Miscarriages of JusticeUK (MOJUK)
22 Berners St, Birmingham B19 2DR
Tele: 0121- 507 0844 Email: mojuk@mojuk.org.uk Web: www.mojuk.org.uk

MOJUK: Newsletter 'Inside Out' No 561 (24/12/2015) - Cost £1

Unlawful Strip Searches - Two Women Prisoners to be Awarded Damages

1. The appellants BK and RH are women serving custodial sentences. On 28 February 2013 they were separately, while at HMP Send, subjected to full body searches (otherwise known as strip searches) in their cells. It has since been conceded that the searches were unlawful. Their claims for damages, liability having been admitted, are, as we were told, proceeding in the County Court.

6. The appellant BK who was born in 1963, was serving an indeterminate sentence of imprisonment for public protection for an offence of manslaughter. She had pleaded guilty on the basis of diminished responsibility. The victim had been her partner, with whom she had been in an abusive relationship. The minimum term had been set at the relatively low figure of 1 year 303 days, with credit for time spent on remand in custody. She has been in custody since 4 October 2006.

7. The evidence was that she had been the victim of sexual abuse as a child. She has active symptoms of mental illness and has suffered acute episodes of such illness. She has been diagnosed with post-traumatic stress disorder and borderline personality disorder. She has been managed in custody under the Care Programme Approach and has on occasion been held in safer custody through concerns at the high risk of self harm or suicide. She had been seeing a psychiatrist on a monthly basis while in prison.

8. A very full independent psychological assessment, set out in a report dated 14 January 2013, considered that, at that time, she represented a low to medium risk of committing violence. Her risk of self-harm and suicide remained high. She was assessed as a vulnerable adult, whose past history of abuse had led her, coupled with drinking issues, to violence. She was, however, considered to have acquired good insight into her difficulties.

9. BK was transferred to HMP Send in 2011. She is an enhanced prisoner under the privileges scheme. She has no adjudications. In fact her last adjudication was in 2006, at a time when she was on remand in HMP Holloway. Her unchallenged evidence was that she had always worked hard to build good relationships with staff. She has never tested positive on any mandatory drug test.

10. Her evidence also was that she had only once previously been strip-searched: that was in 2006, when she was first received into HMP Holloway.

11. At around 8 o'clock in the morning of 28 February 2013 two female prison officers came into her cell. They were wearing gloves. They closed the door and said that they had to strip-search BK and also to search her cell. When she asked why, they said that the searches were targeted. She was made to remove all her top clothing and was inspected. She then put her top back on and was told to remove her trouser bottoms and underwear and spread her legs; she again was inspected. There was no internal examination. The cell was then searched. Nothing was found either on her person or in her cell. She was most distressed. Her undisputed evidence was that the officers in fact expressed to her their surprise that her "name came up".

12. Since then she has, according to her evidence, been scared and distrustful towards staff. There have been incidents of self-induced vomiting and suicidal thoughts. She said: "I feel humiliated, embarrassed, violated and ashamed".

13. A record of cell search was subsequently completed using a typed pro-forma form (F78). As completed, that described the search as "Targeted". The reason for the search was described as: "Alcohol/Drugs". The body search was recorded as a Level 1 search. That was incorrect. Level 1 connotes a search where underwear is not removed. Here, as is common ground, her underwear had been removed. The search should thus have been recorded as a Level 2 search. The Form also recorded that a dog, identified as "Archie", had been used.

14. BK made a written complaint on 16 March 2013. By then she had been told that a dog had given an indication towards her cell: she complained, however, that at the time of the search the officers had told her they could not tell her why she and her cell were being searched. She complained of the effect on her. The written answer, dated 26 March 2013, of the Head of Security and Operations at HMP Send was to the effect that no one, under prison rules, was exempt from searching. The letter stated that when the drug dog shows interest "we are required to undertake appropriate action, which was the case in question". The letter noted also that the Mental Health Team had been asked to make contact with her and explore her concerns. In this regard the letter stated "….searching is part of prison life and you may well have to deal with similar events in future".

15. Thereafter, solicitors' correspondence ensued. Initially it was maintained on behalf of the respondent Secretary of State that the search had been a Level 1 search. However, by the time the Acknowledgment of Service was put in it was conceded that it had been a Level 2 search. It was also conceded that the search had been unlawful because it was "not carried out in accordance with policy": whilst it was maintained that the policy itself was lawful. The Acknowledgment of Service further asserted that the background to the searches was the alleged admission by a prison officer that she had allowed unlawful contraband onto the wing, leading to disorder.

16. RH, who was born in 1976, was sentenced to a life term for murder on 18 May 2007. The victim had been the wife of a man with whom she was having a relationship.

17. RH had in the past been in relationships with men involving sexual abuse. She had a history of depression and excessive reliance on alcohol. A detailed End of Therapy Report prepared in 2010 referred to issues with self-esteem, isolation and emotional control.

18. Since being incarcerated in prison RH at no time had received any adjudications. She was an enhanced prisoner under the privileges scheme. She had not previously been the subject of a full body search. Both under the mandatory testing schemes and under the voluntary testing schemes in which she had participated at various prisons the results were always negative. It was not made clear on the evidence just when she was transferred to HMP Send.

19. In her unchallenged witness statement RH says that on 28 February 2013 at around 9.20 am she was called back to her cell from work. She was told by the female prison officers there present that she was being targeted for a full body search. She explained that she was menstruating but they insisted on a full body search, first examining the lower half of the body, when the clothing had been removed, and then the upper half, when the clothing had been removed. Her clothes were also searched. Certain areas of her cell were then searched. Nothing was found.

20. In her witness statement RH says that she felt "totally humiliated". She says that she was scared and has lost confidence in her dealings with staff. She has had thoughts of self-harm. She is concerned about prison gossip and the fact that this search is on her prison record. She says that she was never told at the time that a drug dog had indicated her cell: she herself never saw the drug dog. Had she been asked, she would have consented to the dog entering her cell.

21. In the form F78 subsequently completed with regard to RH, the full body search was recorded as Level 1 – as with BK, it has since been conceded that this was wrong. It was a Level 2 search. The dog was again identified as "Archie". The search was described as "Targeted". The reason for search was given as "Alcohol/Drugs".

22. RH put in a written complaint dated 8 March 2013. She said that she would like an explanation and wanted to be cleared of any wrong-doing on her file. On 13 March 2013 there was a written response to the effect that she had received a targeted search after the drug dog, while carrying out a routine area search, indicated her cell. The answer repeated the error that this had been a Level 1 search. It was also said that prison rules state that all persons may be searched on entry to or within prisons.

23. In due course, after solicitors' correspondence, the like concessions were made on behalf of the respondent with regard to RH as had been made with regard to BK.

Uddin & Ors, R. v [2015] EWCA Crim 1918 (11 December 2015)

1. The seven appeals and two applications before us in this case challenge anti-social behaviour orders (ASBOs) imposed on the appellants and applicants on 23 January 2015 at the Central Criminal Court. They had come before the Court in respect of two incidents of public disorder, as a result of which they were sentenced to terms of imprisonment on 20 June 2014. Five of the seven appellants received terms of 29 weeks' custody. Mr Mohammed Alamgir was sentenced to ten months' imprisonment. The seventh appellant, Mr Kamran Khan, was sentenced to a total of 55 weeks' custody. One of the applicants, Mr Mohan Uddin, received a total of 21 months and three weeks' imprisonment. And the other applicant, Mr Moshiur Rahman, was sentenced to a term of 21 weeks' imprisonment. These sentences are not challenged before us: an appeal by Mr Kamran Khan against his sentences was dismissed on 7 November 2014.

