



TOP 20 CASES OF 2005

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1. *Limbuela: R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 [2006] 1 AC 396 HL. Granting judicial review of the refusal of asylum support (Nationality, Immigration and Asylum Act 2002 s.55), HRA:ECHR Art 3 was: (1) engaged because such decisions (removing support) were intentional acts and Art 3 was absolute; and (2) violated because leaving asylum seekers to face an imminent prospect of sleeping on the streets, seriously hungry or unable to satisfy basic hygiene needs was inhumane and degrading. This case finds our Supreme Court upholding humanitarian protection for a vulnerable and marginalized group, and vindication for those persistent practitioners and bold judges who had shown themselves unwilling to countenance basic inhumanity.

2. *A: A v Secretary of State for the Home Department* [2005] UKHL 71 [2005] 3 WLR 1249 HL. On special immigration appeals, the HL held that: (1) it was fundamentally unjust and inhumane, and was precluded by law, for any domestic court to rely on evidence obtained by torture; and (2) that principle was not overridden by the Special Immigration Appeals Commission (Procedure) Rules 2003 r.44(3). Here we find the Supreme Court taking another welcome and principled lead.

3. *Jackson: R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 HL. Refusing judicial review, the procedure in the Parliament Act 1911 (restricting the veto powers of the House of Lords) had been validly used to amend the 1911 Act itself (Parliament Act 1949), so that the Hunting Act 2004 (made under the 1949 Act) was an Act of Parliament of full legal effect. This fascinating constitutional case leaves the door ajar to the development of constitutional principles for judicial review of primary legislation. As for the Hunting Act itself, see the HRA challenge: *Countryside Alliance* [2005] EWHC 1677 (Admin) [2006] UKHRR 73 (no HRA-incompatibility).

4. *Al-Skeini: R (Al-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609 [2006] HRLR 192 CA. Granting judicial review (on preliminary issues), an Iraqi civilian death in British custody in post-war occupied Iraq (but not other non-custody deaths): (1) occurred in UK "jurisdiction" (ECHR Art 1); (2) to which the HRA applied extra-territorially; but (3) it was premature (Courts Martial being pending) to decide whether the State duty of investigation (HRA:ECHR Arts 2 and 3) had been breached. This is the CA endorsing the human rights accountability in occupied Iraq, and the extra-territoriality of the HRA (as to which see too *Quark Fishing* [2005] UKHL 57 [2005] 3 WLR 837, where ECHR Protocol I had not been extended to a British Overseas Territory).

5. *Hooper: R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29 [2005] 1 WLR 1681 HL. Refusing judicial review by widowers denied social security and pension payments which

(pre-2001) would have been payable to widows, applying HRA:ECHR Art 14 (with Art 1P and Art 8): (1) the payment of widows pension for pre-2001 bereavements was justified since older widows were likely to be needier (than widowers) as a class; and (2) as to widows payment or widowed mothers' allowance the Secretary of State could rely on HRA s.6(2). Other Art 14 cases in the HL this year were *Wilkinson* [2005] UKHL 30 [2005] 1 WLR 1718 (widows-only bereavement allowance); and *Carson* [2005] UKHL 37 [2006] 1 AC 173 (overseas residents excluded from annual state pension increases; and age-bracket rates of jobseeker's allowance and income support).

6. *Corner House: R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [2005] 1 WLR 2600 CA. Granting a protective costs order (claimant not to be liable for the defendant's costs in any event), the CA gave guidance as to PCOs and cost-capping orders in judicial review. A court had to be satisfied that such an order was fair and just, having regard in particular to the public importance of the issue and the resources of and consequences for the parties. This case can be a new beginning for public interest costs, if rule-makers and judges can shake off the apparent inhibitors (see *Goodson* [2005] EWCA Civ 1172).

