).

45. If this is a civil right at all, therefore, I would be inclined to hold that it rests at the periphery of such rights and that the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of article 6.”
20. Lord Hope adopted a more robust approach. He appeared to endorse *Begum* (at

§55) and, like Baroness Hale, indicated that he would only depart from it if “driven to do so” by subsequent Strasbourg authority. He also suggested - perhaps somewhat optimistically - that the ECtHR in *Tsfayo* had in fact endorsed *Begum* (§§60-61). Finally, he held (albeit, of course, *obiter*) that the right to accommodation under the Children Act 1989 was not a “civil right”. Lord Hope’s more robust stance was not, however, endorsed by the other members of the Supreme Court, and Lord Walker expressly stated that he preferred to keep open whether a “civil right” was at issue.

21. Overall, *A* suggests that the Supreme Court remains committed to the *Begum* approach, and that *Ali* (and its interpretation of *Tsfayo*) will do little to affect the English law solution which the House of Lords endorsed in *Begum*.
22. Further, the observations of Baroness Hale and Lord Hope should be considered in any case where there is a dispute as to whether a “civil right” is at issue.
23. One other recent case is worth noting on this topic. In *De-Winter Heald v. Brent London Borough Council* [2009] EWCA Civ 930 the Court of Appeal upheld the Convention-compliance of a scheme under which the Council’s decision-making in relation to its homelessness function (under s. 202 of the House Act 1996) had been contracted out to a private company.

## **(2) Art. 6 and disciplinary hearings**

24. In general a disciplinary hearing will not attract the protections of Art. 6. However, in the early case of *Le Compte, Van Leuven and De Meyere v. Belgium* (1981) 4 EHRR 1, the ECtHR held that the civil limb of Art. 6 was applicable where the dispute at issue was “decisive” for the rights of the applicant doctors to continue to practice their profession (see §§47-48).
25. Two recent cases have built upon this jurisprudence so as to require public authorities to permit those subject to internal disciplinary proceedings to have legal representation.

### ***Kulkarni v. Milton Keynes Hospital NHS Foundation Trust***

26. The first case is *Kulkarni* ([2010] ICR 101), decided by the Court of Appeal on 23 July 2009.
27. The claimant was a trainee doctor who claimed a right to legal representation in internal disciplinary proceedings. Those internal proceedings concerned an allegation

that Dr Kulkarni had inappropriately touched a female patient. In the event, the Court of Appeal decided the appeal on the basis that Dr Kulkarni had a contractual entitlement to be legally represented. However, Smith LJ (who gave the only judgment) went on to consider *obiter* the position under Art. 6 (at §§63ff).

28. Two principal issues arose: (i) whether Art. 6 was applicable and, if so, (ii) whether Dr Kulkarni had a right to legal representation under Art. 6.

29. As to the first issue, Smith LJ considered *Le Compte* and held at §65:

“It appears to me that the distinction which the court was drawing [in *Le Compte*] was that, in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of the right to practise his or her profession, the article would be engaged.”

30. Smith LJ recognised that only the GMC could deprive a doctor of the right to practice, and noted the argument that the effect of these disciplinary proceedings would at most be that Dr Kulkarni would lose his job. However, she also observed that the likely result of an adverse finding would be that Dr Kulkarni could not work again in any part of the NHS and, indeed, could not complete his training and thus not continue his professional activities at all. Overall, she concluded at §67:

“It seems to me that there is force in [the submission advanced on Dr Kulkarni’s behalf] and, had it been necessary for me to make a decision on this issue, I would have held that article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS.” (Emphasis added.)