3. On 23 January 2015 the court also imposed on all nine men ASBOs for a period of three years. The court had power to do so because, although ASBOs were replaced by criminal conduct orders on 20 October 2014, transitional provisions preserved ASBOs in cases where criminal proceedings began before that date.

4. The appellants are all Sunni Muslims from Luton, and are aged between 26 and 36 years. The offences arose from two incidents in London, and there was CCTV coverage of each. The first was on 10 May 2013 when there was a march from the Regent Park Mosque to the Syrian embassy in Belgravia, where the marchers planned to protest, and so it went down the Edgware Road. Police permission had not been obtained for the march: there was an officer at the mosque, but no police presence was organised for the march. The prosecution contended that the rally was sectarian, demonstrating hostility to Shia beliefs: marchers were said to have carried banners such as (to use the example given by the Judge in his sentencing remarks on 20 June 2014) "Shia's are non-believers and enemies of Islam"; and marchers are said to have chanted correspondingly. A Shia Muslim who was on the Edgware Road remonstrated with a marcher and was abused by Mr Uddin and, in the Judge's expression, "doused with water" by Mr Alamgir. A further disturbance broke out when the march organiser, Mr Anjem Choudary, was being interviewed by a journalist and a man referred to as "Urma" was punched to the ground by Mr Alamgir. He was then hit with a flagstaff by a Mr Mirza Ali and a Mr Jordan Horner, both of whom were defendants at the trial but are not appellants before us. Mr Ali absconded before his trial and was tried, convicted and sentenced in his absence. Mr Horner was convicted of violent disorder and sentenced to two years' custody.

66. Accordingly, the decisions to impose the ASBOs were taken without the prosecution presenting evidence about the appellants' past conduct, including in some but not all cases their past convictions, and, as we infer from the Judge's ruling, without consideration of the personal circumstances of each appellant. Usually a defendant's personal circumstances and

previous behaviour would be highly relevant considerations when making an ASBO. It will rarely have been right for a court to disregard such information in deciding to make an ASBO, and rarer still for it to be irrelevant when determining the terms of an ASBO: as this court explained in the Boness case (cit sup) at para 28, ASBOs "should be tailor-made for the individual offender". The prosecution had, as we have explained, served detailed evidence by way of statements of police officers about each defendant, but those were not relied on and in those circumstances it is not right for us to comment on it. But, for example, as we have said, it was not disputed that some appellants had performed Da'wah for many years without causing offence before the Oxford Street incident: we do not think that it was right to ignore that when ordering the Da'wah prohibition against them.

67. Further, we see nothing about the Edgware Road incident or the Oxford Street incident that justified making the ASBOs without making findings about the part that each defendant played in them: in particular, perhaps, he was involved in planning trouble or reacted when he saw a companion involved in a melee. (As we have said, neither of the two men who start the violence in Oxford Street are appellants before us.) If otherwise we were minded to uphold the ASBOs (wholly or in part), we would have considered the position of each appellant to decide what, if any, prohibition was justified by the risk that he presents. But other conclusions mean that we need not do so.

68. We conclude that the ASBOs against all the appellants should be quashed, and the appeals allowed accordingly.

Surge in Prison Disciplinary Hearings 'Feeding Vicious Cycle' *Alan Travis, Guardian*

The number of punishment hearings held inside prisons has risen by 24% in the past year with almost 160,000 extra days – or 438 years – of imprisonment imposed on inmates, according to a report. The Howard League for Penal Reform says the record 21,629 disciplinary hearings, known as external adjudications, held in prisons in England and Wales in 2014-15 reflects a growing volatility and violence behind bars. “The system of adjudications has bloated beyond its originally intended use, which was to punish incidents of unacceptable behaviour. Indeed, in the most out-of-control prisons it has become a routinely used behaviour management technique,” says the report, Punishment in Prison. The hearings, usually presided over by a prison governor, mainly concern disobedience, disrespect or property offences, which penal reformers say tend to increase as prisons lose control under pressure of overcrowding and staff cuts.

A prisoner found guilty at an adjudication of breaking the rules can face a range of punishments, from the loss of “canteen” – when prisoners can buy extra goods – to solitary confinement or the imposition of extra days in jail. The most serious cases, which can involve the imposition of up to 42 additional days, may be referred to an external adjudicator such as a visiting district judge but without any legal representation for the prisoner. Ministry of Justice figures show that the number of these external adjudications has risen by 4,000 or 24% in the past year to 21,629. Nearly half of these external adjudications – 10,119 – led to the imposition of extra days which totalled 159,497 in 2014-15, a 12% increase over the previous year. Additional days postpone the date on which a prisoner can be released on licence but cannot be added on beyond the end of a sentence.

The official figures show that the number of extra days imposed has been particularly high at Aylesbury young offender institution, where 9,428 extra days were imposed last year on an average population of 418. The next highest was at HMP Rochester, Kent, where 8,048 extra days were handed out to an average of 739 prisoners. Nine of the 10 prisons that most frequently imposed extra days as punishment hold young offenders. The report says that the use of this

form of punishment on children in prison has almost doubled in the past two years, from 1,383 in 2012 to 2,683 in 2014. The report cites the case of one inmate, James, who was given a three-year prison sentence at the age of 16 for a serious offence. He was difficult and disruptive and had 169 extra days imposed after numerous adjudications for fighting and disobedience. He had been due to be released as a "looked after" child with the full support of social services, but the extra punishment meant he was released as an adult without any support.

The chief executive of the Howard League, Frances Crook, said the system of adjudications had become a monster, imposing fearsome punishments when people misbehave – often as a result of the dreadful conditions they were subjected to. "This bureaucratic, costly and time-consuming system of punishments then further feeds pressure on the prisons, creating a vicious cycle of troubled prisons and troubling prisoners," she said. "The principle of independent adjudication where liberty is at risk is an important one. But prisons have come to rely too heavily on the threat of additional days. The Ministry of Justice should curtail the use of additional days in all but the most serious cases. The overuse of adjudications is not seen as fair, it is not fair, and the imposition of additional days is very expensive and counterproductive."

The system costs between £400,000 and £500,000 a year to run with the cost of the extra days imposed estimated at £15m. The prisons minister, Andrew Selous, said when the figures were released in a parliamentary written answer, that disciplinary procedures were central to the maintenance of a safe, custodial environment. "A range of safeguarding measures are in place to make sure that a prisoner or young person is physically and mentally fit to face an adjudication hearing and any subsequent punishment," he added. "Adjudication outcomes are regularly monitored to make sure that no prisoner or young person is charged or punished for any reason other than their disciplinary behaviour."

Bite Marks – The Junk Science Continues to Unravel *Erik Eckholm, New York Times*

Steven Mark Chaney, who was freed from prison in October after 28 years, had to fight back tears as he watched forensic dentists argue here, before the Texas Forensic Science Commission, whether bite patterns on the skin of murder, rape and child abuse victims can offer valid clues to the perpetrator's identity. In 1987, he was sentenced to life on murder charges after a dental expert testified that it was virtually certain that his teeth had caused marks on an arm of the victim, a drug dealer who was stabbed to death. This same expert has now repudiated his testimony as unfounded. Mr. Chaney is one of more than a dozen people around the country who have been released or exonerated in cases involving bite-mark testimony that was later debunked.

Now, the Texas commission is seeking to develop guidelines on whether bite-mark comparisons should have any role in the courtroom. Forensic science more broadly is in turmoil as prosecutors, defense lawyers and judges confront evidence that many long-used methods, like handwriting analysis and microscopic hair comparisons, were based more on tradition than science and do not hold up under scrutiny. Even fingerprint and certain kinds of DNA matches are not quite as certain as many once believed, scientists say. But no lingering technique is under stronger attack than the analysis of purported bite marks, a method first thrust into fame in the televised trial of Ted Bundy in 1979.

