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Equality and Human Rights Commission

Submission to the Joint Committee on Human Rights on Implementation of Human Rights Judgments

26 September 2013

Introduction

The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence to the Joint Committee on Human Rights on the government's response to human rights judgments.

In line with its remit, as a National Human Rights Institution and under s.9 Equality Act 2006, to encourage and support the development of a society based on human rights principles, the Commission has a role in encouraging and assisting public authorities to implement the judgments of the European Court of Human Rights (ECtHR) expeditiously and effectively.

The legal analysis below is based on an understanding of what compliance with the judgment in each case requires, and sets out in brief the Commission's relevant activity in relation to each issue. It does not address cases where the violation arises from the facts of the case rather than the underlying legislative or policy context; nor where the Commission's legal analysis suggests that only individual measures or payment of compensation (just satisfaction) are required rather than general measures to implement the judgment. Initially, there is a brief consideration of the more general sections in the Government's 2012 Report on responding to human rights judgments.

The Government's 2012 Report on Responding to human rights judgments

Reform of the European Court of Human Rights

The Commission's analysis supports in principle measures designed to increase the efficiency of the ECtHR, so long as they do not do so at the expense of the ability of individual applicants to obtain a legal remedy for a violation of their Convention rights. The Commission has worked alongside government officials both during the Brighton Conference in 2012 and subsequently at the Council of Europe Steering Committee for Human Rights (CDDH) to seek to ensure that any reforms will be effective, whilst retaining the ability of the Court to respond adequately to human rights violations across all 47 state parties to the Convention.

UPR and UN Treaty reporting

The Commission acknowledges and shares the Government's commitment to the Universal Periodic Review (UPR) as an important mechanism for sharing best practice on human rights around the world and promoting continual improvement of human rights on the ground. It is recommended that the focus of Government should be on ensuring that reporting on treaty compliance should be focused on evidence and outcomes based monitoring. The Commission welcomes the UK Government's support for the use of its methodology, and that of the SHRC, in their Measurement Frameworks to assist in the construction of state reports to the UN. Helpfully, Ministry of Justice officials recently committed to piloting this methodology for the four recommendations in relation to the UNCAT on which the Committee has asked for the UK Government's report by 31 May 2014.

The UK's approach to the implementation of human rights judgments

The Commission welcomes the increasing role played by the Ministry of Justice in coordinating the implementation of human rights judgments. Complying with a Committee of Ministers request for an Action Plan within a short time of finalisation of an adverse judgment is key to ensuring that steps are taken to implement all judgments without delay. This ensures that not only the Committee of Ministers but also other bodies such as JCHR, the Commission itself and civil society can participate effectively in ensuring that judgments are implemented fully and without undue delay.

Cases

The right to a review for 'whole life tariff' prisoners (Vinter v UK)

This case concerns three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, are currently serving mandatory sentences of life imprisonment. All three applicants have been given whole life orders which they maintain are, as they apply to their cases, incompatible with Articles 3 and 5(4) of the Convention.

When a mandatory sentence of life imprisonment is imposed, the trial judge is required to set a minimum term of imprisonment, which must be served for the purposes of punishment and retribution, taking into account the seriousness of the offence. The principles which guide the trial judge's assessment of the appropriate minimum term are set out in schedule 21 to the Criminal Justice Act 2003 (the 2003 Act). Once the minimum term has been served, the prisoner may apply to the Parole Board for release on licence. A 'whole life order' may be imposed by the trial judge instead of a minimum term if, applying the principles set out in schedule 21, he or she considers that the seriousness of the offence is exceptionally high. The effect of a whole life order is that the prisoner cannot be released other than at the discretion of the Secretary of State. The power of the Secretary of State to release a prisoner is provided for in section 30(1) of the Crime (Sentences) Act 1997, which gives the Secretary of State power to release a life prisoner on compassionate grounds if he is satisfied that exceptional circumstances exist which justify it.

The criteria for the exercise of that discretion are set out in Prison Service Order 4700 chapter 12. This is an order that is issued under the authority of the Secretary of State. It sets out policy and guidance for the management of prisoners serving an indeterminate sentence (including those serving a mandatory life sentence), both during custody and after release on licence. At present the criteria are limited to medical grounds such as where the prisoner is suffering from a terminal illness and death is likely to occur very shortly or the prisoner is bedridden or paralysed or suffering from a severe stoke; and the risk of re-offending is minimal. Provision needs to be available for care outside prison and release must bring some benefit to the prisoner or his family.

