G R E E N S

Issue *68*
February 2015

SCOTTISH HUMAN RIGHTS JOURNAL

Introduction from the Editor

Thanks to Kirsteen Shields for a stimulating contribution on land reform and continued thanks to Scott Blair for the Current Awareness.

Kirsteen illustrates with reference to the current topic of land reform the shortcomings in adopting a narrow "ECHR compliance" approach and the benefits of grounding practice, policy and law in the broader international human rights framework.

It is by now well understood that the Scotland Act has embedded the ECHR in our constitutional and legal framework. However, what is much less widely recognised is that para.7(2) of Sch.5 of the Scotland Act devolves observing and implementing international obligations. Such international obligations clearly include those international human rights treaty obligations entered into by the UK.

More attention needs to be paid to the full implications of this provision for the governance of Scotland. At a minimum, these obligations need to be better taken into account when making law and policy.

Beyond that, priority should be given to learning from the increasing international trend of incorporation of such international obligations into national law. For example, around 60 countries have now given constitutional status to such economic and social rights as the right to an adequate standard of living as contained within the UN International Covenant on Economic, Social and Cultural Rights. There is an increasing international jurisprudence as to how the courts successfully interpret such rights.

There are also relevant examples from elsewhere in Europe of the public benefits in so doing, particularly in the current circumstances where austerity measures have been found to have disproportionately impacted upon the economic and social rights of the most vulnerable in communities.

Future Issues of SHRJ will explore the implications of such an approach in another topical policy area, that of social justice, which is emerging as a dominant part of the current public discourse in Scotland.

Feature

Tackling the Misuse of Rights Rhetoric in Land Reform Debate

Kirsteen Shields, *Lecturer, University of Dundee*

The re-invention of human rights as "absolute" entitlements, either through misunderstanding or wilful misinterpretation, presently rebounding around the echo chambers of online (social) media has potentially significant consequences if not tackled effectively. Increasingly prevalent across all rights issues, particularly apparent in relation to freedom of expression in the wake of the Charlie Hebdo shootings, in Scotland it comes to the fore in relation to the Scottish Government's plans for land reform.

The misrepresentation of rights in the land reform bill debate reveals a pervasive misunderstanding concerning how human rights are designed and applied. To waive, as conservative MSP Murdo Fraser has done for example, the right to property as a trump card, imbued with some special significance above competing interests, to be readily received

Contents

Editor:
Professor Alan Miller

Contributions
Rosemary Johnston, LLB (Hons)
W. Green
21 Alva Street, Edinburgh
EH2 4PS
DX:ED 238
tel. 0131 225 4879
fax. 0131 225 2104

Books for review
to the House Editor
at the above address

Subscription inquires
to the Subscriptions Department
Thomson Reuters, Cheriton House,
North Way, Andover,
Hampshire SP10 5AZ
(tel. 0845 600 9355)
TRLUKI.CS@thomsonreuters.com

Subscription price for 2015: £346
4 issues published per year

ISSN: 1470-8302
Printed by
St Austell Printing Company

Scottish Human Rights Journal is published by Thomson Reuters (Professional) UK Limited (Registered in England & Wales, Company No 1679046. Registered Office and address for service: 100 Avenue Road, London NW3 3PF) trading as W. Green.

Website: www.wgreen.co.uk
W. GREEN

The right to buy is a qualified right

by the European Court of Human Rights in Strasbourg, is fundamentally inaccurate.

Not unsurprisingly, similar thinking emerges from the other side. Professor Alan Miller of the Scottish Human Rights Commission has pointed out that similar inaccuracies emerge in discussion of the proposed community right to buy. Speaking at the Rural Affairs, Climate Change and Environment Committee on Community Empowerment (Scotland) Bill held at the Scottish Parliament on December 3, 2014, he said: "The language that is being used—'absolute right to buy'—is very unhelpful. … The right to buy is a qualified right: there has to be a competing public interest to override the right to peaceful enjoyment by the person who owns the land. Therefore, language such as 'right to buy' or 'absolute right' polarises the debate in an unhelpful way and does not reflect a clear understanding of what the ECHR contributes to the debate."[1]

The nature of rights

An accurate interpretation of human rights begins with acknowledgement that most human rights are not absolute, that they are subject to limitations and derogations, both legal and political in nature. The majority of rights contained within the ECHR are of this design, including the "right to property".