31. On the second issue - whether Dr Kulkarni had a right to legal representation in the internal disciplinary proceedings - it had been submitted that the possibility of Art. 6-compliant proceedings before either the GMC or the Employment Tribunal would (on the *Begum* approach) ensure that the process complied with Art. 6 overall. This submission was rejected. As to the Employment Tribunal, Smith LJ observed that any unfair dismissal claim would not require the Tribunal to determine whether Dr Kulkarni had in fact committed the misconduct (§73). As to the GMC, Smith LJ accepted at §72 that a finding by the GMC that Dr Kulkarni had not touched his patient inappropriately would enable him to obtain employment with the NHS once more. However, she discounted this possibility on the grounds that “there is no certainty that

there will be General Medical Council proceedings. The doctor cannot instigate them.”

32. Overall, Smith LJ concluded that Dr Kulkarni did have a right under Art. 6 to legal representation:

“In my view, in circumstances of this kind, [Art. 6] should imply such a right because the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious.”

33. None of this is very satisfactory. As Smith LJ accepted at §75, it will be difficult for employers to determine whether Art. 6 is engaged in any particular case. Also, Smith LJ’s conclusion under Art. 6 leads to the sort of judicialisation of internal decision-making that the Supreme Court disapproved of in *A*. Further, it is not clear why the solution to any Art. 6 problem shouldn’t lie in the GMC being obliged to amend its procedures and *e.g.* reconsider a doctor’s case in these circumstances if the doctor so wishes. Yet further, and to the detriment of legal certainty, there is nothing Smith LJ’s judgment that expressly clarifies whether the principles she set out also apply to disciplinary hearings in the private medical sector. I will return to this last point after having considered the next case.

### ***R (G) v. Governors of X School***

34. The position is even less clear now that the Court of Appeal has considered a second case in this area: *R (G) v. Governors of X School* [2010] EWCA Civ 1.
35. Mr G was a teaching assistant at X school. A complaint was made that he had kissed and had sexual contact with a 15 year old boy who was undertaking work experience at the school. The Governors decided not to allow Mr G to have legal representation at either the disciplinary hearing or the appeal hearing. Mr G sought judicial review.
36. Laws LJ gave the sole judgment. He analysed the three “phases” in the development of the relevant vetting scheme, from the old “List 99” Procedure under the Education Act 2002, through transitional provisions and finally to the new “Children’s Barred List” under the Safeguarding Vulnerable Groups Act 2006.
37. Regulations<sup>2</sup> required various employers in the education sector to report people who

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<sup>2</sup> See reg. 4 of the Education (Prohibition from Teaching and Working with Children) Regulations 2003, SI 2003/1184.

had, in effect, left work in circumstances that might give cause for concern as to their suitability to work with children. (And it may be noted that this obligation was equally imposed on independent schools). Under the scheme's third phase, such a report would lead to the case being considered by the Independent Safeguarding Authority ("the ISA"). The person concerned has to be included on the list if two conditions are satisfied. First, the ISA must conclude that the person has in fact engaged in suspect conduct (and it may be noted that the ISA is not bound to agree with any related factual conclusion reached in the internal disciplinary proceedings). Secondly, it must appear to the ISA that it is "appropriate" to include the person on the list.

38. Inclusion on the list in effect precludes a person from many forms of work that involves children. The person has a right of appeal to the Upper Tribunal in relation to mistakes of fact and law, but not in relation to the ISA's assessment of whether inclusion is "appropriate".
39. At §27 of the judgment, Laws LJ identified two issues: (i) whether the disciplinary proceedings "were a determinant [sic] of a...civil right, namely the claimant's civil right generally to practice his profession as a teaching assistant" and (ii) whether Art. 6 required the claimant to be allowed legal representation.
40. On the first issue, Laws LJ considered various Strasbourg authorities and concluded at §32 that Art. 6 would apply "where the decision in the relevant proceedings has a substantial influence or effect on the later vindication or denial of the claimant's Convention right" (the inclusion of the last two words is rather difficult to understand; Laws LJ may well have meant "civil right": see §37). In other words, it was not necessary that the effect be "decisive" before Art. 6 would apply (contrast *Le Compte*).
41. Laws LJ rejected the submission that the *Begum* approach of subsequent judicial control was sufficient to ensure that Art. 6 was satisfied overall. Such an approach could not be applied to disciplinary procedures that led to barred list procedures (§42).
42. He also rejected the argument that the barred list procedure was sufficient to ensure compliance. The reasoning here appears to be that a governors' decision about both the facts and their significance (*i.e.* how serious the misconduct was) would have a profound influence on the ISA's decision-making, not least because the ISA won't be operating an oral hearing procedure with cross-examination. Thus, applying the test that he had formulated, Laws LJ held that Art. 6 applied because unfavourable findings against Mr G in the internal disciplinary proceedings would have a