Prior to the entry into force of the 2003 Act, it was the practice for the mandatory life sentence to be passed by the trial judge and for the Secretary of State, after receiving recommendations from the trial judge and the Lord Chief Justice, to decide the minimum term of imprisonment which the prisoner would have to serve before he would be eligible for early release on licence. At the time, the minimum term was also referred to as the "tariff" part of the sentence. It was also open to the Secretary of State to impose a "whole life tariff" on a prisoner. In such a

case, it was the practice of the Secretary of State to review a whole life tariff after twenty-five years' imprisonment to determine whether it was still justified, particularly with reference to cases where the prisoner had made exceptional progress in prison.

With the entry into force of the 2003 Act, all prisoners whose tariffs were set by the Secretary of State have been able to apply to the High Court for review of that tariff. Upon such an application the High Court may set a minimum term of imprisonment or make a whole life order. In Scotland there is no equivalent to the 'whole life order'.

The ECtHR judgment in this case makes clear that a life sentence is inhuman or degrading in breach of Article 3, unless there is both some prospect of release and some possibility of review. This is because even if a whole life order is justified when made, continuing detention may become unjustified later. It would be incompatible with respect for human dignity to deprive a person of his freedom without at least providing him with the chance to someday regain it. Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate grounds.

The judgment does not ban whole life orders. It does not introduce for the first time into law the possibility of a review. The judgment does not require that any "whole life" prisoner be released, ever.

On the Commission's legal analysis it is possible to read section 30 as not just giving a power of release to the Secretary of State, but as imposing a duty on him, wholly within the boundary of the 'compassionate grounds' requirement in s.30, to exercise that power and to release a prisoner if it can be shown that his or her continued detention has become incompatible with Article 3, for example, when it can no longer be justified on legitimate penological grounds. Therefore no amendment to the legislation would necessarily be required to implement the decision in Vinter. What would remain is the need to amend the Prison Service Order so that it provides for an additional

criteria to trigger the Secretary of State's discretion to release life prisoners, allowing for a review of whole life orders after a set period, usually after twenty-five years' imprisonment, with further periodic reviews thereafter to enable a consideration of whether the prisoner's continued detention has become incompatible with Article 3.

However, the passages in the Grand Chamber's judgment analysing the comparative and international law materials adduced before the Court show clear support for the institution of a dedicated mechanism, integrated within the sentencing legislation, providing for a review of life sentences after a set period, usually after twenty-five years' imprisonment, with further periodic reviews thereafter.

The state's positive obligation to secure employees' right to manifest their religion or belief (Eweida v UK)

In this case, the ECtHR found that UK, through decisions of the domestic courts, had failed to strike the right balance between the competing interests of the Christian employee - to wear a visible crucifix in her frontline British Airways customer service role - and those of the employer to maintain a corporate uniform policy, which prohibited non-mandatory items of jewellery. This resulted in an unjustifiable breach of the applicant's Article 9 convention rights.

The Commission intervened when the case was before the Strasbourg Court, arguing that the UK courts' judgment disclosed an interpretation of an individual's Article 9 right to religious freedom that was unbalanced, unfair and in need of reform. The majority of the Strasbourg Court appear to have accepted this point.

In the Commission's legal analysis the legislative framework (Human Rights Act 1998 and the Equality Act 2010) is sufficient to protect religious rights at work in the UK. In contrast, domestic case law precedents on Article 9 rights require re-consideration in order to provide effective protection of these rights in practice.

The Commission's submissions on Article 9 highlighted the restrictive interpretation of Article 9 rights by the domestic courts. The House of Lords decision in Begum v Denbigh High School, sets a precedent that

unduly restricts Article 9 rights. In that case the freedom of a Muslim pupil to find a school permitting her to wear a Jilbab was sufficient to deprive her from engaging Article 9 rights when challenging another school's decision prohibiting pupils from wearing such clothing.

The Commission's submission highlighted two particular legal case law interpretation problems. Domestic case law precedents protected 'core' but not 'peripheral' beliefs under Article 9. Domestic case law also held that Article 9 rights are not engaged if the applicant could choose, for example, to resign and find suitable alternative employment.