The Texas agency has won national praise for its examinations of the reliability of all sorts of forensic methods and testimony. Initially it responded to complaints about evidence in individual criminal cases. It has moved on to also evaluate whole fields, like bite-mark matching. "Some aspects of forensic science have never been validated," said Vincent Di Maio, a retired doctor and medical examiner who has been chairman of the Texas commission since 2012. "That's a problem that had to be addressed, and nobody else was going to do it for us." The commission's recommendations, expected in February, will be the first formal finding by any state or federal agency on the validity of bite-mark evidence, said Chris Fabricant, the director of strategic litigation at the Innocence Project. He added that they might help speed up inquiries into hundreds more convictions around the country as well as discourage dubious testimony in the future.

Mr. Chaney, 59, said he nearly cried at his hearing last month when two of the dental experts, after expressing their apologies to him for a tragic mistake by members of their craft, still argued that bite comparisons can play a useful role in criminal trials. They didn't seem to be considering the cost in human lives," he said. "I'm grateful that people say they're sorry, but that doesn't replace 28 years of my life." Since Mr. Chaney's trial in 1987, studies have shown that dental experts cannot reliably claim that a bite wound was caused by a particular individual. They cannot even consistently agree on whether wounds were caused by bites at all.

Put under rigorous scrutiny, some forensic tools, including comparisons of lead chemistry in bullets and the matching of aural voice prints, have already been largely discarded. The accuracy of many supposed signs of arson, like burn patterns that seemed to be caused by a liquid, has also been disproved. This year, the Federal Bureau of Investigation admitted that examiners at its vaunted crime lab had for decades overstated the reliability of microscopic hair matches. As the ability grows to collect ever more microscopic amounts of DNA, even from door knobs, more of the specimens contain genetic material from several people. Separating such mixtures is difficult, and in some cases, experts now acknowledge, the sample can be matched to a suspect with far less certainty than had been assumed.

A report issued in 2009 by the National Academy of Sciences, "Strengthening Forensic Science in the United States," was a turning point. An expert panel warned of enormous disparities around the country in the quality of crime laboratories and said many methods had not been scientifically validated. While some technologies like DNA analysis and toxicology were rooted in sound laboratory science, the report said, others involving interpretation of "observed patterns" like fingerprints, writing samples, tool marks, tire tracks, footprints, bite marks and hair specimens had never been properly studied. The report called for more research and for a national center to set standards for accreditation and proper use of technologies. That led to the creation in 2014 of a National Commission on Forensic Science, which is charged with advising the federal government on ways of "strengthening the validity and reliability of the forensic sciences" and their uses in the courtroom.

That 2009 report spurred needed research, said Michael J. Saks, an expert on evidence at the Arizona State University School of Law. "But I don't see much impact in the courtroom so far." D. Michael Risinger, an expert on forensics at the Seton Hall College of Law, compared changing the practices of prosecutors, courts and experts to "turning a battleship." Mr. Risinger and others praised the Texas commission for moving quickly to apply changing science to real cases. The agency is, for example, seeking to determine how new concerns about DNA interpretation and hair comparisons should affect past convictions and future trials in the state.

The commission had a rocky start after it was formed in 2005, in reaction to a scandal in the police crime laboratory in Houston involving shoddy DNA testing and false forensic testimony that forced the reappraisal of hundreds of convictions. Painful questions were also being raised about the execution of Cameron Todd Willingham in 2004 for a murder conviction based on arson evidence that had been widely discredited well before he was put to death.

The commission started an investigation of the Willingham case, but its work met resistance from state officials in 2009. The governor at that time, Rick Perry, a Republican, replaced three commissioners, interrupting the inquiries. Although the commission issued a report in 2011 calling for more up-to-date training of fire investigators, the state's attorney general ruled that the commission did not have legal authority to rule on evidence offered in cases before 2005.

Since then, however, the commission, composed of seven scientists, a prosecutor and a defense lawyer, has won bipartisan praise. "We're a hard-core law-and-order state, but we think you should convict people who are guilty and not innocent," Dr. Di Maio said. He added that he had seen no evidence of political pressure in his years as commission chairman. Within Texas, the commission has so far identified about three dozen cases that used bite-mark evidence, said Lynn R. Garcia, the body's general counsel. Once the commission recommends guidelines, any cases that relied heavily on testimony considered invalid under the forthcoming report may be reopened. Even without official guidelines, a number of prisoners who were convicted of murder and rape based on bite-mark testimony have been exonerated by DNA tests or, like Mr. Chaney, were able to convince a court that the evidence was bogus.

In January, the Mississippi Supreme Court is to decide whether to reverse the conviction of Eddie Lee Howard Jr., who has been on death row for more than two decades. He was convicted in the murder and rape of an 84-year-old woman largely because of testimony of a forensic dentist whose claims that he could detect and identify the source of faint bite marks have been widely condemned by his colleagues in the field. In the Texas commission hearing last month, Dr. David R. Senn of the University of Texas Health Science Center at San Antonio argued that bite-mark evidence could still play a valuable if limited role in some cases by, for example, pointing toward which of a few obvious suspects was likely to be the offender, or excluding other suspects. But commission members also heard from researchers who showed that because of the malleability of human skin, the same teeth leave different marking patters with each bite. Other researchers presented a study in which leading forensic dentists viewed photographs of skin wounds and in most cases could not agree on whether the marks were even caused by a bite. Mr. Chaney's presence at the hearing, in a small state office, was a reminder of the stakes.

The prosecutor and a judge agreed to set him free after the Innocence Project and Dallas public defenders petitioned on his behalf. But the decision to drop charges must be affirmed by an appeals court in the coming months. After the session, Mr. Chaney said that he had been eligible for parole after 20 years, but was denied it because he refused to admit guilt. He described his torment as his grandparents, his oldest stepson and his oldest grandson (a car crash victim) all died during his incarceration, while he was not allowed to attend the funerals. But his wife stood by him, Mr. Chaney said, and gave him a home to go back to. "It's amazing," he said. "I'm a blessed man in that regard."

'Cardiff Newsagent Three' Report: No Perjury.

Newsagent Phillip Saunders was murdered in 1987. Innocent men, the Cardiff Newsagent Three, spent eleven years in jail, but the long-awaited South Wales Police report into the case says there is insufficient evidence to charge any of the original trial witnesses with perjury, Wales Online reports this week. Michael O'Brien, Darren Hall and Ellis Sherwood had their convictions quashed in 2000 after doubt was cast on the truth of the testimony of Stuart Lewis. DI Lewis had claimed to have overheard a shouted confession from O'Brien and Sherwood in Canton Police Station cells.

"I remain disappointed that Stuart Lewis was not charged, but believe overall that this is a fair report," commented Michael O'Brien. "A lot of positive changes have been made by the police so that what happened in our case should never happen again. I now want to put what happened behind me and move on in my life. Obviously I would like to see whoever was responsible for the murder of Phillip Saunders brought to justice." "As a result of forensic advances, South Wales Police recently decided to revisit the murder of Phillip Saunders, to look in particular at whether DNA or other new opportunities exist," Detective Chief Superintendent Lorraine Davies said. "Since the murder of Phillip Saunders 28 years ago, a number of investigations have taken place but despite this we still believe there could be someone who has vital information."

Is There Really any Difference Between a Terrorist and an Ordinary Criminal?