“substantial effect” on the outcome of the barred list procedure (§48).

43. Laws LJ then addressed the second issue of whether Mr G was entitled under Art. 6 to legal representation. He noted that a professional advocate might have a real impact on Mr G’s chances of success in the disciplinary proceedings (§50). He referred to various authorities to the effect that the overall question was whether the trial process was “fair”. There is then this *non sequitur*. Given the possible effect of a professional advocate, Art. 6 required Mr G to be afforded the right to legal representation (§53).
44. (A further issue as to whether the disciplinary proceedings were “criminal” for Art. 6 purposes was left undecided.)

### ***The issues raised***

45. Laws LJ was, I think, wrong to move from the fact that a professional advocate might well have an impact on a decision to the conclusion that under Art. 6 a decision-maker must afford a right to legal representation. Improving a person’s chances of success isn’t necessarily the same as addressing some lack of fairness in a procedure. Is it intended that the school should in turn instruct a professional advocate to present their case, or is the employee to be given an advantage over the school in this respect (and wouldn’t this in itself lead to unfairness)?
46. There is also the vexed question of whether these principles should apply to private institutions (*e.g.* private hospitals or independent schools). It would on its face be a strange result to find that Art. 6 required a private party to augment its internal disciplinary procedures. But, on the other hand, why should an employee in a private institution be left at such a disadvantage by comparison to his peers in the public sector? If Art. 6 is engaged, the argument will run, then the Court (as a “public authority” within the meaning of the Human Rights Act 1998) must take steps to ensure a Convention-compliant process even where the internal disciplinary proceedings are taking place within a private institution.
47. I suspect that the Courts will not want to go this far. This will mean that they either will have to recognise and justify a significant difference in treatment between employees in the private and public sectors, or *Kulkarni* and *G* will need to be reconsidered.
48. The latter is perhaps more likely given that applying Art. 6 to internal disciplinary procedures does not stop at the question of whether legal representation must be permitted. There are other important rights that Art. 6 guarantees, such as a right to

an independent and impartial tribunal (which e.g. a manager in a hospital trust cannot be), or a general right to a public hearing (which would seem to be singularly inapt in the context of internal disciplinary proceedings).

49. These cases are likely to lead to unexpected complications as their consequences are worked out in future litigation. For instance, in the case of *Edwards v. Chesterfield NHS Trust* (reported in the High Court as [2009] IRLR 822), which is currently under appeal, it is being argued by the claimant doctor (against whom an allegation of sexual misconduct had been made) that Arts. 6 and 8 should enlarge the scope of his entitlement to contractual damages for wrongful dismissal. The Trust argued successfully in the High Court that the claimant's damages should be capped at three months' wages (as per the contractual notice period). It is understood that the claimant is arguing that Art. 6 and/or 8 require this orthodoxy to be overturned, and his career-long loss should be compensated on the basis that pursuant to Arts. 6 and 8 the Trust should have applied a fuller procedure and should have concluded that the doctor was in fact innocent of the alleged misconduct.