7. *Ewing:: R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583 [2006] 1 WLR 1260 CA. Upholding a costs order, where a vexatious litigant (needing Supreme Court Act 1981 s.42 permission to commence judicial review) instigated a failed claim for permission for judicial review, he could (whether or not technically a "party") be ordered to pay the costs of a third party's acknowledgment of service. This case is important for the guidance given as to (a) the limited purpose and summary nature of the defendant's summary grounds, and (b) the application of the *Mount Cook* practice and principle as to recovering costs of failed permission hearings.

8. *Al-Jedda: R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) DC. Refusing judicial review, the continued detention of the claimant in Iraq could not violate HRA:ECHR Art 5, that right having been qualified by UN Security Council Resolution 1546. This anxious case illustrates the increasing direct relevance of international law in domestic courts, here used as a trump card by the Government to avoid a finding of human rights violation.

9. *ERRC: R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 AC 1 HL. Granting judicial review, the system of entry pre-clearance at Prague Airport (operated in circumstances of "asylum overload"): (1) was not incompatible with the UK's Refugee Convention obligations; but (2) was directly discriminatory against Czech Roma (and therefore in breach of international law). This case is a triumph for an NGO in establishing unlawful immigration control. Sadly, no 'international *Padfield* principle' could condemn an operation serving to frustrate the Refugee Convention. As to immigration removal, see *Bagdanavicius* [2005] UKHL 38 [2005] 2 AC 668 (insufficiency of protection needed to invoke Art 3 in non-state agent case).

10. *Stancliffe: Stancliffe Stone Co Ltd v Peak District National Park Authority* [2005] EWCA Civ 747 [2006] Env LR 158 CA. Dismissing a claim form action for declarations as to the minerals planning status of previously worked quarries, the challenge should have been by judicial review to set aside a 1996 list. By reason of delay, no such challenge could now be pursued. This case illustrates and confirms the residual impact of the *O'Reilly v Mackman* principle of procedural exclusivity: litigating public law issues by private law claim form action can be an abuse of process where it would circumvent the time limits applicable to judicial review.

11. *Greenfield: R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 [2005] 1 WLR 673 HL. Dismissing an HRA claim for damages: (1) although a prison disciplinary offence had been dealt with in a manner violating HRA:ECHR Art 6 (criminal charge with no legal

representation); (2) a finding of violation was sufficient and no monetary award was appropriate. This case establishes that HRA damages will not generally be awarded for procedural violations. The Court will not speculate on whether the default impacted on the decision. The other side of that coin must be that an individual can succeed in an HRA judicial review, for say declaratory relief, without needing to show that the procedural default impacted on the substantive decision.

12. *SB: R (SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199 [2005] 1 WLR 3372 CA. Granting judicial review: (1) the school's uniform policy (and consequential exclusion decision) interfered with the HRA:ECHR Art 9 (and Art 2P) rights of the claimant, who sincerely believed that Islamic law required her to wear a jilbab; and (2) the school, who had not properly approached its policy by reference to those rights and the necessity test, should reconsider. Nor for the first time (*Bibi* [2002] 1 WLR 237), the CA here seizes on a procedural short-cut to a difficult question of justification. As to Art 9, see too *Williamson* [2005] UKHL 15 [2005] 2 AC 246 (statutory prohibition on corporal punishment in schools Art 9-compatible).

13. *Rashid (Home Secretary): R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744 [2005] INLR 550 CA. Granting judicial review, the Secretary of State's failure to apply the then Home Office policy (not to rely on internal relocation in certain Iraqi asylum cases) was: (1) in breach of the legitimate expectation of the claimant (despite his ignorance of the policy); and (2) so unfair as to be an abuse of power. This is a classic case of substantive unfairness, analysed on alternative bases. The case is also interesting for its just and principled approach to remedies: now that circumstances in Iraq had changed (and the claimant could not meet the Refugee Convention criteria) the court would not confer inapt refugee status, but declared the claimant's entitlement to exceptional leave to remain.