A separate issue arises in relation to how 'disparate impact' is determined for the purposes of an indirect religious discrimination claim under domestic equality law. This claim was determined under the Employment Equality (Religion or Belief) Regulations 2003. Mirroring the domestic approach towards 'core' and 'peripheral' beliefs under Article 9, the Court of Appeal held that 'disparate impact' could not be established, beyond the applicant, because not all Christians considered the wearing of a visible crucifix to be mandatory. Consequently, the Courts did not proceed sufficiently to examine the proportionality/justification question in relation to the religious discrimination claim. It is uncertain whether that aspect of the domestic court's conclusions will require re-evaluation in light of the Equality Act 2010, which supersedes the 2003 Regulations, and/or in light of the European Court of Human Rights judgment on Article 9 rights in this case.

Domestic case law now appears to lag behind that of the Strasbourg Court, a situation that is unlikely to change until the Supreme Court distinguishes or overturns the Begum judgment. The Supreme Court might have an opportunity to re-consider the Begum judgment in the case of R (on the application of Hodkin and Another) v Registrar-General of Births, Marriages and Deaths (UKSC 2013/0030) in which Article 9 claims are being considered. We understand that the case was heard on 18 July 2013 and judgment is awaited in the near future.

Both the Commission and the Government welcomed the Strasbourg Court's judgment in this case. Shortly after the judgment was published, the Commission produced guidance for employers/employees to help improve awareness and ensure practices uphold religious rights at work.

The Commission is engaged in a wider programme of work with faiths, secular and humanist groups and a range of public and private sector organisations to promote better understanding of the issues involved and to come up with potential solutions. This will include looking at how far the law needs to be reviewed.

The state's positive obligation to protect employees against discrimination based on political affiliation (Redfearn v UK)

The absence of legal protection from unfair dismissal for political beliefs/affiliation for people with less than one (now two) years' service, at the time of the applicant's dismissal in 2009, resulted in the UK breaching his Article 11 (freedom of assembly) convention rights. The clear consequence of this decision was that new legislation was required either to prohibit discrimination on political grounds regardless of the length of employment service, or to create another exception to the qualifying service rules for unfair dismissal rights under the Employment Rights Act 1996.

The Commission intervened in this case to emphasise the importance of the anti-discrimination rights of service-users from black and ethnic minority communities. Those rights must be assessed and upheld, where relevant, in the examination of whether the reason for dismissal is either 'substantial' or 'proportionate' taking proper account of all the circumstances in a given case. The enhanced protection from dismissal based on political opinion must not come at the cost of reducing protection against discrimination on other prohibited grounds (such as race).

The Government has now addressed the legal protection gap via the Enterprise and Regulatory Reform Act 2013. Section 13 of that Act amends section 108 of the Employment Rights Act 1996, creating another exception to the unfair dismissal qualifying period if the principal reason for dismissal relates to the employee's political opinions or affiliation. This provision came into force on 25 June 2013. The new legislation should provide Employment Tribunals with the means to determine the reasonableness of decisions to dismiss employees on political grounds in the round, taking all relevant circumstances into account, in a similar fashion to pre-existing unfair dismissal laws. The

Commission is committed to monitoring how this new provision is applied and interpreted in practice, ensuring rights based on characteristics protected under the Equality Act 2010 are effectively protected.

The state's positive obligation to investigate allegations of slavery, servitude, forced or compulsory labour (CN v UK)

In this case the ECtHR held that the investigation into the applicant's complaint of domestic servitude was ineffective due, in part, to the absence of specific legislation criminalising forced labour and servitude where it was not linked to movement of people and therefore the UK had, at the time of the complaint, acted in violation of Article 4 of the ECHR.

That particular problem has been remedied by section 71 of the Coroners and Justice Act 2009 which came into force in England and Wales in 2010 and in Scotland, by s.47 of the Criminal Justice and Licensing (Scotland) Act 2010. These create new statutory offences of knowingly holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour. This provides protection against acts of non-sexual exploitation but not necessarily associated with the movement of people (i.e. trafficking).

Whilst the CJA 2009 and CJLA 2010 address the absence of specific legislation criminalising forced labour and servitude, questions remain about the UK's compliance with its obligations under the Convention and the EU directive (Directive 2011/26/EU) designed to improve and make consistent State law, policies and practices in respect of forced labour and human trafficking.

The provision of an adequate legal framework must be complemented by sustained improvements in policy and practices to provide effective protection against further violations of Article 4 rights in this context. The Commission is working towards generating those improvements, and the Government's recent announcements of further legislative measures to address human trafficking through the 'Modern Slavery' Bill are welcome developments in this regard.