Express limitations, sometimes termed "express definitional restrictions" to the rights are stated in the plainest terms within the text of the European Convention of Human Rights. Furthermore, there are general limitations which apply to all ECHR rights all except the absolute rights. Article 15 ECHR states that ECHR rights may be suspended "in time of war or other public emergency threatening the life of the nation," provided this is "strictly required by the exigencies of the situation".

The right to property under the ECHR

The right to property (like the right to freedom or expression) is not absolute. It is subject to art.15 general restrictions and specific limitations within the provision for the right itself. Article 1 protocol 1 ECHR on the right to peaceful enjoyment of possessions (commonly referred to as 'the right to property') states:

"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It is a qualified right. It arrived late, in the form of the first additional protocol to the ECHR, as an add-on to the original convention, following protracted negotiations and failure to reach agreement amongst States as to its formulation and inclusion in the core text. It is a right to "peaceful enjoyment of possessions", rather than a "right to property" and, as the legal text states, it applies only some of the time.

It is stated in the clearest terms that the right is limited by the public interest. In other words, the right to property may be waived on the grounds of public interest, in compliance with the rule of law. Whereas the wording and rationale of other ECHR rights demonstrate a desire to protect individuals' rights against state interference, art.1 protocol 1 ECHR contains an explicit recognition of the rights of States to interfere in accordance with the general interest.

The central question remains therefore would the "right to peaceful enjoyment of possessions" art.1 protocol 1 ECHR apply to the landowners in order to block or restrict the Scottish Government's proposed land reform. In order to answer this question we must consider how the ECHR decides on questions concerning the derogation of rights on the grounds of "public interest".

The European Court of Human Rights approach to public interest

On deciding whether a prima facie interference with a right is justified on the grounds of a stated limitation or qualification, the Court is primarily concerned to strike a fair balance between interests. The Court typically addresses three questions:

1. Was the interference in accordance with, or proscribed by, law? (Hypothetically regarding law reform, are the measures depriving the landowners of their property proscribed by law in the form of a statute?)
2. Was it genuinely in pursuit of one or more of the legitimate purposes at issue? (Hypothetically, is the deprivation genuinely in pursuit of the public interest?)
3. Taking all relevant circumstances into account, was it necessary in a democratic society for those ends? (Could the public interest objective be achieved by alternative democratic means?)

The first question is easily addressed. That the provisions would be set out in an Act of the Scottish Parliament should satisfy the criteria that the provisions of domestic law are "sufficiently accessible, precise and foreseeable in their application".[2] As the proposed reform applies a universal rule on land ownership and succession this also removes any question of violation of art.14 (the right to be free from discrimination). The proscribed by law test may also involve an examination of procedural safeguards (this applies to "proceedings" or administrative measures taken by a State authority pursuant to legislation), the conduct of the State, the conduct of the applicant, and issues of retrospectivity. Given the detailed provisions for the proposed Land Reform Bill set out in the Scottish Government's consultation paper, in particular the provi-

sions on "A: Greater transparency and accountability of land ownership", it is reasonable to expect questions of process will be ironed out well in advance of any submission before the European Court.[3]

The second question is more difficult and the approach of the Court is less consistent in this regard.[4] It is established in the wording of the ECHR that the "public interest" is a legitimate purpose for derogating a right but herein lies the nub of the issue: In deciding whether a measure taken by the Scottish Ministers is genuinely in pursuit of the public interest, who should decide on what constitutes the public interest in the first instance?

In deciding on this matter, the European Court of Human Rights is inclined to defer to the government of the State in question to decide on what constitutes the public interest.[5] This is especially so in relation to art.1 protocol 1 where a high degree of discretion to States is considered necessary. (After all, taxation would be very problematic if the extent to which a State could qualify the right to property was to be decided on by the European Court of Human Rights.)

In deferring to the State's definition and defence of public interest, the process becomes more complicated when applied to a conflict between "governments" within a State, between Holyrood and Westminster in other words. To pursue an art.1 protocol 1 violation at the ECHR, a case would be made by an individual (a landowner claiming a violation) against the Holyrood administration acting essentially as an authority of the UK State. The ECHR would consider that public interest was a legitimate ground for limitation of the right but it would be for the UK government to argue that the proposed land reform qualified in this category. Given the ideological dimensions of the land reform debate, it is unlikely that such a decision would be made free of vested interests.