14. *Huang: Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105 [2006] QB 1 CA. On immigration removal appeals in ECHR Art 8 (family life) cases, since the subject-matter involved no aspect of government policy the immigration judge (adjudicator)'s appellate role (Immigration and Asylum Act 1999 s.65(1)) involved: (1) deciding proportionality on the merits (not the range of reasonable responses); (2) without according any margin of discretion to the SSHD; (3) but with very considerable respect for the balance struck by the immigration rules; and (4) accordingly departing from them only in truly exceptional circumstances. This is an interesting analysis of HRA review, which shows how policy-content affects the degree of judicial restraint.

15. *Mullins 1: R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin) Stanley Burnton J. Refusing judicial review (on a preliminary issue), the Jockey Club's Appeal Board was not a public authority amenable to judicial review and any supervisory jurisdiction would need to be invoked by private law claim form action in (including by transfer to) the Queen's Bench Division. This is a post-HRA application of *Aga Khan* [1993] 1 WLR 909, and illustrates the appropriateness of transfer out of the Administrative Court.

16. *Roberts (Parole Board): R (Roberts) v Parole Board* [2005] UKHL 45 [2006] 2 AC 738 HL. Refusing judicial review, the use in principle of a specially appointed advocate to deal on the claimant's behalf with sensitive undisclosed material was not (3-2) ultra vires (Criminal Justice Act 1991 s.32) nor (4-1) incompatible with HRA:ECHR Art 5(4). This case is a narrow endorsement of special advocates in a novel context and special circumstances.

17. *Haw: R (Haw) v Secretary of State for the Home Department* [2005] EWHC 2061 (Admin) [2006] QB 359 DC. Granting judicial review (2-1), the statutory prohibition on unauthorised demonstrations near Parliament did not apply to a demonstration which had started before the Act came into force and its reach could not be extended by commencement order. In this case the DC's narrow reading of penal legislation meant it had failed to achieve its purpose: amusingly, it

meant the person Parliament was out to get, the magnificent Brian Haw, was the one person beyond the reach of the Act. The case also illustrates the willingness to provide declarations dealing with questions of criminality, in an appropriate case. As to that, see too *Hampstead Heath Winter Swimming Club* [2005] EWHC 713 (Admin) [2005] 1 WLR 2930 (error of law as to liability to prosecution for allowing self-regulated swimming in a pond).

18. *Northern Cyprus Tourism: R (Northern Cyprus Tourism Centre Ltd) v Transport for London* [2005] EWHC 1698 (Admin) [2005] UKHRR 1231 Newman J. Granting judicial review, the refusal to accept Northern Cyprus tourism adverts on London buses violated HRA:ECHR Art 10 being (1) insufficiently foreseeable to be "in accordance with law"; (2) lacking a legitimate aim; and (3) with no pressing social need. This is a cracking example of HRA proportionality, applying even to what happens on the outside of a London bus.

19. *Hammond (Home Secretary): R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69 [2005] 3 WLR 1229 HL. Granting judicial review (declaration), since HRA:ECHR Art 6 might require an oral hearing in the High Court in an appropriate case, the paper-only tariff-reconsideration provision (Criminal Justice Act 2003 Sch 22 para 3) had to be read compatibly with Art 6 (as agreed was permissible under HRA s.3) to include an implied condition: no oral hearing 'except where required in the interests of fairness to comply with Art 6'. This is a wonderful example of HRA s.3: reinterpreting a straightforward statutory 'no' to mean an HRA-compatible 'maybe'.

20. *Soneji: R v Soneji* [2005] UKHL 49 [2006] 1 AC 340 HL. The HL held that confiscation proceedings were not invalidated by the failure to certify "exceptional circumstances" for an adjournment (as required by the Criminal Justice Act 1988 s.72A(3)), since it was not the purpose of the legislation that an act done in breach of the statutory requirement was invalid. This is the latest in a line of cases which show that the old "mandatory/directory" distinction has been replaced by principles which analyse the consequences of default, as a matter of legislative intent.