Systemic problems in detecting and supporting victims of human trafficking and forced labour has been the subject of a recent inquiry by the Commission post-dating the circumstances of this particular case and the Strasbourg Court's judgement. Evidence uncovered and highlighted by the Commission's Trafficking Inquiry (and follow-up work) shows that problems persist in terms of law, policy and practice in identifying, investigating and tackling Article 4 violations.

The EHRC Inquiry into Human Trafficking in Scotland recommended, amongst other things, the introduction of a 'human trafficking background' statutory aggravation in the sentencing of those convicted of related criminal offences, such as sexual assault or forced labour. The Scottish Government considered this recommendation and agreed with it and through the Criminal Justice (Scotland) Bill is proposing the introduction of a statutory aggravation to any criminal offence where it can be proved the offence had a connection with people trafficking.

Other gaps in the law remain: the Commission has alerted the Home Office and Crown Prosecution Service to these concerns. Trafficking networks are complex and it is not clear that acts of "harbouring" or "receiving" people with a view to exploitation (as included in Article 2 of the Directive) are criminalised. There may be circumstances in which a person harbouring or receiving people acts exploitatively but is not concerned with their movement / travel, for example providing accommodation during transit, which are not currently captured by the criminal law.

ECtHR case law (including CN v UK) suggests a more bespoke approach is required to give effect to the state's positive obligations under the ECHR. Furthermore other provisions which might be said to address this point do not attract maximum penalties sufficient to meet the requirements of Article 4(2) of the Directive (up to ten years in prescribed circumstances). For example, causing or inciting prostitution or gain (section 52 of the Sexual Offences Act 2003) has a maximum penalty of 7 years only.

Article 8 of the Directive requires that there should be provision not to prosecute victims of trafficking for their involvement in criminal activities which have arisen as a consequence of their having been a victim of

trafficking. The Commission's analysis is that there is cause for concern about victims of trafficking being arrested, prosecuted and convicted in relation to immigration or other offences, despite the the CPS guidance that, where there is evidence in support of the victim having been trafficked and having committed an offence whilst coerced, then it must evaluated as to whether it is in public interest to continue the prosecution. The Commission and the Office of the Children's Commissioner intervened in appeals against a conviction of a number of child victims of trafficking who had been found in cannabis farms in the UK and subsequently prosecuted under the Misuse of Drugs Act 1971[1]. The Commission made submissions that;

- the court has an active role in reviewing the decision to prosecute and can reach its own decision as to whether to continue with the prosecution or to stay proceedings where sufficient evidence is not before it, and
- an investigation, in accordance with the positive obligations under Article 4 (as per CN), by the relevant authorities is key in determining whether a prosecution should take place and/or continue, and
- that the best interests of a child are a primary consideration.

The Court accepted these submissions, ruling that the best interests of a child victim should be a primary consideration; that an investigation should be carried out and the relevant authorities and parties should ensure that the outcome of this is before the court, and where such evidence is not before it, it can stay proceedings. Further, due enquiries should be made about a child's age and where there is reason to believe an individual is a child, they should be treated as such until their age is assessed. The CPS is currently reviewing its policy for the prosecution of cases of human trafficking to reflect the test set out by the Court, this is to be shared with the Commission and others before its publication.

Aside from its interventions in CN v UK itself, and Criminal appeal case above, the Commission has also been engaged in addressing a variety

[1] R v (1) L (2) HVN(3) THN(4) T-and-(1) The Children's Commissioner for England (2) Equality and Human Rights Commission (interveners) Criminal Court of Appeal [2013] EWCA Crim 991

of issues faced by those in domestic servitude through litigation, including;

- intervening in Asuquo v UK at the ECtHR about similar points to those raised in CN. This case was settled in 2012.
- intervening in the ECtHR in Kawogo v UK (2010) about the violation of the right not to be held in slavery or servitude contrary to Article 4 EHRC and the failure to investigate and prosecute as a criminal offence.
- s28 assistance (by way of funding representation) in R v Hounga at the Supreme Court to challenge the finding that Ms Hounga is precluded from bringing a claim as she was a knowing participant to the illegal contract and so she could not then rely on that illegal contract.
- s28 assistance in Mruke and Asmaa Hemdan at Tribunal and in Taiwo v Olaigbe at the Court of Appeal; these cases address the issue of the inability of migrant domestic workers to bring claims for exploitation under the Equality Act 2010 and so be compensated in respect of that.