According to the Scotland Act 1998, Sch.5, however, interpretation of international obligations is not a reserved matter and it may be for the Scottish Ministers themselves to decide on. In any case, either government would be under a certain obligation to demonstrate and justify a certain balance of interests in addressing the interests of individuals against those of the wider public interest.[6] Again, the detailed provisions set out in the consultation paper, in particular those under the heading "specific measures to manage land and land rights for the common good", may be expected to allay the concerns of the European Court in this respect.[7]

On the third question, the Court will consider whether there is a reasonable relationship of proportionality between the means employed and the aim of the provision in question. Here again, definition of the public interest – the aim of the provision—is key. Is the public interest to alleviate poverty or to obtain revenue, for instance? Interestingly, in relation to taxation under art.1 protocol 1, it has been argued in English courts that the contention that the measure could only be justified as proportionate where "the means used to impair the right or freedom are no more than is necessary to accomplish the objective" should be rejected.[8] Instead, it has been argued that a high degree of discretion is granted to the State in interfering with art.1 protocol 1 in pursuit of the public interest, and the test to be applied to challenge successfully a taxing measure must be to show that the legislature's assessment was "devoid of reasonable assessment". The result is that the hurdle for the claimants on art.1 protocol 1 is higher than for other rights.

On this reasoning, were the UK government to dismiss outright any public interest justification for interfering with landowner's rights, it may only be a matter of time before the issue is submitted to the ECHR again, this time on the application by members of the wider community who argue that their economic, social and cultural rights more widely (and perhaps the right to adequate housing most specifically) are interfered with by the existing laws on property and succession in Scotland.

The conflict of interests strikes as the most sensitive of balances embedded in human rights law; the relationship between the individual and the community. This relationship remains one of the most important issues in contemporary human rights jurisprudence and philosophy. Defining the public interest is precisely political, and arguably should be left to the remit of the State's engines of democratic decision-making as opposed to judicial reasoning. Public interest may emerge to be to alleviate poverty to pursue prosperity over growth, in which case a wider conceptualisation of rights ought to be embodied—one that recognises land and other resources as national assets.

International human rights obligations

This wider conceptualisation of land ownership as designed to serve the greater good is embedded in international human rights law. In particular, it is a necessary basis on which rights inherent in the International Covenant on Economic, Social and Cultural Rights may flow. Article 2 (1) ICESCR places a duty on the Scottish ministers to use the maximum available resources to ensure progressive realisation of the rights contained in the ICESCR: this includes the right to housing, adequate food and an adequate standard of living. As has been acknowledged in several international principles and interpretive documents, in order to facilitate the realisation of these and other human rights, access to land is necessary.[9]

Furthermore, obligations to address disadvantage as a priority are embedded in these obligations. For ex-

the hurdle for the claimants on Art.1 Protocol 1 is higher than for other rights

the land reform debate offers an opportunity to rescue rights from their misrepresentation

ample, ICESCR Sixth Session (1991) General Comment No.4 on the Right to Adequate Housing (art.11(1) of the Covenant) states: "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others."

Furthermore, the Committee states there is no reduction in these obligations in times of austerity, continues: "The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its general comment No.2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant."[10]

The status of these obligations

It is well established that the Scottish Parliament must legislate in compatibility with the rights set out in the European Convention on Human Rights, as set out in the Scotland Act 1998 s.29(2)(d).[11] If Scottish ministers do not do so, the legislation at issue may be struck down by domestic courts or may result in a decision from the European Court of Human Rights.

Furthermore, in relation to international obligations generally and the obligations under the International Covenant on Economic, Social and Cultural Rights in particular, the Scotland Act 1998 Sch.5 s.7(2)(a) calls on the Scottish ministers to observe and implement international obligations, of which one—but only one—is the International Covenant on Economic, Social and Cultural Rights. It would be seemingly very short-sighted were those provisions to not be at least treated as influencing factors in the policy drafting, if not as strictly binding obligations.