Robert Fisk, Independent: 'Criminals' are our chaps, while 'terrorists' are dark-skinned Muslims. Cops and reporters have a lot in common. Both are students of human folly. They have an osmotic-parasitic relationship. And so I suppose it's only natural that they should fall into lockstep over crime. Over the past few years, I've discovered that there is crime pure and simple (gangland crime, killing by gun-crazed students or anti-abortionists, Mafia hit squads), and "terrorist crime", for which the guilty parties must qualify by being politically angry, adherents – directly inspired or otherwise – to a religious deviation and usually evil, messianic, sadistic, sick, medieval members of a "death cult". The latter, needless to say, includes "homegrown radicals" who slaughter people of any religion because of the West's adventures in the Middle East. In reality, this means that "ordinary" crime – the mass killing of Westerners by Westerners for money, greed, personal revenge or a drug-related desire to kill fellow humans – is treated as somehow normal. But "terrorist" crime almost always indicates that Muslims are held responsible. In other words, criminals are our chaps, while terrorists are dark-skinned Muslims who hate our values, want to chop off our heads and are obviously crazy.

We saw the wobbly nature of this nonsense immediately after the killing of 14 innocent Americans in California. At first, the US cops said they did not know if this was a "terrorist-related" (sic) crime. They called it a mass shooting. We were told on several channels that the murders were the result of a dispute – the gunman had supposedly been angered by insults from one of the 14 victims. But then he turned out to have a Muslim name and, along with his wife, kept a whole armoury at home and had apparently pledged "allegiance" to Isis. The mass shooting then became "an act of terror". To further confuse this new definition, however, the cops said that they did not believe the couple had any direct contact with Isis, despite the group's claim of responsibility. Then it turned out that the couple had been "radicalised" – something the Mafia don't undergo – years before the slaughter.

In the London tube station stabbing a week ago, the semantics became equally confused. At first, the police were "investigating a stabbing" at Leytonstone; but after a videotape soundtrack recorded a man shouting: "This is for Syria", and a civilian shouting back: "You ain't no Muslim, bruv" – the cops declared it "a terrorist incident". Dave Cameron made much of the "You ain't no Muslim, bruv" quote. A man has since been charged with attempted murder.

Yet all this is a bit odd. Back in the 1980s, when the British Army and the IRA were fighting to the death in Northern Ireland, the UK government was desperate to label the IRA as criminals, vicious criminals, desperate criminals, even terrorist criminals, but above all common criminals who must be made amenable to the law and sentenced to many years in prison, whatever

the reason for their violent campaign. Then the IRA decided they wanted to be called "political prisoners" – the polite version of "terrorists" – because they wanted their murders, robberies and intimidation to be seen as "political crimes" outside the herd of mafiosi, contract killers, rapists and sadists that inhabit all societies, including that of Northern Ireland. So enthusiastic were the IRA to claim "political" status that they went on hunger strike. Ten died under Mrs Thatcher's cold gaze. But then the UK government gave way on almost all the IRA's demands. IRA inmates became "politicals" and emerged from captivity when "peace" was declared – while the common-or-garden crooks and murderers of Northern Ireland remained at Her Majesty's pleasure.

So does it pay to be a "terrorist" or an ordinary criminal? I suppose it depends how much your life is worth. For the British Isis fighters Reyaad Khan and Ruhul Amin, killed in a UK drone strike, being classified as a terrorist proved lethal. Their deaths – for which read executions – were, according to Dave, "necessary and proportionate to the individual (sic) self-defence of the UK". They had been planning attacks in Britain. In other words, Dave would not have directed a drone to annihilate a school murderer from Leicester or a hit man from the East End of London – even if they were planning a further killing. Messers Khan and Amin had to be far away and working for Isis to qualify for a drone attack. Then Dave and our military lads and lasses sentenced them to capital punishment.

Yet the criminal/terrorist dichotomy stretches even further. The latest claim by Syrian opponents of Bashar al-Assad – that Assad is a far greater "terrorist" than Isis because he has killed more people than the Islamist group (six times as many, according to Channel 4) – suggests that the sheer number of dead men, women and children who have died at your hands determines whether you are a criminal or a terrorist. Or perhaps it means that a "terrorist" group with more moderate aspirations in killing – presumably, in this case, Isis – is less horrid than a terrorist group with even more notches on the barrels of its guns.

But hold on a minute. If we take the example of Assad's opponents to its logical conclusion, we have to concede that Messrs Bush and Blair – through the illegal invasion of Iraq in 2003 – were responsible for the destruction of far more innocent lives than Isis and Assad put together. So do Blair and Bush qualify as super-terrorists? Or just criminals, albeit "war" criminals who might theoretically qualify for The Hague international court, but who are absolutely safe from drone attacks and will never, ever, be called "terrorists"?

The Right to a Court: Article 6 Of the Human Rights Convention Lord Sumption

Article 6 of the European Convention on Human Rights provides that "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." Article 6 is an important part of the Convention. For quite a number of years, it has been the most fertile source of petitions to the European Court of Human Rights, and has accounted for the largest number of violations. Last year, just over a quarter of all violations found by the Court were violations of Article 6. The principal offenders were Turkey and the countries of the old communist block, notably Russia and Romania. The United Kingdom is well down the list of offenders and did not feature at all in that year. But it has had its own collisions with Article 6. Since 1975 there have been according to my computation 79 cases in which the Strasbourg Court has found violations of Article 6 by the United Kingdom, more than any other article. In addition, since the Human Rights Act came into force in 2000, the United Kingdom courts have on five occasions made declarations of incompatibility based on Article 6. During the same

period, the House of Lords or the Supreme Court have on three occasions declared aspects of Scottish criminal procedure to be incompatible with Article 6.

Numbers of course do not tell the whole story. In addition to cases in which the United Kingdom has been found to have violated Article 6, there has been a fair number of cases since 2000 in which a violation of the article has only been avoided by reading down legislation under section 3 of the Human Rights Act, or by quashing subordinate legislation or other executive acts. More generally, Article 6 has had a significant influence on criminal procedure and on new legislation, notably in the fields of criminal sentencing and penal policy and in the creation of fresh avenues of review of administrative decisions. So I think that we may take it that although our violations of Article 6 are neither as frequent nor as serious as those of Russia, Romania or Turkey, the article raises significant issues for all three jurisdictions of the United Kingdom.

I want to focus this evening on one particular aspect of Article 6, namely what has been called the "right to a court". This is the right, which has been held to be implicit in Article 6, not just to have legal proceedings fairly conducted but to bring legal proceedings at all, without having to confront some legal, administrative or practical obstacle. The "right to a court" admittedly accounts for only a small proportion of the cases in which the Strasbourg Court has found violations of Article 6. In the case of the United Kingdom it accounts for just five of the UK's 79 violations. But the principle has a broader significance which I think warrants the attention that I propose to give it. This is because it provides an interesting, and I think revealing case-study of the way in which the jurisprudence European Court of Human Rights tends to expand the scope of the Convention.

The origin of the "right to a court" is the decision of the Strasbourg court in Golder v United Kingdom (1979-80) 1 EHRR 524. The facts were simple enough. Mr Golder was a prisoner serving a fifteen-year sentence for robbery with violence at Parkhurst Prison in the Isle of Wight. A prison officer had written an entry in his prison record alleging that he had participated in a serious riot. As a result, he had suffered two weeks in solitary confinement and was at risk of being refused parole at the end of his sentence. He denied that he had had anything to do with the riot, and proposed to instruct a solicitor to sue the prison officer for libel. But under Rule 33 of the Prison Regulations as they then stood, a prisoner was not allowed to communicate with any outsider in connection with any legal business without the permission of the Home Secretary, which in this instance was refused. So in 1970, Mr Golder petitioned the Strasbourg court.