Deportation of foreign national offenders and the right to family life (AA v UK)

The failure of domestic decision-makers, tribunals and courts properly to assess and weigh the importance of the child's 'best interests' in this case - applying the UN Convention on the Rights of the Child (UNCRC), given effect through the ECHR - meant that a decision to deport a foreign national from the UK to Nigeria violated his Article 8 convention rights.

Since 2008, following the ECtHR judgment in Maslov v Austria, deportation of foreign national children should only occur in exceptional cases, and the Court has emphasised the importance of 'best interests' assessments compatible with the requirements of the UNCRC.

Domestic immigration law contains provisions making it mandatory for the Secretary of State to issue deportation orders in respect of foreign national criminals who have been sentenced to 12 months imprisonment (s.32(5) UK Borders Act 2007) or those who commit a particularly

serious offence with reference to secondary legislation, regardless of the length of sentence (s.32(3) UK Borders Act 2007).

The Secretary of State has additional discretionary powers to deport people whose removal is deemed to be conducive to the public good (s.3(5)(a) Immigration Act 1971). Subject to certain conditions, criminal courts also have powers, through the 1971 Act, to recommend deportation of foreign national criminals. European Union directives, Council of Europe (Committee of Ministers) Recommendations, domestic Immigration Rules and Home Office policies contain further sources of law and policy influencing or directly affecting immigration practices relating to the deportation of foreign national criminals. Individuals adversely affected by the improper exercise of these powers have the opportunity to challenge the compatibility of decision-making through the domestic courts. The exercise of those powers must be compatible with convention rights based on obligations contained in the Human Rights Act 1998, including Article 8 ECHR, and within immigration legislation as well (see, for example, section 55 of the Borders, Citizenship and Immigration Act 2009 requiring decision-makers to consider the 'best interests' of affected children, supplemented by the duty of immigration decision-makers to have regard to the UNCRC through the Every Child Matters statutory code of practice).

Taking relevant legislation, rules, policies, guidance and case law into account, deportation decisions in practice require an examination of a number of factors such as the length of residence, severity of the offence, history of criminality, likelihood of re-offending, relevant immigration status and history, the nature, extent and duration of family ties in the UK and the country of origin. In Strasbourg Article 8 case law terms, these (and other) factors are collectively referred to as the 'Boultif' criteria, after the judgment in the case of Boultif v Switzerland (54273/00). In the Article 8 proportionality assessment, decision makers are required to assess the weight to be given to each relevant factor, before determining where the right balance lies in each case between protecting public interests (especially safety) and interfering with an individual's private/family life rights.

The assessment of a child's 'best interests' in accordance with the UNCRC requires consideration of additional factors including where the child's formative life experiences have taken place, looking at what impact deportation (and possible separation from parents and siblings) would have on the child's family/private life, education and career aspirations, and whether deportation would hinder the further development and effective re-integration of child offenders within society.

The Commission's legal analysis is that domestic case law now appears to have addressed the particular problem identified in this case – the UK's failure to accord sufficient weight to the child's best interests. In 2011, the UK Supreme Court set an important precedent, in the case of ZH (Tanzania) v SSHD (2011 UKSC 4), in upholding the requirement in domestic, European and International law that a child's 'best interests' are a primary consideration in decision-making affecting children. In that case, the 'best interests' of British children (born and raised in the UK) weighed in favour of preventing the deportation of their foreign national mother, effectively allowing her to remain in the UK notwithstanding her extremely poor immigration history.

The Upper Tribunal (Immigration and Asylum Chamber) recently considered the practical impact of changes to the Immigration Rules (of July 2012, HC 192) in MF (Article 8 - new rules) Nigeria (2012 UKUT 00393(IAC)), a decision dated 18 September 2012. The rules prescribe criteria, based on the length of sentence, duration of UK residence and the extent of family or private life in the UK, to determine if deportation orders should be made. A failure to meet the requirements of the rules is expected to result in deportation unless there are 'exceptional circumstances' or 'insurmountable obstacles'. In that case the Upper Tribunal concluded that changes to those Rules did not affect the usual two-stage process of determining if a decision complied with the Rules, and then with the Convention – with the proviso that the domestic Rules must be given appropriate weight in the assessment of proportionality under Article 8, but cannot supplant Convention requirements.

Following an unsuccessful attempt to circumscribe the Secretary of State's powers to revoke deportation orders on Article 8 non-compliance grounds (via an amendment to the Crime and Courts Bill in March 2013), the Government announced further planned reforms of immigration legislation in the last Queen's Speech.