Conclusion

Though the questions that will pervade the process of land reform planning and policy throughout 2015 are inherently political, the toolkit used to assess them need not be. Indeed it should not be. If the body of ECHR law is incorporated appropriately, the land reform debate offers an opportunity to rescue rights from their misrepresentation and to re-establish the ECHR as an institution which responds to the prevailing needs of societies and aligns State power to address those needs.

---

[1] See Official Report of the Rural Affairs, Climate Change and Environment Committee December 3, 2014 on Community Empowerment (Scotland) Bill: Stage 1, available at: *http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9669#.VMEJakurZuY* [Accessed February 2, 2015].

[2] See for example *Guiso-Gallisay v Italy* (app. no.58858/00) ss.82-83, December 8, 2005.

[3] The Scottish Government consultation paper: *A Consultation on the Future of Land Reform in Scotland*, Tuesday, December 2, 2014, is available here: *http://www.scotland.gov.uk/Publications/2014/12/9659* [Accessed February 2, 2015].

[4] For fuller consideration see Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights", The Modern Law Review, Vol. 62, No.5 (Sep., 1999), pp 671–696.

[5] See further key cases on the State's margin of appreciation: *Handyside v United Kingdom* (app. no.5493/72) [1976] ECHR 5 (December 7, 1976); *Silver and others v United Kingdom*, (app. nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, and 7136/75), March 25, 1983, Series A, No.61; *Lingens v Austria* (1986) 8 EHRR 407. For discussion see McHarg above fn 4.

[6] See for example *Sporrong and Lönnroth v Sweden* (1983) 5 E.H.R.R. 35 at [69].

[7] See above fn 3.

[8] *R (on the application of Federation of Tour Operators, TUI UK Limited, Kuoni Travel Limited) v Her Majesty's Treasury* [2007] EWHC 2062 (Admin) Stanley Burnton J. Rejected at [133].

[9] See, e.g., The Vancouver Declaration on Human Settlements, UN Conference on Human Settlements, Adopted June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture Organization of the United Nations (FAO), adopted 127th Session of the FOA Council, November 2004, Guideline 8B (Access to resource and assets: Land). Cited in Elisabeth Wickeri* Anil Kalhan *Land Rights Issues in International Human Rights Law* (UK: Institution for Human Rights and Business, 2010).

[10] At para.11. Available here: *http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11* [Accessed February 2, 2015].

[11] Scotland Act s.29(1): An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Follows, s.2(d): A provision is outside that competence so far as any of the following paragraphs apply—(d) it is incompatible with any of the Convention rights or with Community law.

Current Awareness

Compiled by Scott Blair, *Advocate*

ECHR ARTICLES INDEX

Article 6—case 1
Article 8—case 3, 4
Article 10—case 2
Protocol 1, Article 3—case 2

CRIMINAL PROCEDURE

(1) *Docherty (Patrick) v HM Advocate* [2014] HCJAC

D applied for leave to appeal to the Supreme Court against a decision of the Appeal Court refusing his second appeal against conviction for murder Docherty (Patrick) v HM Advocate [2014] HCJAC 94, 2014 G.W.D. 29–572. D submitted inter alia that: (1) his first three grounds of appeal, namely non-disclosure of two police statements and reliance on evidence of one of his police interviews, were convertible devolution issues; (2) his fourth ground of appeal, namely misdirection by the trial judge in relation to dock identification, was not a convertible devolution issue at the time of appeal, but by the time the Appeal Court was determining the matter in the second appeal, it was de facto determining a compatibility issue because it was deciding whether or not a public authority had acted contrary to the ECHR art.6.

Held: Application refused. No compatibility issues had been determined by the Appeal Court and there was no competent appeal to the Supreme Court in the absence of such a determination. Any rights that D had to raise compatibility issues had been extinguished, none of the grounds of appeal had become devolution issues or compatibility issues by virtue of having been apt for consideration as ECHR art.6 matters, and in so far as the grounds of appeal might have become convertible devolution issues, they were determined when the court refused to entertain them at the first appeal hearing. Nothing in D's application could properly be viewed as a submission that the court erred in law on a compatibility issue, and the application had failed to meet the essential requirements for the grant of leave in *Macklin (Paul Alexander) v HM Advocate* [2013] HCJAC 141, 2013 G.W.D. 37–717, applied. Opinion, that D's application had not raised any issue of general public importance and any tension between the application of the tests in *McInnes (Paul) v HM Advocate* [2010] UKSC 7, 2010 S.C. (U.K.S.C.) 28 and *Brodie (George) v HM Advocate* [2012] HCJAC 147, 2013 J.C. 142 was insufficient, particularly where D had not submitted that there was any material distinction between the two tests.