### **(3) Employment vetting and *R (Wright) v. Secretary of State for Health***

50. *R (G) v. Governors of X School* leads neatly on to the next case, *Wright* ([2009] 1 AC 739), where the House of Lords considered the application of Arts. 6 and 8 to the system of provisional listing of care workers accused of misconduct. Baroness Hale gave the sole speech.
51. Any person who is on the list of people considered unsuitable to work with vulnerable adults (the "POVA list") cannot be a care worker. The POVA list scheme, under Part VII of the Care Standards Act 2000, is similar to the "POCA list" scheme for persons working with children.
52. Like the legislative schemes at issue in *G*, various employers and authorities are required to refer care workers to the Secretary of State for Health in specified circumstances. If the information causes the Secretary of State to conclude that it "may be appropriate" to include the care worker on the POVA list, he must follow a procedure to determine the issue and, crucially, he must also "provisionally include the worker in the list" (s. 82(4) of the Care Standards Act 2000). A provisional listing will prevent any new employer from employing the care worker at issue. In practice, care workers were not offered any opportunity to make representations (or otherwise respond to the allegations) prior to provisional listing.
53. When determining in due course whether to confirm the listing, the Secretary of State

applies a test of whether the provider “reasonably considered the worker to be guilty of misconduct” (*i.e.* not whether the care worker was in fact guilty of that misconduct). However, in practice, a final decision from the Secretary of State on this point ordinarily took many months. A care worker who is confirmed on the list has a right of appeal to the Care Standards Tribunal, which - unlike the Secretary of State - is concerned with whether the alleged misconduct actually took place.

54. All four appellants in *Wright* were nurses who had been accused of misconduct and provisionally listed. However, in the event, the allegations in each case had eventually been rejected. They complained that the scheme breached their rights under Arts. 6 and 8.
55. Baroness Hale noted that Art. 6 generally does not apply to proceedings relating to matters such as interim orders. She also observed, however, that provisional listing could at least in some cases have a dramatic effect on a care worker’s employment. Overall, she concluded at §22 that there will “undoubtedly be some cases, perhaps the majority, where [Art. 6] does apply”.
56. Baroness Hale therefore turned to consider what Art. 6 required in the scheme at issue. At §§25-28 she concluded that the scheme breached Art. 6 because (i) the denial of any right to make representations prior to provisional listing was a denial of a fundamental element of fairness; and (ii) the detrimental effect of provisional listing could often be irreversible and incurable.
57. The Court of Appeal had held that the solution lay in using s. 3 of the Human Rights Act 1998 to construe s. 82(4) so as to require the care worker to be afforded a right to make representations prior to provisional listing “unless the Secretary of State reasonably considers that the delay resulting from affording such an opportunity would place a vulnerable adult at risk of harm”. Baroness Hale did not consider this to be a sufficient answer. The care worker might have a good answer to allegations no matter how serious they are. An *ex parte* procedure should be justifiable in sufficiently urgent cases, but there would need to be a swift method of hearing both sides thereafter.
58. But Baroness Hale didn’t leave the analysis there. She also went on to consider Art. 8. As to the applicability of Art. 8, Baroness Hale was inclined to take the same view as she had done for Art. 6, given (i) the possible impact of provisional listing on personal relationships and (ii) that inclusion on the list was likely to become public knowledge and thus affect the care worker’s reputation. At this point the analysis speeds up considerably:

“[Counsel for the nurses] does not, of course, argue that such interference will never be justifiable under article 8(2). The point is that the procedures must be fair in the light of the importance of the interests at stake. I would agree that the low threshold for provisional listing adds to the risk of arbitrary and unjustified interferences and thus contributes to the overall unfairness of the scheme.” (§37)

59. Baroness Hale declined to spell out how the scheme should be amended. The Supreme Court simply made a declaration of incompatibility.

#### **(4) Art. 8 as a framework for limiting the use of personal/private information**

60. In a sense, the Art. 8 analysis in *Wright* may be seen as an instance where that Convention article is used as a means of controlling the way that public authorities might otherwise use personal/private information about individuals. This use of Art. 8 is even clearer in the next case, *R (L) v. Commissioner of Police of the Metropolis* [2009] 3 WLR 1056.