Questions will arise as to whether the present process of legal examination will be altered (and, of so, how) as a result of proposed changes to immigration legislation in the UK. So far, the domestic courts and tribunals have interpreted the Immigration Rules compatibly with ECHR rights as interpreted by the domestic and Strasbourg courts. Whether that is still possible, if announced proposals to upgrade certain Immigration Rule requirements into primary legislation are taken forward in the forthcoming Immigration Bill, will require scrutiny once the proposals are published.

The right to a judicial hearing on proportionality in possession proceedings against Gypsies (Buckland v UK)

The issue of security of tenure for gypsies and travellers has been an issue at least since the judgment in Connors v the UK in 2004 in which the Court held that the eviction of a family from a gypsy caravan site by a local authority, in August 2000, without procedural safeguards was a violation of Article 8. In 2010 the Commission worked with Parliamentary and government officials in both England and Scotland to seek to resolve the issue. The problem was remedied by Section 318 of the Housing and Regeneration Act 2008, which after some delay was brought into force in England in April 2011.

In October 2010 the Commission wrote to the Minister for Housing and Communities in Scotland seeking an equivalent amendment in the Housing Bill but the Scottish Government took the view that this was not necessary. This was on the basis that the Scottish Government considered that an apparent oversight in the drafting of subsequent legislation arguably has the effect of revoking the previous exclusion of gypsies/travellers from those procedural safeguards.

The Mobile Homes Act 1983 was enacted to restrict the eviction from caravan sites of occupiers of caravans and requires that the court consider it reasonable for any agreement to be terminated. One of the consequential amendments made by the Local Government etc (Scotland) Act 1994 is the repeal of the section of the Caravans Sites and Control of Development Act 1960 which had exempted local authority gypsy/traveller sites from that protection under the 1983 Act.

However, the difficulty in relying on that amendment revoking the exclusion is that it is highly unlikely that the courts would accept any argument that legislation concerned solely with local government reorganisation had the intention of granting gipsy/travellers the security of tenure available to those covered under the 1983 Act, where there was not any debate on the issue. There is accordingly a need for express legislative amendment to make the position clear, along the lines of the section 318 amendments already made in England and Wales, with the specific purpose of extending the protection in the Mobile Homes Act 1983 to local authority gypsy/traveller sites in Scotland.

Secondary legislation was awaited in Wales to bring section 318 of the Housing and Regeneration Act 2008 into effect there, extending the protection contained in the Mobile Homes Act 1983 to local authority Gypsy and Traveller sites. This has now been brought into force in Wales from 10 July 2013, which remedies the specific violation identified in Buckland.

Jurisdiction of the United Kingdom under Article 1 of the Convention (Al-Skeini v UK)

The Commission has been involved in a series of cases in which we have sought to ensure that the human rights protections provided for in the HRA extend as broadly as the law permits. Most recently in Susan Smith and others v Ministry of Defence [2013] UKSC 41 the Commission sought to ensure that the ECtHR's Al Skeini judgment was properly applied by the Supreme Court to ensure that human rights protections are afforded to UK armed forces personnel when on duty abroad to the extent that is reasonable to impose such an obligation on the state, in

recognition of the similar obligation already imposed on the soldiers to those they interact with, including civilians and detainees.

In Al-Saadoon v the UK, the Commission argued that the jurisdiction of the ECHR should extend to where the state has de facto control in the circumstances, not only where there is de jure authority over a territory. In Catherine Smith v the Assistant Deputy Coroner for Oxfordshire, the Commission argued that members of the British armed forces are within the UK's jurisdiction wherever they are (because they are subject to British military law, British criminal law, employment law and so on, at all times) and that therefore an Article 2 compliant 'enhanced' inquest was required in the case of the death of Private Smith. In both cases the Commission's position was effectively accepted by the court (but not entirely in the case of Catherine Smith when it reached the Supreme Court, hence the need for the second (unrelated) Smith case).

In Susan Smith's case the Commission's submissions were accepted in the leading judgment of Lord Hope (with whom the whole court agreed on this issue). The court held that in the light of Al-Skeini the Supreme Court's judgment in Catherine Smith could no longer stand.

Judgment in Pritchard v the UK remains outstanding. In that case the Commission also argued that following the ECtHR's ruling in Al-Skeini, there could be no compelling justification for maintaining the view that a British soldier would be protected by the jurisdiction of the ECHR whilst on the base but not the moment he steps outside it.