Mr Golder's petition worked its way through the Strasbourg process at a critical stage in its history. The Strasbourg Court had very little business in the early 1970s. People were not as conscious of the Convention as they later became. The Court's jurisdiction to hear individual petitions was limited to states that had opted to allow them. The United Kingdom had only recently exercised that option, and many states had still not done so. The decision to allow individual petitions from the United Kingdom had been made by the Labour Government in 1966. They made it partly because they believed that it would make little difference. They assumed that the Strasbourg institutions could be expected to respect the limits of what the convention states had actually agreed. By the early 1970s, however, with a Conservative government in power, the picture had begun to look very different. Under the procedure which then obtained, petitions were dealt with in the first instance by the European Commission on Human Rights. They did not reach the Court unless the Commission or a Convention state referred them. In the view of the UK Government, the Commission had shown a distressing tendency to expand the scope of the Convention by implying additional rights into it which had not been agreed by the Convention states. An important milestone was passed in October

1970, when the Commission ruled that 243 applications by East African Asians who had been refused a right of entry into the UK were admissible on the ground that Article 3, which prohibits inhuman or degrading treatment, was capable of applying to acts of racial discrimination. Lord Lester of Herne Hill, who as Anthony Lester QC who was counsel for the applicants, is on record as saying that he doubted whether the Court would have been so bold.

In March 1971, six months after the admissibility decision in the East African Asians case, the Commission declared Mr Golder's complaint to be admissible, and in their report on the merits in June 1973, they upheld it. They held that the right to a fair trial implied a right to a trial. It was therefore violated by any administrative measure which restricted a person's right to instruct a solicitor. The British government referred the case to the Court. They were not particularly concerned about the particular position of Mr Golder. The Parole Board had not in fact been told about the prison officer's accusation, and he had been released without difficulty more than a year before the Commission reported. The government was much more concerned about the Commission's propensity to add implied rights to the Convention. They wanted to treat Mr Golder's case as a test case on the general approach to the construction of the Convention. Thus it was that Mr Golder found himself in Strasbourg up against the combined learning of two former legal advisers to the Foreign Office, Professor Sir Francis Vallat KCMG, QC, and Sir William Dale KCMG, and Mr Gordon Slynn QC, the future Lord Slynn of Hadley.

The argument of these great luminaries was that the Convention was not designed to protect all human rights. It was intended to protect only those particular rights upon which the parties to the original Convention had been able to agree when it was drafted in 1950. There was therefore, in their submission, no justification for extending the scope of the Convention any further than its language warranted. The Foreign Office obviously shared Mr Lester's view that they would get a more cautious approach from the court than from the Commission. As it turned out, they were both wrong. The Court adopted the Commission's line, and Golder became one of the leading cases on the teleological approach to the application of the Convention.

The Court held that there was a right to put a civil dispute before a court, and not just a right to have it tried fairly when it got there. Their reasoning was based on the rule of law. They began by drawing attention to Article 31 of the Vienna Convention on the Interpretation of Treaties, which authorises resort to general principles of law recognised by civilised countries as an aid to interpretation. The rule of law was such a principle. Starting from this position, they reasoned as follows: Article 6, by requiring civil disputes to be determined at a fair and public hearing before a independent and impartial tribunal, was designed to give effect to the rule of law - the rule of law also required a right of access to the courts – therefore Article 6 must also be taken to require a right of access to a court. They reinforced this conclusion by a reductio ad absurdam. If there was no right to a court, the right to a fair and public hearing before an impartial and independent tribunal was not worth much. A state would always be able to "do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

There were three dissenting judgments. The longest and most acrimonious of them came from the British judge, Sir Gerald Fitzmaurice, a notable international lawyer and himself a former Legal Adviser to the Foreign Office, who had worked on the drafting of the Convention while it was being negotiated. His dissent is worth studying, because it goes to the heart of the difference between the supporters and the opponents of the Strasbourg's court's expansive approach to the Convention. The difference between the Commission and the UK Government, he observed, was not really about the meaning of the Convention at all. The rival arguments represented different juridical frames of mind. The UK Government submitted that Article 1 bound the state parties to give effect to the rights "defined" in the following articles, and no right to a court was defined in Article 6. The argument of the Commission, on the other hand, "amounted to this, - that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all possible from any of its terms."

This approach, he said, might be legitimate from a legislator, but not from a court of interpretation. There was, he said, "a considerable difference between the case of "law-giver's law" edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains."

The Court's approach, according to FitzMaurice, was "typical of the cry of the judicial legislator all down the ages - a cry which, whatever justification it may have on the internal or national plane, has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact... The point is that it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them."

Whether or not one agrees with Sir Gerald FitzMaurice's interpretation of Article 6, it seems to me that he put his finger on the real difference between the two sides of the argument. He also correctly identified the wider significance of the majority's judgment. The decision in Golder marked, at an early stage of the Court's history, its adoption of an approach to the interpretation of Convention which was radically different from the approach of international tribunals to the interpretation of treaties generally. Instead of seeking to ascertain the intentions of the contracting parties from the language, the travaux and other recognised aids to interpretation, the articles of the Convention were in effect to be treated as a body of legal principle capable of autonomous legal development in accordance with the values which its provisions might be said to represent. This is essentially a process of extrapolation rather than interpretation. It is more like the way that the common law develops autonomously into new areas. The expression "living instrument" was not coined until three years later. But the concept was adopted in Golder well before the phrase was devised in Tyrer v United Kingdom (1979-80) 2 EHRR 1.

The potential for expanding the scope of the Convention into new areas was at least one reason for the exponential growth of the Strasbourg Court's business, which began in the late 1970s. Golder was the first judgment of the Court to which Sir Gerald Fitzmaurice was party. He became a persistent critic of the Court, and dissented in most of the eleven cases on which he sat in his time as one of its judges.

Personally, I have no difficulty with the actual result in Golder. I think that it is implicit in a rule that civil rights and obligations will be determined at a fair and public hearing before an independent and impartial tribunal, that a litigant will be allowed access to that tribunal in order to determine his claim. The proposition seems to me to be no more radical than the corresponding common law rule which the courts have repeatedly recognised over the past half-century. As early as the 1760s, Blackstone wrote in his Commentaries in the 1760s (4th ed., 1876, 111): "A… right of every [man] is that of applying to the courts of justice for redress of injuries. Since

the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein." Indeed, the French text of Article 6 comes very close to saying this in terms.

The problem about Golder lies not in the result, which is unexceptionable, but in the reasoning. In basing its judgment mainly on the rule of law, the Court the Strasbourg court raised a major question which it left unanswered, namely what does the rule of law require in this context. Golder was a very simple case. If the officer's report about Mr Golder was untrue, as Mr Golder alleged, then he had a good cause of action for libel. It was common ground that the English courts would have received and determined his action whether or not his instructions to his solicitor had been communicated in breach of the Prison Regulations. So the real effect of the Prison Regulations was to confer a discretionary administrative power on the Home Secretary to obstruct the exercise of a legal right, by preventing Mr Golder from invoking the courts' jurisdiction. Moreover, in this instance, the power had been exercised so as to prevent Mr Golder from suing an employee of the Prison Service itself. I do not have the slightest difficulty in regarding that as an interference with Mr Golder's right to a fair hearing. Equally, once one accepts that there may be a right not to be obstructed from accessing the court, it is a short step to holding that in some cases the state may be obliged to provide positive assistance, for example by way of legal aid, in a case where without it a litigant will be unable to exercise his rights. This was the step which the Strasbourg court took in 1979 in Airey v Ireland (1979-80) 2 EHRR 305.

The principle accepted in Golder and again in Airey has, however, been treated as decisive of many cases in which the petitioner's problem did not arise from any difficulty in accessing the court, but from the rules of law which fell to be applied when he got there. This can happen in a number of ways. The courts may lack jurisdiction under their own law. Or there may be a procedural bar, such as the expiry of a limitation period or the certification of the Claimant as a mental patient or a vexatious litigant. Or the Claimant may simply have no legal right to assert under the domestic law. These are all examples of legal rules which, without preventing access to a court, may prevent a civil claim from succeeding. Such rules are law, and on the face of it the rule of law would appear to require that effect should be given to them. On that footing, there is only one basis on which Article 6 could be relevant. That is that the article is not just concerned with removing obstacles in the way of a litigant seeking to enforce his legal rights. It also determines what limits may properly be placed upon the scope of those right. It therefore has potential implications for the substantive law of a Convention state.