#### ***R (L) v. Commissioner of Police of the Metropolis***

61. *L* marks a significant change in the law on employment vetting. In *L*, the Supreme Court used Art. 8 to create a more sensitive and fact-based framework for the disclosure of what is often known as “soft intelligence” under the Enhanced Criminal Record Certificate (“ECRC”) regime.
62. At the time at issue in *L*, Part V of the Police Act 1997 provided for three types of certificates: a criminal conviction certificate, a criminal record certificate and an ECRC (the most detailed and thorough of the three). The governing provision for ECRCs at the time of *L* was s. 115 of the Police Act 1997 (similar wording is now found in s. 113B of that Act). ECRCs may be requested for a wide range of positions, including those involving working with children and vulnerable adults. As well as information regarding convictions and cautions, an ECRC may include allegations held on local police records about an applicant’s criminal or other behaviour which have not been tested at trial or led to a conviction. For this purpose, local police forces have to consider whether they have information that “might be relevant” and, if so, whether it “ought” to be included in the ECRC (s. 115(7), now s. 113B(4)).
63. Ms L worked at a midday assistant at a secondary school. The employment agency for whom she worked required her to apply for an ECRC. In Ms L’s case, the “soft intelligence” that was disclosed by the Metropolitan Police was that (i) her son had

previously been put onto the child protection register under the category of neglect; (ii) Ms L had failed to exercise the required degree of care and supervision over her son and had refused to co-operate with social services and (ii) her son had eventually been found guilty of, and imprisoned for, robbery. Ms L sought to challenge this disclosure by reference to Art. 8.

64. The previous leading authority on the point was the Court of Appeal's decision in *R (X) v. Chief Constable of the West Midlands Police* [2005] 1 WLR 65. The thrust of that decision was that a disclosure should be made unless there was good reason not to do so, and that it was difficult to see how there could be a good reason if the information "might be relevant". In other words, the Court concluded in effect that there was little possibility that a disclosure under the ECRC regime might be a disproportionate interference with Art. 8 rights.
65. Lord Hope gave the leading speech in *L*. He dealt with two principal issues. First, the extent to which the ECRC regime "engaged" the Art. 8(1) rights of applicants. Secondly, the circumstances in which a disclosure by a local police force might be disproportionate.
66. As to the first issue, Lord Hope took a broad approach to the scope of "private life" for the purposes of Art. 8, and concluded that disclosure decisions were likely to fall within the scope of Art. 8(1) in "every case". In reaching this conclusion, Lord Hope relied on the likely impact of a disclosure on securing a position within the relevant fields and its effect on an applicant's reputation. He also (at §§25-27) relied on a line of Strasbourg authority on secret records that are systematically stored by *e.g.* intelligence agencies to conclude that: "...information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of Article 8(1), with the result that it will interfere with the applicant's private life when it is released." (§27).
67. Significantly, Lord Hope held that this analysis could hold good notwithstanding that information about convictions was in a sense "public" information (as convictions take place in public):

"...the systematic storing of this information in central records means that it is available for disclosure under Part V of the 1997 Act long after the event when everyone other than the person concerned is likely to have forgotten about it. As it recedes into the past, it becomes a part of the person's private life which must be respected." (§27)

Lord Neuberger made a similar observation at §71.

68. As regards the second issue - proportionality - the Supreme Court disapproved *X* and held that in *X* the balance had been tilted too far against the applicant. Neither the need to protect the public nor the need to respect the applicant's privacy took precedence over the other. There was thus no presumption in favour of disclosure (§45). Lord Hope concluded at §46:

"In cases of doubt, especially where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true, chief constables should offer the applicant an opportunity of making representations before the information is released."

It may be noted that this procedural right to make representations was recognised notwithstanding the absence of any provision to this effect in the statutory scheme itself.