On the Commission's analysis the UKSC judgment in Susan Smith should help ensure that the issue raised in Al-Skeini does not arise again in future.

Prisoners voting rights (Greens v UK and Hirst v UK)

The Commission has recently made a full submission to the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill.[2]

[2] http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/submission-to-the-joint-committee-on-the-draft-voting-eligibility-prisoners-bill-june-2013/

The Commission's legal analysis is that a restatement of the existing ban (i.e. complete disenfranchisement of prisoners) would not satisfy the Committee of Ministers as effective implementation of the Hirst and Greens judgments. If that option were adopted the government would inevitably be vulnerable to further claims, including the many cases that are currently stayed by the ECtHR, and compensation would be likely to be awarded. However, the ECtHR has made clear in its judgment in Scoppola v Italy (No.3) [2012] ECHR 868 (Scoppola), accepting the United Kingdom Government's argument, that each state has a wide discretion as to how to regulate any ban so long as it does not constitute blanket disqualification. The Commission's legal opinion is therefore that either options (a) or (b) in the draft Bill would now constitute effective implementation of the Hirst and Greens judgments.

Elections are a reserved matter. It is worth noting that the recently passed Scottish Independence Referendum (Franchise) Act 2013 does not provide votes for prisoners in the Referendum.

Risk of return to trial using evidence obtained by torture (Othman (Abu Qatada) v UK)

In January 2012, the European Court of Human Rights approved the memorandum of understanding between the UK and Jordan, deciding that despite some room for improvement the agreement would ensure that Abu Qatada would not be exposed to a real risk of torture if he were deported. However, it held that his deportation would be in breach of Article 6 ECHR (the right to a fair trial), in that evidence obtained through the use of torture would be admitted in his retrial in Jordan.

The Commission acknowledges the strenuous efforts made by the Secretary of State to ensure that the risk of the applicant's retrial in Jordan being tainted by the use of evidence obtained by torture was eliminated, and the new agreement that was reached with the Jordanian authorities.

Privacy issues in the collection and storage of personal data (MM v UK)

In April 2000 the girlfriend of the applicant's son wished to leave Northern Ireland with the applicant's ten-month old grandson and return to live in Australia following her separation from the applicant's son. In order to try and force her son and his girlfriend to reconcile their differences, and in the hope that her grandson would not return to Australia, the applicant disappeared with her grandson on the evening of 19 April 2000 without the parents' permission. The police were called and the child was returned unharmed on the morning of 21 April.

As a consequence, the applicant received a caution for child abduction in November 2000. On 6 March 2003, in reply to a query from the applicant, the police advised her that her caution would remain on record for five years, and so would be held on record until 17 November 2005. In 2006 the applicant was offered employment as a Health Care Family Support Worker subject to vetting. She was asked to disclose details of prior convictions and cautions. She accordingly disclosed details of the incident of April 2000 and her subsequent caution on the form provided, and consented to a criminal record check. In October 2006, the offer of employment was withdrawn, because of the caution for child abduction appearing in the CRB check.

In 2008 regulations were established to identify when and how information could be disclosed when offenders apply for jobs dealing with children and vulnerable adults. The purpose of the regulatory change in 2008 was to increase security of vulnerable individuals after the Soham murders. However, the new regulations led to the more frequent disclosure of data related to with very minor offences.

Subsequent to these changes, the Criminal Records Office informed MM that all convictions and cautions where the injured party is a child are kept on the record system for life.

The Court concluded that the UK lacked a clear legislative framework for the collection and storage of data. There was no clarity as to the scope, extent and restrictions of the powers of the police to retain and disclose caution data. Additionally, there were no mechanisms for independent

review of a decision to retain or disclose data, either under common law police powers or pursuant to Part V of the 1997 Police Act. Finally, the Court also noted the limited filtering arrangements in respect of disclosures. Consequently, the Court concluded that retention and disclosure of the applicant's caution data cannot be regarded as being in accordance with the law and therefore was in breach of Article 8.

Part V of the Police Act 1997 extends the standard and enhanced criminal record checks to Scotland. Disclosure checks in Scotland for 'regulated work' with children and protected adults are carried out under the Protection of Vulnerable Groups (Scotland) Act 2007, replacing these types of disclosure checks under the Part V of the Police Act 1997. Information about cautions will be included in standard, enhanced and PVG scheme record checks.