One answer to these questions might have been that Article 6 is not about content of the domestic law of Convention states governing liability. It is only about procedure. When the Duke of Westminster complained, in James v United Kingdom (1986) 8 EHRR 123, that that the Leasehold Reform Act 1967 allowed his qualifying leaseholders to compulsorily purchase his freeholds without providing any grounds on which he could object before a court, he was met with the answer (para. 81) that Article 6 "does not in itself guarantee any particular content for (civil) rights and obligations in the substantive law of the Contracting States." In Fayed v United Kingdom (1994) 18 EHRR 393, the Court expanded this statement. "The Court," it said, "may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned." These formulae have been repeated time and again in the subsequent case-law of the Strasbourg Court. But, as so often in Strasbourg, these forthright statements do not quite mean what they seem to say. Article 6 has been the vehicle for some quite striking incursions into the content of domestic law.

The two landmark cases were Ashingdane v United Kingdom (1985) 7 EHRR 528 and Fayed v United Kingdom (1994) 18 EHRR 393 In both of these cases, petitions based

on Article 6 failed, but the reasoning considerably extended the scope of the article to cover the content of the domestic rules of law.

Ashingdane arose out of Mental Health Act 1959, which conferred extensive powers to commit mental patients to hospitals. Section 141 of the Act provided that no one should be civilly liable for anything done pursuant to the Act unless it was done in bad faith or negligently. Mr Ashingdane had been detained under the Act in Broadmoor Hospital on the ground that he was a dangerous schizophrenic. After a certain amount of time, it was decided that he could safely be transferred to a less secure establishment. But he remained in Broadmoor because no other psychiatric hospital could be found to accept him. He sued the Department of Health for breach of statutory duty in failing to transfer him, but found his action barred by section 141. On its face, here was a statutory rule that determined the content of Mr Ashingdane's civil rights against the health authorities. In the absence of bad faith or negligence he had no claim against them under English law. The Court of Appeal struck out the claim. They held that the alleged breach of statutory duty was not based on either bad faith or absence of reasonable care, and that was the end of the matter. The Strasbourg Court accepted that Mr Ashingdane had been able to go before the courts, even if the outcome was that his action failed. But that, they said, was not the end of the matter. "It must still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's 'right to a court', having regard to the rule of law in a democratic society" (para. 57). That required the court to decide whether section 141 pursued a legitimate objective and to apply a proportionality test. In particular the court had to be satisfied that the statute did not impair the essence of Mr Ashingdane's rights. As it happened, section 141 was held to be both legitimate in principle and proportionate as applied to Mr Ashingdane. By inference the Strasbourg court must also have thought that it did not impair the essence of his right. But the startling result of the Court's reasoning was that Mr Ashingdane's right to a court was said to have been interfered with simply because under the law of England he had no cause of action. Moreover, because the proportionality of applying section 141 had to be decided in the light of the particular impact that that would have on Mr Ashingdane, the Strasbourg Court appeared to be saying that rules of substantive law which applied to particular categories of person had to be applied on a discretionary basis.

Nearly a decade later, the Strasbourg Court had to deal with the case of Fayed v United Kingdom (1994) 18 EHRR 393. Mr Mohammed Fayed is a notable friend of the legal profession who needs no introduction to this audience. Inspectors appointed under the Companies Acts had published a report in which they made serious criticisms of his honesty. His complaint was that he could not sue them successfully for libel because they were entitled to qualified privilege. Of course, Mr Fayed had not been deprived of access to the court, any more than Mr Ashingdane had. His problem was that since the facts did not warrant a plea of malice, his claim was bound to fail. Now qualified privilege is a rule of substantive law. Where it applies, it is a defence to liability. But the Strasbourg Court declined to decide what sort of rule it was. They held that whether it was a procedural bar or a rule of substantive law, Article 6 required it to be reviewed for legitimacy and proportionality. They must therefore have thought that by allowing a defence of privilege to a libel Claimant, English law was restricting Mr Fayed's right to a court in a manner which needed to be justified. Their reason for taking this view seems to have been that they regarded a defence such as qualified privilege, which is available only to certain categories of Defendant, as a personal immunity. Thus they took the reductio as absurdam of the Court in Golder, and expanded it (para. 65) to say that it would be inconsistent with the rule of law if the state were to

"confer immunities from civil liability on large groups or categories of persons."

This seems most surprising. Before one can regard a rule of law as conferring an immunity on some one, one has to be satisfied that it relieves him of a liability that he would otherwise have been under. What liabilities he would otherwise have been under must depend not just on the elements of legal liability but on the availability of any legal defences. The approach of the Strasbourg Court in Fayed seems to have been that a defence such as qualified privilege, which was available only to some categories of persons, must for that reason alone be regarded as an immunity. But as a general statement, that simply cannot be right. Whether a defence amounts to an immunity must depend, surely, on the reason why the defence exists. Very few legal liabilities are unqualified. Most qualifications reflect some reservation about the kind of activities which ought to give rise to liability. The defence of qualified privilege is broadly speaking available in cases where the law regards the activity in which the Defendant was engaged as giving rise to a duty in whose performance there is a public interest, and which may require them to say unkind things about other people, provided that they do so without malice. There is a world of difference between a defence of this kind and an immunity based on status. If Article 6 can nullify a defence in this way, it is in effect turning a qualified liability into an unqualified one. This is in reality to create through the interpretation of Article 6 a substantive right which has no basis in the law of the State concerned, precisely the exercise which the Court in Fayed acknowledged to be illegitimate.

The muddle which the Strasbourg Court got into on this question was cruelly exposed by its decision in Osman v United Kingdom (2000) 29 EHRR 245. Mr Osman had been killed by a man who was subsequently convicted of manslaughter by reason of diminished responsibility. His widow and son sued the police for negligence in failing to act on evidence of the killer's aberrant behaviour in the period before he struck. English, like Scottish law recognises a duty of care as existing only if certain conditions are satisfied. One of them is that it should satisfy the public policy test, i.e. that it is fair, just and reasonable that such a duty should be owed. In Hill v Chief Constable of West Yorkshire [1989] AC 53, the House of Lords had held that, absent a specific assumption of responsibility, it was not fair, just and reasonable that a duty of care should be owed by the police to the public in relation to the investigation or prevention of crime. That rule has recently been reaffirmed by the Supreme Court. As a result, the Osmans' action was struck out as unarguable in the High Court. This was held by the Strasbourg Court to be a violation of Article 6. There is no doubt that the Strasbourg court misunderstood some aspects of the English law of tort. In particular it did not appreciate that the decision in Hill had been about the sorts of activity which could give rise to a duty of care as a matter of law. They assumed that the question whether it was fair, just and reasonable to impose liability had to be decided on a case-by-case basis in the light of the particular facts, and that the English court had been prevented from carrying out that exercise by the order striking out the claim. However, the main reason why the Court found a violation of Article 6 was, I think, a different one. They made the same mistake as the court had made in Fayed. They treated the non-liability of the police as a kind of institutional immunity based on status, and concluded that it was too broad to be proportionate. Actually, the law was that the police owed no duty to the Osmans, because the activities in which they were engaged were not such as ought to give rise to a duty of care. There was no immunity because there was nothing for the police to be immune from.