69. *L* will therefore have a very significant effect on the operation of the ECRC scheme. Police forces are likely to become more cautious as regards disclosures, and applicants will (in borderline cases) need to be given a right to make representations.
70. But this is not to say that *L* will necessarily lead to radically different decisions being taken as to disclosure in individual cases. In particular, it may be noted that the Supreme Court were unanimous in rejecting Ms *L*'s challenge on the facts: the information had properly be disclosed in her case.

#### **Other Art. 8 "data protection" cases**

71. Another instance of Art. 8 being applied to control the power of public authorities to make use of personal information is *Wood v. Commissioner of Police for the Metropolis* [2009] EWCA Civ 414. Mr Wood had been photographed by a police photographer at an AGM of a company that organised arms fairs. He had no criminal convictions, and had not committed any offences whilst at the AGM. The Court of Appeal held that the taking and retention of the photographs amounted to a disproportionate (and thus unlawful) breach of Mr Wood's Art. 8 rights.
72. A further example is the slightly older Strasbourg case of *S and Marper v. UK*, judgment of 4 December 2008, in which the ECtHR found that the UK's DNA

database scheme breached Art. 8 as constituting a disproportionate interference with the private life of the applicants.

73. Plainly the Data Protection Act 1998 imposes certain limits on the ability of data controllers to process and use personal data. However, cases such as *L, Wood and S and Marper* show that, where the bodies at issue are public authorities, consideration may also need to be given to Art. 8, and that Art. 8 may increasingly come to represent an additional layer of protection for individuals.

#### **(5) Art. 8 possession cases**

74. There is an ongoing and complex debate in English law as the extent to which Art. 8 imposes additional requirements on top of domestic law in the context of possession proceedings brought by public authorities. The issue arises because, in Art. 8 terms, premises may be a person's "home" without him having any legal right to occupation under domestic law.
75. The issue has been to the House of Lords on three occasions: *Harrow LBC v. Qazi* [2004] 1 AC 983, *Kay v Lambeth LBC* [2006] 2 AC 465 (unusually, a committee of seven law lords) and *Doherty v Birmingham City Council* [2009] 1 AC 367 (after *Kay*, but a committee of only five law lords).
76. Despite the great length and detail of these three judgments, considerable uncertainty remains. It is striking that each case was decided on a 3:2 (or, in *Kay*, 4:3) majority.
77. The basic majority position (Lord Hope at §110 of *Kay*, as reconsidered in *Doherty*) is that an occupier with no legal right to possession under domestic law may seek to challenge a possession claim in one of two ways, known as "gateway (a)" and "gateway (b)". Gateway (a) involves an Art. 8 challenge to the overall structure of the legislation at issue (as opposed to the application of that legislation in the particular case). Gateway (b) is a domestic public law challenge (heard by the County Court, by way of a defence to the public authority's action) to the lawfulness of the public authority's decision to recover possession. The word "domestic" here is important. The House of Lords remains of the view (for the present, at least) that under gateway (b) the public authority's decision cannot be impugned on the basis that in the particular circumstances of the case it breached the occupier's Art. 8 rights. However, and unhelpfully, *Kay* and *Doherty* suggest that the form of review under gateway (b) is somehow more intensive than it would be under orthodox judicial review principles (*e.g. Wednesbury* rationality, etc.). What remains wholly unclear is the precise extent of this new form of public law review.

78. As an illustration of the continuing uncertainty, three significant Court of Appeal cases on these issues were decided in 2009 alone.
79. *Doran v. Liverpool City Council* [2009] 1 WLR 2365 concerned an Irish traveller who had a pitch on a Council site. Toulson LJ emphasised the domestic nature of the review under gateway (b). At §60, he held that such a challenge had to be based on the facts as they reasonably appeared, or should have appeared, to the Council at the time it made its decision.
80. The next Court of Appeal case was *Taylor v. Central Bedfordshire Council* [2009] EWCA Civ 613. The public authority at issue sought possession against occupiers who had acquired tenancies from a housing association (rather than the public authority). The judgment of Waller LJ is rather discursive, and adds little clarity to this area. At §29 Waller LJ held that a public authority was not obliged to consider the personal circumstances of an occupier before deciding to seek possession. However, at §44, he also said that the public authority should take account of the personal circumstances of the occupier known to it. The judgment also contains the suggestion at §§39-40 that the occupier will in principle be able to seek review of every decision taken by a public authority in an effort to seek possession (*e.g.* the original decision, the decision to proceed with a claim, the decision to press for a possession order at the hearing, etc.)
81. The third Court of Appeal case was *Manchester City Council v. Pinnock* [2009] EWCA Civ 852. The case concerned the demoted tenancy regime (under the Housing Acts of 1984 and 1996). A demotion order had been made by the County Court “demoting” Mr Pinnock’s secure tenancy on grounds of anti-social behaviour on the part of his family. The issue arose as to whether, when the Council sought possession following further anti-social behaviour, gateway (b) could apply so that the County Court could review the reasonableness of the Council’s decision to press ahead and seek possession. Having carefully considered the legislative scheme, Stanley Burnton LJ held that the County Court had no such power: if the statutory procedure was followed then the statute obliged the Court to make the order. *Pinnock* is under appeal to the Supreme Court.
82. On its face, the analysis in *Pinnock* would seem to apply equally to the introductory tenancy regime given the similarities in the relevant legislative provisions. However, this is not entirely clear given that in the introductory tenancy regime there is no prior Court consideration of the tenant’s case (as takes place in the demoted tenancy

regime in when the Court considers whether to make a demotion order). It is likely<sup>3</sup> that the Court of Appeal will consider this issue in March 2010 in *Hall v. Leeds City Council* and *Frisby v. Birmingham City Council*. These appeals are currently listed to be heard with two others (*Powell v. Hounslow* and *Manchester v. Mushin*) which will enable the Court of Appeal to speak once more on the issue of Art. 8 in the possession context.

83. However, it is unlikely that these upcoming appeals will resolve the uncertainties that exist. This is because the principal difficulty is that the restrictive approach of the House of Lords to the scope of gateway (b) has not found favour in Strasbourg (as is illustrated most clearly by *McCann v. UK*, judgment of 13 May 2008). The gap between domestic law and Strasbourg jurisprudence may become even more pronounced once the ECtHR gives judgment in *Kay v. UK* (the Strasbourg continuation of *Kay v. Lambeth LBC*). But the Court of Appeal is bound to apply House of Lords authority irrespective of any differing Strasbourg analysis.
84. Interestingly, *Pinnock* is listed for four days in July 2010 before nine justices of the Supreme Court. It would seem that the Supreme Court are at least giving themselves the opportunity to reverse *Qazi*, *Kay* and *Doherty* and recognise that an Art. 8 challenge can always in principle be raised by an occupier against a public authority who seeks possession. I think it is likely that this is precisely what the Supreme Court will conclude. Such a decision would (perhaps thankfully) sweep away the jumble of cases which have sought to explore the new form of more extensive conventional judicial review as created by the majority in *Kay* and *Doherty*.
85. There is one other development to note. In *Quadrant Brownswood Tenant Co-operative Limited v. White* (HC 09 C 03494), the Chancery Division is due to rule on a claim for a declaration of incompatibility that an occupier has raised in possession proceedings (by reference to Art. 8) against a private landlord. This appears to be the first opportunity for direct judicial consideration of whether any of the above principles apply as between private parties. It is expected that judges will find this an odd contention, but as in various other “horizontal effect” scenarios it is not wholly obvious why the standard public authority Art. 8 analysis does not apply. In particular, premises would appear to be capable of being a “home” for Art. 8 purposes whether or not the interference at issue is at the hands of the State or private third parties.

**February 2010**

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<sup>3</sup> There is a possibility that the appeals will be stayed pending the Supreme Court’s judgment in *Pinnock*.