Information relating to a person's criminal activity in Scotland is held in the Scottish Criminal History System (CHS), which is managed by the Scottish Police Authority (SPA). The information recorded can be in the form of conviction information or non-conviction information (i.e. information relating to criminal activity where use has been made of a non-court based option to deal with the offending behaviour such as an alternative to prosecution). When criminal activity is undertaken and linked to a particular person, individual cases will be created on CHS and are treated as pending until a decision to prosecute or otherwise deal with the criminal activity is made. Once a decision is reached, it is then treated as a disposal.

Decisions about what information should be held on the CHS are made by reference to Police Scotland's rules about recording, retention and weeding of information on the CHS. The operation of these non-statutory rules means that after certain criteria are met, information relating to old criminal activity is deleted from the system. Each case is weeded (i.e. completely removed) from the CHS on its individual merits based on the appropriate retention rule.

The rules include a list of other specific offences and non-convictional disposals (Police and Senior Police Officer's Warnings; Police Fixed Penalty Notices; Fiscal Warnings; Fiscal Disposals and Children's Hearing Disposals) where automatic weed will take place after two or three years (Police Scotland Recording, Weeding and Retention of Information on Criminal History System (CHS) August 2013 v.2.00).

The Commission has a long standing interest in the human rights implications of the collection, retention and use of an individual's personal information by the police and other agents of the State. It has intervened in a number of cases to assist the court in cases where violations of Article 8 are alleged, in particular:

- R (GC & C) v Commissioner of Police of the Metropolis [2011] UKSC 21 concerning the indefinite retention of DNA samples and profiles on the DNA database of individuals who have not been convicted of an offence, in which the Commission argued the blanket collection and retention of DNA, coupled with the discriminatory use of the powers of arrest, amounts to an arbitrary interference with the rights protected by Article 8, and accordingly violates Article 8.

- R (RMC) v The Commissioner of Police of the Metropolis [2012] EWHC 1681 (Admin) concerning the arbitrary and indefinite retention of people's photographs by the police, when the person is subsequently released, not charged or acquitted of an offence;

- R (on the application of T) v Chief Constable of Greater Manchester and others [2013] All ER (D) 212 concerning the retention and subsequent disclosure of a warning given to an adult when he was a child, which raises important issues concerning blanket policies of mandatory State disclosure of adverse historical information, warnings and convictions concerning individuals, without individually tailored proportionate decision-making which takes account of individual circumstances.

- R (on the application of John Oldroyd Catt) v The Association of Chief Police Officers of England, Wales and Northern Ireland and The Commissioner of Police for the Metropolis [2013] EWCA Civ

192 , concerning the powers of the police to collect and indefinitely retain personal information about members of the public, who are attending lawful public demonstrations, on the National Domestic Extremism Database.

These cases involved various statutory and related instruments which set out police powers in relation to the collection and use of personal information. The Commission has intervened to assist the court to decide in each case that the blanket policies in question interfered with the individuals' Article 8 rights, were not necessary in their current form and did not achieve a legitimate aim. Consistently, there was no clarity as to the scope, extent and restrictions of the powers of the police to retain and disclose the personal information in question.

MM raises similar issues about what information necessarily needs to be obtained and retained by law enforcement agencies in order to detect and prevent crime, and what is an illegitimate intrusion to an individual's private life. The core of this balancing act is the establishment of a well-elaborated proportionality test. The judgment shows that there is a need to restructure data retention and data disclosure practices in the UK policing and justice sector to ensure that such a proportionality assessment is introduced into these types of decisions. At present, there is a continuing risk of breaches of privacy rights in the storage and retention of data in the criminal justice system, and further scrutiny of the current systems will inevitably be required to prevent these issues recurring.

About the Equality and Human Rights Commission

The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act. It gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.

The Commission has a statutory duty under the Equality Act 2006[3] to encourage and support the development of a society in which: people's ability to achieve their potential is not limited by prejudice or discrimination, there is respect for and protection of each individual's human rights, there is respect for the dignity and worth of each individual, each individual has an equal opportunity to participate in society, and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

The Commission is responsible for monitoring the effectiveness of the equality and human rights enactments and advising on the effectiveness of enactments, as well as the likely effect of a proposed change of law[3].

As a UN accredited National Human Rights Institution, the Commission is required to 'promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party'.[4] This includes the European Convention on Human Rights, incorporated in the Human Rights Act 1998.

Find out more about the Commission's work at:
www.equalityhumanrights.com

[3] Equality Act 2006, section 11
[4] Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993.