These errors were shortly afterwards pointed out by Lord Browne-Wilkinson, delivering the leading judgment in the House of Lords in Barrett v Enfield London Borough Council [2001] 2 AC 550. This case was not about the liability of the police. It was about the corresponding rule that no duty of care was owed by local authorities engaged in child protection. The House

felt bound by the decision in Osman to allow the action to go to trial, although they regarded it as legally misconceived. But they expressed the hope that the decision in Osman would be revisited. Lord Browne-Wilkinson observed (page 558) that the Strasbourg Court's decision in Osman was "extremely difficult to understand". "Although the word 'immunity' is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence."

The result of Osman was that for some years actions against the police and other public authorities could not be struck out. Instead, they were required to go through the ritual of a full trial only to fail later and at much greater cost for want of a relevant duty.

Osman was effectively overruled by the Grand Chamber in Z and others v United Kingdom (2002) 34 EHRR 3. Z was another claim against a local authority for the negligent performance of its duty to protect children. It had been struck out as unarguable in the High Court, a decision ultimately affirmed by the House of Lords. By the time the case reached Strasbourg the explanation of Lord Browne-Wilkinson in Barrett was available. The subsequent course of events exposed the divisions within the Strasbourg court. The Commission was entirely unrepentant. They invited the court to stick to its analysis in Osman, on the ground that the claim must be regarded as arguable in English law, notwithstanding the decision of the House of Lords that it was not. This was, apparently, because the Claimants had been granted legal aid and had won in the Court of Appeal. Essentially, the Commission regarded the policy concerns that underlay the English law of tort as misguided. The majority of the Grand Chamber disagreed with the Commission. They accepted Lord Browne-Wilkinson's explanation of English law and held that it undermined the decision in Osman. They therefore rejected the complaint. However, in two joint judgments, four judges of the Grand Chamber dissented. Both judgments were essentially based on a dislike of the principles of the English law of negligence. Their authors held the view, which they took no trouble to conceal, that in a matter as important as the protection of children, there ought to have been a duty. One dissent appeared to deprecate as an "immunity" any domestic law qualification of a general rule of liability if the qualification applied only to a specific category of persons or activities. It suggested that it had been inconsistent with Article 6 to strike out the claim on general policy grounds, even when the policy in question went to the very existence of a legal duty. The other dissent went further. It openly criticised what its authors called the refusal of the House of Lords to "extend tortious liability for civil wrongs arising out of a duty of care by local authorities for child care."

The decision of the Strasbourg Court in Z marked a schismatic moment in the development of Strasbourg's outlook. The outcome, however, was a notable vindication of the policy of constructive dialogue between the Court of Human Rights and the national courts. Yet in Matthews v Minister of Defence [2003] 1 AC 1163 (para. 140) Lord Walker observed that notwithstanding Z the "uncertain shadow of Osman still lies over this area of law." This was because only six months after the decision in Z, the observations of the Strasbourg Court in Fayed, which had launched the Court on its campaign against so-called "immunities", were repeated word for word in Fogarty v United Kingdom (2002) 34 EHRR 12 as if nothing had happened. This suggested that the repentance of the Court was limited to the question of duties of care, and that their basic analysis of immunities remained intact. I shall return to Fogarty in a moment.

The result of the Osman debacle was a certain amount of regrouping in two cases decid-

ed in 2005 and 2006. One was Roche v United Kingdom (2006) 42 EHRR 30. The other was Markovic v Italy (2007) 44 EHRR 52. Roche was about personal injuries suffered as a result of service in the armed forces. Under section 10 of the Crown Proceedings Act 1947 the Secretary of State was required to certify that the injuries had arisen from the Claimant's service in the armed forces. The effect of the certificate was that the injured serviceman had no right to sue the Crown for negligence but enjoyed instead a right to a service disability pension without proof of fault. The Grand Chamber adopted a new approach. According to this approach, the application of Article 6 to immunities should depend on a distinction between the substantive and the procedural rules of domestic law. This of course was the very distinction that the Court had declined to draw in Fayed. But that case was disregarded as being, in this respect, a one-off decision on its facts. The court held that an immunity from liability should be regarded as substantive and not subject to review under Article 6; whereas an immunity from suit should be regarded as procedural and open to review in accordance with the triple test of legitimacy, proportionality and consistency with the "essence of the right". In this case, the Court accepted the analysis of the House of Lords that a section 10 certificate was substantive, and concluded that therefore Article 6 had no application.

In Markovic, the applicants were a group of Yugoslav citizens seeking redress in the Italian courts for the death of their relatives in the NATO air-raid on Belgrade in 1999, which had been launched from bases in Italy. These were said to be acts of war in violation of international law. The Corte de Cassazione had held that the Italian courts had no jurisdiction over acts of war or indeed over any acts of the Italian state which were impugned on the sole ground that they violated international law. The Strasbourg Court adopted the same distinction between substance and procedure as they had in Roche. They held that the limitation on the jurisdiction of the Italian court was substantive. The decision of the Corte de Cassazione, they said (para. 114), "does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war."

The distinction between substance and procedure is certainly an improvement on the indiscriminate approach previously adopted. But it is hardly satisfactory. It can be, as has often been remarked, a very fine distinction indeed. Even when the distinction is clear, it is frequently arbitrary. And there are some rules of law which do not readily lend themselves to a simple classification as procedural or substantive.

Time bars are a good example. Limitation or prescription is an almost universal feature of developed systems of law. In England, limitation is a procedural defence. Except in the case of title to land, it bars the remedy but not the right. It follows that under current Strasbourg conceptions, its application to any particular case is subject to review for legitimacy and proportionality. This is what the Strasbourg Court held in Stubbings v United Kingdom (1997) 23 EHRR 213. In Scotland, limitation is also procedural, but prescription is substantive. It extinguishes the right. So it seems clear that if identical claims were barred by limitation in England and prescription in Scotland, Article 6 would be engaged in England but not in Scotland. Indeed, this is what the Scottish courts have held: see S v Miller (No 1) 2001 SC 977.

State immunity is a more controversial example. The Strasbourg Court first grappled with state immunity in Waite and Kennedy v Germany (2000) 30 EHRR 261, a decision in 1999 about the statutory immunity conferred by German law on the German operations of an intergovernmental organisation, the European Space Agency. The case was decided after Osman but before Z. The Court cited Osman as authority for the proposition that a rule of law

which limits the application of some principle of liability to particular categories of persons, must be treated as an immunity and subject to review for legitimacy and proportionality. But it went on to hold that the application of state immunity to a wrongful dismissal claim was justified. It reached the same conclusion in Fogarty v United Kingdom in 2002, a sex discrimination case brought against the United States by an employee of its London embassy. By the time that Fogarty was decided, the Court had retreated from Osman. But in its judgment, it repeated verbatim its earlier statement, simply deleting the reference to Osman and substituting a reference to the passage from Waite and Kennedy which had been based on Osman.

Once the Strasbourg court began to adopt its distinction between substantive and procedural immunities, it had to put state immunity in one box or the other. In Al-Adsani v United Kingdom (2002) 34 EHRR 11, the court decided that state immunity was procedural. It followed that a court giving effect to the immunity would have to justify it as legitimate and proportionate. This decision has been received with some perplexity by the English courts. What I think that the Strasbourg court meant by describing state immunity as procedural is that it does not go to the merits of the claim. It does not define the existence or extent of any legal duty. But it is certainly not procedural in the sense that the organisation and practises of the court system are procedural. State immunity is a rule of substantive law, the effect of is that the court has no jurisdiction. As Lord Bingham observed in Jones v Saudi Arabia [2007] 1 AC 270 at para [14], Article 6 cannot confer on a court a jurisdiction which it does not have, and a state cannot be said to deny access to its court if it has no access to give. When Jones v Saudi Arabia reached Strasbourg, the court was invited to reconsider Al-Adsani. But it simply reaffirmed the decision in Al-Adsani without so much as addressing the difficulties involved.