ELECTORAL LAW

(2) *Moohan v Lord Advocate* [2014] UKSC 67

The appellant prisoners (M) appealed against a decision ([2014] CSIH 56, 2014 S.L.T. 755) that the blanket ban on prisoners voting in the Scottish independence referendum was not unlawful. M had made an unsuccessful application for judicial review of the Scottish Independence Referendum (Franchise) Act 2013, which based the franchise for the referendum on the franchise for local government elections, which was determined by the Representation of the People Act 1983. Section 2(1)(b) of that Act provided that a person who was subject to any legal incapacity to vote would not be entitled to vote at a local government election. Section 3(1) incapacitated convicted prisoners from voting. M argued that the 2013 Act's blanket disenfranchisement of convicted prisoners in relation to the referendum was ultra vires the Scottish Parliament on the following grounds: it was incompatible with ECHR Protocol 1 art.3; it was incompatible with ECHR art.10; it was incompatible with EU law; it contravened the substantive requirements of the International Covenant on Civil and Political Rights 1966; it was incompatible with the basic democratic principles of the common law constitution, namely the principle of universal suffrage and the concomitant fundamental right to vote; it contravened the common law requirements of the rule of law.

Held: appeal dismissed (Lords Kerr and Wilson dissenting on the issue of ECHR Protocol 1 art.3). (1) The ordinary meaning of the words of Protocol 1 art.3 strongly supported the view that the signatories of the ECHR were undertaking to hold periodic elections to a democratically elected legislature. The requirement that the elections were held "at reasonable intervals" also suggested that the drafters of the article did not have referendums in mind. The words in their ordinary meaning did not support a wider view that the article was intended to cover any major political decision which was put to a popular vote, however important that decision might be. Further, there was no real support for M's position in the Strasbourg jurisprudence. There was no clear direction of travel in that jurisprudence to extend the article to referendums. On the contrary, between 1975 and 2013 there had been at least 12 applications in which claims under the article concerning a right to vote in referendums had been rejected as inadmissible (see paras 8 and 15 of judgment). (2) The courts below had been correct to hold that art.10 did not confer any wider right to vote than was conferred by Protocol 1 art.3 (para.19). (3) There had been no breach of EU law. First, a "yes" vote in the referendum would not itself determine the citizenship of M or others born in Scotland. Secondly, the instant court had recently held that EU law did not incorporate any right to vote, such as that recognised in the Strasbourg court's case law on the ECHR (paras 22–24). (4) M's submission that the Scottish Parliament lacked the competence to legislate in breach of

IU (Pakistan), Applicant **[2014] CSIH 85**

art.25 of the International Covenant on Civil and Political Rights failed to allow for the fundamental separation of powers in our constitution. The UK Parliament and the Scottish Parliament made laws; the executive branch of the UK Government made international treaties; but unless those treaties were incorporated into law, they did not affect domestic rights (para.29). (5) It could not be said that the common law had been developed so as to recognise a right of universal and equal suffrage from which any derogation had to be provided for by law. It had been our constitutional history that the right to vote had been derived from statute. The UK Parliament through its legislation had controlled the modalities of the expression of democracy. It was not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determined our democratic franchise (para.34). (6) There could be no separate argument that the rule of law encompassed a universal right to vote (para.38). (7) Per Lord Kerr at para.69: "The primary aim of Protocol 1 art.3 was to ensure that citizens should have a full participative role in the selection of those who would govern them. Given that a referendum as to whether Scotland should become an independent nation would have made a critical difference to the form of government to which M and other citizens in Scotland would be subject, the right to vote in this particular referendum should be recognised as an undeniable aspect of M's Protocol 1 art.3 right".

IMMIGRATION

(3) *LWF (China) v Secretary of State for the Home Department* [2014] CSIH 24

A Chinese national (F) reclaimed against a decision of the Lord Ordinary refusing her petition for judicial review of a decision of the Secretary of State for the Home Department (S) certifying her claim as clearly unfounded in terms of the Nationality, Immigration and Asylum Act 2002 s.94(2). F had entered the United Kingdom in 2006 on a six month visitor visa, she overstayed and in December 2012, she was served with removal directions. She submitted a human rights claim based on her two year relationship with a UK national (J), which S refused. F's petition for judicial review of that decision was refused by the Lord Ordinary on the grounds that F and J had no family life together, F did not qualify under the new Immigration Rules, and her return to Hong Kong would not be a disproportionate interference with her ECHR art.8 rights.

Held: Reclaiming motion refused. (1) There was nothing to suggest that F would face unacceptable consequences if she were returned to China and no exceptional facts or circumstances had been demonstrated The case of *MS (India) v Secretary of State for the Home Department* [2013] CSIH 52, 2013 G.W.D. 23-441 was considered. (2) No immigration judge, assessing the case as favourably as possible for F, would have concluded that F's removal from the UK was disproportionate in the circumstances. (3) The Lord Ordinary was entitled to conclude that the only rational view that could have been taken of F's claim was that it was clearly unfounded and her s.94(2) certification should not be reduced, her appeal was bound to fail and S and the Lord Ordinary were entitled to reach the conclusions they did. (4) The reasons given by the Lord Ordinary were adequate to support his conclusion as in this particular case a stark narration of the facts, followed by the Lord Ordinary's conclusion on those facts, was all that was required.

(4) *IU (Pakistan), Applicant* [2014] CSIH 85

A Pakistani husband and wife (collectively Z) sought leave to appeal against a decision of the Upper Tribunal (U) allowing an appeal by the Secretary of State for the Home Department against a determination of the First-tier Tribunal (F) allowing Z's appeal against S's decision to remove them. F had concluded that interference with the ECHR art.8 rights of Z and their child (C) would be grossly disproportionate and their removal from the United Kingdom would be arbitrary. On appeal U held that F had erred in its approach to the immigration rules and concluded that Z's removal from the UK would not be disproportionate as C was very young, she had been born while Z were temporarily resident in the UK, she was not a British or Union citizen, and her private life was dependent upon her relationship with Z. Z submitted that (1) there was no error in law in F's art.8 assessment and U had erred in law in interfering with that part of F's decision; (2) U had failed to take proper account of Z's situation.

Held: Leave to appeal refused. (1) F's error of approach had permeated the art.8 assessment, there was no separate analysis of the facts that F considered relevant to art.8 and no separate consideration of C's interests, and U had been entitled to conclude that F had erred, to set its decision aside and to remake it. (2) Although it was important to give proper weight to the particular and specific circumstances of an applicant, the court was not persuaded that U's approach in this respect amounted to an error of law. (3) No important point of principle arose for the purposes of the Act of Sederunt (Rules of the Court of Session 1994) 1994 Sch.2 Pt 3 para.41.57(2)(b).

MENTAL HEALTH

(5) *Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] A.C. 896; [2014] 2 W.L.R. 642; [2014] 2 All E.R. 585

The appellants (P, X and Y) appealed against decisions ([2011] EWCA Civ 1257, [2012] P.T.S.R 1447 and [2011] EWCA Civ 190, [2012] Fam. 170) that living arrangements made for them by the respondent local authorities did not amount to a deprivation of liberty under the ECHR art.5. P had cerebral palsy and Down's syndrome and required 24-hour care. He was in supervised local au-

thority accommodation. Intervention was required to cope with his challenging behaviours, including use of restrictive clothing and the insertion of fingers into his mouth to prevent him from eating his continence pads. The Court of Protection concluded that he was being deprived of his liberty, but that it was in his best interests. The Court of Appeal found that he was not being deprived of his liberty. X and Y were sisters with significant learning difficulties. X was in foster care with intensive support in most aspects of daily living. She would be subject to restraint if she attempted to leave the house. Y was in residential care and under continuous supervision and control. The Court of Appeal upheld a decision that X and Y's living arrangements were in their best interests and did not amount to deprivation of their liberty, referring to the "relative normality" of their lives compared with the lives they might have had if still living with their family.

Held: Appeals allowed. (Lords Carnwath, Hodge and Clarke dissenting in X and Y's appeals). (1) The cases involved consideration of the criteria for determining whether the living arrangements made for a mentally incapacitated person amounted to a deprivation of their liberty. The deprivation of liberty safeguards in the Mental Capacity Act 2005 sought to secure professional assessment, independent of the hospital or care home in question, regarding whether the person lacked the capacity to make their own decision about accommodation, and whether it was in their best interests to be detained. The European Court of Human Rights had not dealt with a case combining certain features of the instant cases, including: (a) a person who lacked legal and factual capacity to deal with their own placement but had not evinced dissatisfaction or objection; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which was as close as possible to "normal" home life; and (c) the initial authorisation of that placement by a court as being in the person's best interests. It was axiomatic that people with mental and physical disabilities had the same human rights as everyone else. It might be that those rights had to sometimes be restricted, but the starting point should be the same. Far from disability entitling the state to deny such people human rights, it imposed a duty to make reasonable accommodation to cater for their special needs. Those rights included the right to physical liberty, as guaranteed by art.5. That was not a right to do what, or to go where, one pleased. It was a more focused right not to be deprived of that physical liberty. The "relative normality" approach adopted by the Court of Appeal, was rejected in P's case, as it was inconsistent with the view that people with disabilities had the same rights as everyone else. The approach had more application to X and Y's case, but did not answer the question of whether it involved a deprivation of liberty in other respects for which the state was responsible. The answer was in the key feature that the person concerned "was under continuous supervision and control and was not free to leave", *HL v United Kingdom* (app. no.45508/99) (2005) 40 E.H.R.R. 32 applied. The person's compliance or lack of objection was not relevant; the relative normality of the placement, whatever the comparison made, was not relevant; and the reason or purpose behind a particular placement was also not relevant. It was easy to focus on the positive features of the placements for all three appellants, but the purpose of art.5 was to ensure that people were not deprived of their liberty without proper safeguards. Because of the extreme vulnerability of people like P, X and Y, a periodic independent check on whether the arrangements were in their best interests was needed. The CoP decision in P's case would be restored and a declaration made that X and Y's living arrangements constituted a deprivation of liberty within the meaning of s.64(5) of the 2005 Act (see paras 1, 8-10, 32, 45-58 of judgment). (2) (Per Lords Carnwath, Hodge and Clarke) A further feature of the instant cases that the ECtHR had not yet ruled on was the fact that the regimes involved were no more intrusive or confining than was required for the protection and well-being of the person concerned. The attractions of a universal test, applicable to all regardless of physical or mental difficulties, were recognised, but the ECtHR had remained wedded to a case-specific test. There was also concern that nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty. X and Y could be said to have had their liberty restricted compared with a person with unimpaired health and capacity. However, that was not the same as a deprivation of liberty (paras 88-104).

HUMAN RIGHTS STOP PRESS

In ***McDonald v United Kingdom*** (2015) 60 EHRR 1 the applicant (M) complained that the withdrawal of night-time care disproportionately interfered with her right to respect for private life under the ECHR art.8. M had suffered a stroke and several falls which limited her mobility. She had a small and neurogenic bladder, which meant she usually had to urinate two to three times a night. This combination of factors made it unsafe for her to access a toilet or commode unaided. M was provided by the local authority with a temporary care package, which included seventy hours per week of night-time care. Four consecutive care assessments found that M had a need for night-time assistance but the local authority decided to reduce the amount allocated to her care by removing night-time care and supplying her with incontinence pads. M applied for judicial review of the decision and pending resolution, She continued to receive night-time care for five nights, reducing to four nights after one month and then ceasing altogether after 45 months. Her application for judicial review was refused but the local authority carried out a further care plan review in 2009 in which it was decided that, despite M's opposition, the provision of incontinence pads was a prac-

***Horncastle v United Kingdom* (app. no.4184/10)**

tical and cost-saving solution. The domestic courts found that from the date of the 2009 reassessment there had been no interference with M's art.8 rights, nor had there been a failure to comply with the Disability Discrimination Act 1995. M contended that the withdrawal of night-time care had disproportionately interfered with her art.8 rights and that by withdrawing the night-time service the respondent State was in breach of its positive obligation to provide her with a service which enabled her to live with dignity. The State argued that it enjoyed a wide margin of appreciation in striking a fair balance between the competing interests of individuals and the community as a whole, which was even wider where it involved assessing priorities for the allocation of limited resources.

The Court upheld the complaints in part. (1) The State had accepted the determination of the Supreme Court (upholding the Court of Appeal) that the local authority had been in breach of its statutory duty to provide M with care in accordance with its own assessment, between the date it withdrew night-time care and the 2009 care plan review. Consequently, M's right to respect for her private life had been breached during that period (see paras 50-52 of judgment). (2) From the date of that care plan review, the interference had been lawful and the state had a wide margin of appreciation on issues of social, economic and health-care policies, see *James v United Kingdom* (A/98) (1986) 8 E.H.R.R. 123, *Shelley v United Kingdom* (Admissibility) (app. no.23800/06) [2009] Prison L.R. 5, and *Hatton v United Kingdom* (app. no.36022/97) (2003) 37 E.H.R.R. 28. That margin was particularly wide when an assessment of priorities in the allocation of limited State resources was involved, *Osman v United Kingdom* (23452/94) [1999] 1 F.L.R. 193 considered. The court was satisfied that the decision to reduce M's care package had been fully considered by the local authority and by the domestic courts and was proportionate as M's personal feelings had properly been balanced against the local authority's concern for her safety and independence and respect for other care-users (para 56-58).

In ***Ibrahim v United Kingdom*** (app. nos 50541/08, 50571/08, 50573/08, and 40351/09) the European Court of Human Rights held, by six votes to one, that there had been no violation of art.6(1) and 6(3)(c) arising from detention following the events of July 21, 2005 where four bombs were detonated on the London transport system but failed to explode. The perpetrators fled the scene and a police investigation immediately commenced. The first three applicants, Mr Ibrahim, Mr Mohammed and Mr Omar, were arrested on suspicion of having detonated three of the bombs. Mr Abdurahman, the fourth applicant, was initially interviewed as a witness in respect of the attacks but it subsequently became apparent that he had assisted one of the bombers after the failed attack and, after he had made a written statement, he was also arrested. All four applicants were later convicted of criminal offences. The case concerned the temporary delay in providing the applicants with access to a lawyer, in respect of the first three applicants, after their arrests, and, as regards the fourth applicant, after the police had begun to suspect him of involvement in a criminal offence but prior to his arrest; and the admission at their subsequent trials of statements made in the absence of lawyers.

The Court noted that, two weeks earlier, suicide bombers had detonated their bombs on the London transport system, killing 52 people and injuring countless more. It was satisfied that, at the time of the four applicants' initial police interviews, there had been an exceptionally serious and imminent threat to public safety, namely the risk of further attacks, and that this threat provided compelling reasons justifying the temporary delay in allowing the applicants' access to lawyers. It also found that no undue prejudice had been caused to the applicants' right to a fair trial by the admission at their trials of the statements they had made during police interviews and before they had been given access to legal assistance. The Court took into account the counterbalancing safeguards contained in the national legislative framework, as applied in each of the applicants' cases; the circumstances in which the statements had been obtained and their reliability; the procedural safeguards at trial, and in particular the possibility to challenge the statements; and the strength of the other prosecution evidence. In addition, as concerned the fourth applicant, who had made self-incriminating statements during his police interview, the Court emphasised the fact that he had not retracted his statements even once he had consulted a lawyer but had continued to rely on his statement in his defence up until his request that it be excluded at trial.

In the case of ***Horncastle v United Kingdom*** (app. no.4184/10) the European Court of Human Rights held, unanimously, that there had been no violation of art.6(1) or 6(3)(d) in a case which concerned four applicants' complaints that in admitting victims' written statements as evidence against them at their criminal trials the domestic courts had violated their right to have examined witnesses who gave sole or decisive evidence against them. The Court reiterated the principles established in its Grand Chamber judgment in *Al-Khawaja and Tahery v United Kingdom* (app. nos 26766/05 and 22228/06) in which it had agreed with the domestic courts that a conviction based solely or decisively on the statement of an absent witness would not automatically result in a breach of art.6(1) as the question was whether there were adequate counterbalancing factors in place, including strong procedural safeguards, to compensate for the difficulties caused to the defence. In relation to the first two applicants, the Court found that even assuming that the written statement of the victim had been "decisive", there had been sufficient safeguards in domestic law to protect their right to a fair trial. In relation to the second two applicants, the Court concluded that the statement had been neither the sole nor decisive basis of their conviction and, accordingly, that there had been no violation of their defence rights.