None of this mattered very much as long as the court continued to hold that state immunity was justified. But there are signs that the court has begun to carry its traditional hostility to special defences and jurisdictional voids rather further. In Cudak v Lithuania (2010) 51 EHRR 15 in 2010, the Grand Chamber held that Article 6 had been violated when the Lithuanian courts upheld a claim for state immunity in a case of unfair dismissal brought by a switchboard operator at the Polish embassy in Vilnius. The Strasbourg Court had nothing against the fairness or impartiality of the Lithuanian proceedings. They simply thought that the Lithuanian courts had got the answer wrong. They should not have regarded the employment of the applicant as an act of sovereign power, jure imperii. Precisely the same approach was adopted, with the same result, in Sabeh El Leil v France (2012) 54 EHRR 14 in 2011, another unfair dismissal case, this time brought by the head of the accounts department in the Kuwaiti embassy in Paris. It was held that the Paris Court of Appeals had been wrong to find as a fact that the applicant's job had included participating in sovereign acts done in the course of the embassy's diplomatic business, and that it had thereby arrived at the wrong conclusion as a matter of French law. Now, the Strasbourg Court may or may not have been right in the view that it took of the merits of these two cases. But it seems a surprising result of Article 6 that the European Court of Human Rights should act as a Court of Appeal from perfectly fair proceedings in national courts simply because it disagreed with the way in which they had applied their own law. It also opens up the prospect that the hitherto absolute immunity of states in respect of sovereign acts may have to be treated as a qualified immunity whose application must be assessed on a case by case basis depending on whether its application to particular facts can be regarded as proportionate.

Before the decision in Roche, the Strasbourg Court had subjected special defences to review under Article 6, whether they were procedural or substantial. It currently reviews them if they are procedural but not if they are substantive. But it is worth asking why they should be reviewable in either case. The effect of a bar on proceedings is exactly the same, namely

that the claim will fail. A rule of law may be procedural and yet reflect fundamental legal policies of the forum governing the incidence of liability. If a national court entertains the claim but decides in perfectly fair and impartial proceedings that the bar applies, it is not easy to see how the litigant can be said to have been deprived of a court.

My object in making these remarks is not to rubbish Article 6. Its express provisions are among the core principles of any civilised society. It has undoubtedly brought benefits both to the United Kingdom and to other member states of the Council of Europe. To give just two examples in a UK context, it has forced the United Kingdom to reduce the anomalous role which the executive once had in criminal sentencing; and it has restricted attempts to allow the deployment of closed material in court proceedings without, I think unduly impairing the interests of national security. Its potential impact on the somewhat brutal forensic practices of some former communist countries of eastern Europe seems likely to be even more beneficial. But these are questions which lie within the scope of the core values of Article 6. The problem really lies with the appetite that the Strasbourg Court has demonstrated over the past half-century or so to transform the Convention into what in Loizidou v Turkey (1998) 26 EHRR CD5 it called an “instrument of the European public order”. This has resulted in the application of Article 6 in areas well beyond its core values, which appear to have little to do with the fairness of proceedings or even access to a court. In his dissent in Golder, Sir Gerald Fitzmaurice warned that the implication of into the Convention of rights which were not expressed there would lead to the development of a class of human rights with no exact definition and no principled limits. That prophecy has been borne out by events. Opinions will differ about whether these additional rights are desirable. Like, I suspect most lawyers, I think that the picture is mixed. Some are while others are not. What seems clear, however, is that the result has been to expose the European Court of Human Rights to accusations of altering principles of civil liability in ways that are practically incapable of amendment or repeal by national legislatures. It is open to doubt whether Article 6 was ever intended to serve such a purpose.

Hawke, R (On the Application Of) v Secretary of State for Justice [2015]

The essential issue - 1. In this case there are two claimants, a convicted prisoner, who is the second claimant; and his wife, who is the first claimant. I will call them respectively "the prisoner" and "his/the wife". The wife is seriously disabled and cannot realistically and at proportionate cost visit the prisoner where he is currently detained. The claimants contend that the Secretary of State for Justice has acted, and is continuing to act, unlawfully by not detaining the prisoner in a prison closer to her home.

45. As I have already explained, I am satisfied in this case that there is no breach in this case of the objective duty under section 20 of the Equality Act to make reasonable adjustments. By making provision for Accumulated Visits, the Secretary of State for Justice has done all that he reasonably and objectively can do. But I am not satisfied, in the way that Bracking so clearly requires, that the Secretary of State for Justice, or his officials or staff, have given the positive due regard which section 149 requires. If I were to brush over this, as the submissions of Ms Slarks encourage me to do, I would be failing in my own duty to mark the failure of a public authority to give effect to section 149 in the way that Bracking so clearly requires. 46. Athough Ms Slarks relies upon what Lord Brown of Eaton-under-Heywood said in McDonald v Kensington and Chelsea [2011] UKSC 33 at paragraph 24, those observations are not in point at all in the present case. There, Lord Brown referred to a person who is ex hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons. That is far removed from the situation here. 47. I will accordingly make a declaration, in terms to be agreed by counsel or the subject of further argument, to the general effect that on the facts and in the circumstances of this case there has been a failure by the Secretary of State for Justice to discharge his duties under section 149 of the Equality Act 2010. However, neither claimant has suffered any loss as a result, since even if the Secretary of State for Justice or his staff or officials had fully and duly discharged their duties under that section, the outcome would have been, and will still be, the same.

Outcome - 48. Aordingly, save for the above declaration, the remainder of this claim for judicial review, including the claim for damages, is dismissed. 65. So for these reasons, I am clear, now that it has been drawn to my attention, that section 31(2A) of the Senior Courts Act 1981 does apply in this case and that the exception under subsection (2B) is not established. I am therefore forbidden by statute from granting the declaration which in paragraph 47 above I had previously contemplated granting. The formal outcome of the case will therefore be, not as I expressed it under the heading "Outcome" in paragraph 48 above, but that the whole of the claim for judicial review is dismissed. 66. I Nevertheless conclude this judgment by repeating what I said in paragraph 45 above: that I am not satisfied on the facts and in the circumstances of this case that the Secretary of State for Justice or his officials of staff have given the positive due regard which section 149 of the Equality Act 2010 requires, and on the facts and in the circumstances of this case, there has been a failure by the Secretary of State for Justice to discharge his duties under that section. I intend those words to represent "a declaratory judgment" of the kind contemplated by Blake J in paragraphs 58 and 61 of his judgment in Logan. I am confident that the Secretary of State for Justice or appropriately senior officials will consider and take heed of what I have said.

West Midlands Police in £1m Compensation Payouts to Public *Express & Star*

People have successfully claimed for wrongful arrest, false imprisonment, trespassing and assault, among others, during the period. The highest payout was £57,500 back in November 2012 for wrongful arrest, false imprisonment, trespass and wrongful infringement of human rights. This year alone the Police were forced to pay out £389,596.40 to the public, and this figure excludes the amount it has paid out in compensation to its own force. This figure has risen year on year, with £243,253.08 paid out in 2013 and £297,596.40 in 2014. Other examples of high payouts include £45,000 for assault, wrongful arrest and false imprisonment and £26,500 for wrongful arrest, false imprisonment, trespass and infringement of human rights. But West Midlands Police insisted that the figures need to be put into perspective and that, when at fault, the police must pay out to ensure public accountability remains 'an essential pillar of modern policing'.

Hostages: Sally Challen, Naweed Ali, Khobaib Hussain, Mohibur Rahman, Tahir Aziz, Roger Khan, Wang Yam, Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Robert Knapp, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan.