Landmark CHAMBERS

A YEAR IN JUDICIAL REVIEW - KEY CASES AND TRENDS

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MAIN THEMES

- Continued significant flow of important Human Rights cases in the highest courts with SC being robust in protection of HR
- Key focus on relationship between austerity and human rights - although limited intervention in social and economic policy areas
- Courts particularly keen to ensure access to justice
- Summed up in "money related challenges losing; access to Courts challenges winning".
- Evolving approach to ECJ references and "acte claire"

Section 1: General Judicial Review Principles

- In addition to those main trends there has been continued evolution of key general judicial review principles including:
  - Consultation
  - The Standard of Review – continued diminishing role of *Wednesbury?*
  - Use of Common Law rather than HRA as first port of call
  - Legal Certainty
  - Procedural Fairness

  As we are going through note: (1) emphasis on common law and answer the same as under HRA; (2) irrationality and proportionality starting to be elided.

Consultation - R(Moseley) v. Haringey 29/10/14

- The Facts: CTB replacement with CTRS. 10 % reduction in government grant.
- A statutory obligation to consult those who LA thinks affected
- The premise of the Consultation:
  - The shortfall will be £5m. "This means that the introduction of a local CTRS will directly affect" the assistance provided to all CTB recipients except pensioners.
  - The Options addressed – how to spread the pain *but only amongst CTB recipients. Fundamentally no consultation on options for saving the shortfall elsewhere in the budget*

Consultation – Moseley (2)

- Lord Wilson (& Kerr/Hale/Clarke) - focus on "fairness"
  - Endorsed the Sedley Criteria as a "prescription for fairness"
  - Degree of specificity in consultation may be affected by the identity of those consulted – with a greater level of specificity for individuals and especially the economically disadvantaged;
  - Demands of fairness higher when considering removing an existing benefit or advantage
  - Unless statute otherwise dictates, Consultation must include "arguable yet discarded alternative options" – endorsing *Medway* and *Montepelier* and even where statute requires consultation on preferred option only there needs to be a passing reference to rejected options: *Gateshead ; Royal Brompton*
  - It is necessary to examine the con doc to see if it is "reasonably obvious" what the other options were; and why they were rejected
  - *Very short and helpful exposition of principles underpinning a mass of historic case law*

Consultation - Moseley 3

- Lord Reed - took a different tack (Hale/Clarke agreed but felt there was little meaningful difference and they could "safely agree with both")
- Focussed on the statutory scheme not fairness given this was a case where statute mandated consultation.
- Huge variety of statutory obligations to consult – depending on the subject matter, the context, the purpose of consultation and the range of people to be consulted. The ambit of the duty depended on the statutory context and purpose: SC36.
- Here the purpose was to ensure public involvement in local government decision making.
- And to achieve that objective it must fulfil certain minimum criteria.
- With the same result albeit by a different route.

Thus where statutory duty to consult, focus on the requirements of that scheme in their context; where non-statutory focus on what fairness requires.

Standard of Review – Wednesbury under continued attack?

Background:

The Core Principle – no merits review/ *Wednesbury* – no case yet displaces that under common law and regularly applied (Evans v. SSCLG [2013] EWCA) but:

- that is not approach adopted in ECJ or under HRA (proportionality)
- further, under common law, not the approach on certain issues:
  - interpretation of policy - no longer a *Wednesbury* test (Tesco v. Dundee): ultimately, interpretation is for the Courts
  - errors of fact - *ex parte E* –ultimately correctness of primary facts can be for the Courts;
  - what fairness requires is for the Court not the decision maker – *Gillies v. SSWP (2006) and Osborn v. Parole Board* [2014]
  - differing intensity of review on issues of judgment depending on subject matter – right back to *Bugdaycay* (1987), *R(MOD) v. Smith (1996)* and *Lord Phillips in* Q (2004)

Intensity of Review – Proportionality and Anxious Scrutiny

- Rigorous academic debate as to where the lines should be drawn – with suggestions that approach to standard of review should depend on the subject matter and the competence of the Courts to test the reasoning and logic of the decision maker. On polycentric matters of finance/policy or national security, SoS democratically accountable, politician and civil servants in a better position to make judgements than Court: on other matters, SoS may have not special institutional competence greater than the Courts. Irrationality is a coarse instrument which does not reflect this nuanced approach.

- Not yet played out in *Wednesbury* (rationality) cases but playing out in the proportionality field in three recent SC cases (and hints that expanding into domestic *Wednesbury* territory).
  - Kennedy v. Charity Commission [2014] 2 WLR 808
  - Bank Mellat [2014] AC 700
  - R(Lord Carlisle) v. SSHD [2014] UKSC 60 (12th November 2014)

Standard of Review (Case 1) - Kennedy v. Charity Commission March 2014

Important case on the extent of the "**open justice principle**". But also debates intensity of review.

Facts:

Charity Commission inquiry into a charity. Journalist sought access to the underlying material under FOIA. CC refused relying on FOIA statutory prohibition on disclosure.

That prohibition could not be read down under HRA based on Art 10 to the opposite effect of what Parliament evidently intended.

However, that was not an absolute prohibition and there may be other statutory or common law rules which would allow disclosure of the material including the "open justice principle"

SC focussed on the purposes of the Charities Act 1993 – there found a power to disclose applying the "open justice principle" and the transparency purposes of the CC.

And in that context comments were made, obiter, as to the scope of review of any refusal to disclose.

Standard of Review Kennedy v. Charity Commission (2)

- In essence, the statutory scheme obligations on CC were comparable with any which might arise under art 10. The real issue would be whether the public interest in disclosure is outweighed by the private or public interests in not disclosing (analogous to those in art 10(2)). On that issue:

> ***"The Courts will adopt a high standard of review to any decision not to disclose information where there is a genuine public interest in the information, requested for important journalistic purposes…."***

- Using the common law (and not the HRA), a **common law** presumption in openness (*Lord Mance* @46).
- Per Lord Toulson – "the question in any case is whether there is a good reason for not allowing public access" [129]
- In practical terms, **no difference between common law approach and that of HRA** (51)

Standard of Review - Kennedy (3)

On intensity of review (**paragraphs which will no doubt be relied on widely and which starkly demonstrate the Wednesbury test will be unrecognisable in certain contexts**)

"the right approach is now surely to recognise… that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge *in a particular situation". Among the categories of situation identified in de Smith are those where a common law right or constitutional principle is in issue. [56]*

"The normal standard applied by a Court reviewing a decision of a statutory body is whether it was unreasonable in the Wednesbury sense…. But we are not here concerned with a decision as to the outcome of the inquiry. We are concerned with its transparency. If there is a challenge to the High Court against a refusal of disclosure by a lower court or tribunal, the High Court would decide for itself the question whether the open justice principle required disclosure… but the Court should give due weight to the decision and, more particularly, the reasons given by the public authority. The reason for the High Court deciding itself whether the open justice principle requires disclosure of the relevant information is linked to the reason for the principle. It is in the interests of public confidence that the higher court should exercise its own judgment in the matter and that information which it considers ought to be disclosed is disclosed" [132]

Standard of Review – Bank Mellat

Facts: *Proportionality challenge to decision of UK to effectively freeze all activities of Iranian Bank in UK as a means of frustrating the Iranian nuclear programme. The issue was whether action by the UK "bore some rational and proportionate relationship to the statutory purpose of hindering" [Lord Sumption [19]] the nuclear programme.*

Held

General Purpose lawful although no rational reason for action just against this bank. Large margin of judgment given national security. Precautionary approach to nuclear proliferation clearly lawful. Whether a measure serves the purpose of restricting nuclear proliferation "depends on an experienced judgement of the international implications of a wide range of information some of which may be secret. This is pre-eminently a matter for the executive" [21]

"[Decisions] may be based on an evaluation of complex facts, or consisderations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations the Court has to allow room for the exercise of judgment for [those] who bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process".

Nothing particularly new or surprising there – recitation of well established principles

Standard of Review – Evidential value of judgments R(Lord Carlisle) v. SSHD 12/11/14

Fact: Members of HoL wished to invite a speaker from the Iranian opposition to speak to Parliament. She was the subject of a direction which the SSHD refused to lift preventing her entry to the UK because of her organisations terrorist history and because of the impacts on relations with Iran.

In testing proportionality: (per Lord Sumption)

"…the assignment of weight to the decision maker's judgment has nothing to do with deference in the ordinary sense of the term. It has two distinct sources. The first is the constitutional principle of the separation of powers. ***The second is no more than a pragmatic view about the evidential value of certain judgements of the executive whose force will vary according to the subject matter." [22]***

"It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive" [23].

There are issues "which at no point lie within the *exclusive* province of the executive".

Lord Sumption focussed on the situation where the question is not the constitutional role of the Court – but "what evidential weight to be placed on the executive's judgment…" [32].

"… in determining what weight to give to the evidence the court is entitled attached special weight to the judgments and assessment of a primary decision maker with special institutional competence." [34]

Otherwise the weight to be attached to judgements (in a proportionality context) will be context specific:

"The executive's assessment of the implications of facts is not conclusive, but may be entitled to great weight depending on the nature of the decision and expertise and sources of information of the decision maker." [32].

Reading between the lines and extrapolating from proportionality to rationality, as Lord Sumption did in his recent ALBA talk, the direction of travel appears to be a further move away from pure "Wednesbury".

Legal Certainty and secondary legislation – – Reilly and Wilson v. SSWP - "knowing where you stand"

Context: Increasing tendency for legislation to give very wide regulation power to SoS re: social security schemes

Facts:

S.17A JSA 1995 – regulations making power to impose obligations on jobseekers to participate in a scheme of any "prescribed description".

Regulations repeated statutory formulation without more – no definition of "the scheme". The scheme was to be provided "pursuant to arrangements made by SoS".

Individuals required to participate in sub-schemes and *to do whatever was required of them*. No detailed information given.

So could receive a notice requiring you to turn up for unspecified work without any "scheme" and without any consultation with you on pain of loss of benefits.

Legal Certainty - Reilly

Held

1. No more important duty of Courts than to ensure SoS complies with will of Parliament in setting secondary legislation
2. Where primary legislation required "prescribed" scheme, a scheme had to be set out in regulations – not just a recitation of the empowering enactment; there was therefore no scheme and regulations were u/v
3. Courts had to be realistic about the standards to be achieved by the Government

3. The notice - "do whatever you are told" - was invalid – **recipient did not know where he stood** - [55].

4. Common fairness required that the Claimant had some information about the relevant schemes in advance so that s/he could make representations about whether they should be placed on schemes and which placement was most appropriate for them [66].

Procedural Fairness – Osborn v Parole Board

Facts

Case 1: Prisoner released on licence after half of a 6 year sentence. Recalled for breach of conditions. PB declined to order re-release. PB declined an oral hearing because factual issues were not likely to be central to decision to recall. Claim for JR based on art 5(4) – allegation that HRA required such a hearing.

Cases 2 and 3: life prisoner - tariff expired. Single member of PB refused release on the papers. Could pursue appeal and oral hearing if "significant and compelling reasons". Request for oral hearing declined – no chance of release and live evidence not required to assess risk.

Held:

1. **Case should have been brought under common law – protection of HR was not a discrete area of law but permeated common law. The starting point was the substantive and procedural rules of domestic law – repeat of focus on common law being the first port of call;**
2. Common law standards of fairness required a hearing whenever "fairness to the prisoner required it in the light of the facts of the case and the importance of the issues at stake".
3. That approach fulfilled the section 6 duty to comply with art 5.4

Procedural Fairness (2)

Held cont…

Impossible to define exhaustively when fairness required an oral hearing but would include

1. Where important facts were in dispute or significant explanation and mitigations were advanced where oral evidence was needed in order to consider credibility
2. The PB could not otherwise make an independent assessment of risk;
3. Oral presentation was necessary to put the case effectively [2]

Purpose of oral hearing was not just to assist PB but also to reflect prisoner's legitimate interest in being able to actively participate in a decision with important implications for him

It was for the Court to determine whether the procedure was fair – it was not to review the reasonableness of the PB's decision.

Procedural Fairness – Bank Mellat again

Further Issue: whether the draconian action should have been preceded by advance notice and opportunity to make representations.

Held:

1. Common law duty to give advance notice and an opportunity to make representations to an individual against whom draconian statutory powers were proposed to be exercised, depends on the particular circumstances (subject to what the statutory scheme says).
2. Unless the statute expressly or impliedly excluded the common law duty, or consultation was impracticable or would defeat the object, fairness required that the individual concerned be given advance notice and an opportunity to make representations.

And see common fairness references in Reilly (above).

Common Law as first port of call

Headline: Recent SC cases have emphasised that the common law can often be the first and only port of call because it achieves the same and has the same underlying principles as Convention. Leave you to summise why that might be?

Osborn v. PB: Lord Reed [54] ff

"the values underlying both the Convention and our own constitution require that convention rights should be protected primarily by a detailed body of domestic law" [56]

"The importance of the HRA is unquestionable. It does not however supercede the protection of human rights under the common law or statute or create a discrete body of law…."[57]

- see leading HR cases - A v. SSHD (evidence from torture) *Guardian (closed evidence) - decided under common law not HRA.*

Kennedy v. Charity Commission - Lord Mance – convention rights may be expected generally if not always to be reflected in common law. [46]. Common law may go further than Convention; starting point must be common law. Answer to the case could be found in common law - not Art 10. No difference in answer under art 10 or common law.

SECTION 2: HUMAN RIGHTS CASE LAW

Quick trot through the headlines which will be dealt with in more detail in the break out session this pm.

The headline - significant number of major cases with the SC being robust in protection of HR.

Assisted Suicide – Nicklinson (NL this afternoon)

- states had wide margin of appreciation on whether assisted suicide should be legal;

- (majority) the prohibition was within the margin of appreciation – protecting vulnerable people (minority) could not be so satisfied on the evidence

- (Maj) Court had power to declare legislation incompatible even if within margin of appreciation with HRA and would not shirk from that responsibility if incompatible; (minority) matter for Parliament

- not incompatible

Cheshire West v. P – deprivation of liberty/safeguards for mentally ill

Lady Hale - Very strong comments on HR applying to everyone [45]/[47]

Fact ECHR had not decided the issue was not important and did not dictate caution– SC had to determine it (s.6 HRA) and was capable of doing so. Hint that SC not happy to be told it must follow ECHR and could not lead?

Deprivation of liberty – "continuous supervision and control and was not free to leave" [49]

On facts, deprivation of liberty – did not make it unlawful but did mean that safeguards had to be applied [1]

EM (Eritrea) v SSHD (SC)

Returning asylum seekers to first country of entry under Dublin II

- Presumption EU states would comply with Convention obligations

  But rebuttable presumption
- Violation of Art 3 doesn't require systemic deficiencies [42]
- Test was real risk of treatment contrary to Art 3 – Sorring v. UK
- Positive obligations under Art 3 for Asylum seekers
- Assessment must be rigorous

Detention Action v SSHD (High Court)

Inherent unfairness on the Fast Track Detention policy

- Case brought under art 5 and common law
- Fast track process was not in principle unlawful (including appeal process)
- Based on principles in *Medical Justice*
- Ouseley J found there was inherent unfairness by virtue of a combination of factors and the absence of any procedure for early instruction of lawyers.
  - ***"I am satisfied that the shortcomings at various stages require the early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview. This is the crucial failing in the process as operated. "***

R (T) v Chief Constable of Greater Manchester Police (SC)

Enhanced criminal record certificate regime

- Disclosure of cautions jeopardised their careers – extreme facts
- Breach of Art 8
  - Was this not in accordance with law or lack of proportionality ?
- Decision wasn't based on legislation always operating incompatibly, but that it is capable of operating incompatibly and has done so in this case
- Reed – did pursue a legitimate aim but not necessary in a democratic society

SECTION 3: AUSTERITY AND MONEY

Headline:

Consistent with the approach to intensity of review already considered, challenges to socio/economic decisions on austerity have been given a relatively light touch by the Courts.

MM v. SSHD - income threshold for spouses entering the UK.

- if immigration rules being challenged as contrary to convention right then must be shown to be inherently unfair and disproportionate
- sufficient for SoS to have rational belief that policy would meet the aim
- indirect discrimination was found to be justified

Benefit Cap

R (JS) v SSWP (CA)

Challenge to benefit cap on A1P1/Art 14

(Hoped to have received SC decision this morning but postponed). CA held:

- Was indirectly discriminatory
- Pursued a legitimate aim
- Substantial democratic legitimacy
  - Extensive consideration of Parl debate
- Cost alone cannot justify discrimination but not sole aim
- Threshold for positive obligation under Art 8 was very high

Bedroom Tax

*R (MA) v SSHD (*CA)

A1/P1 and Art 14

- Did indirectly discriminate against disabled
- Test was – whether manifestly without reasonable foundation
- *"I accept that the court must scrutinise carefully the justification advanced. But it is not sufficient to expose some flaws in the scheme or to conclude that the justification is not particularly convincing. The stringent nature of the test requires the court to be satisfied that there is a serious flaw in the scheme which produces an unreasonable discriminatory effect."*

R (LH) v Shropshire Council

- Exception to general trend: austerity challenge successful
- Council had closed adult day care centre
- Had consulted on principle of closing centres in general
- Had not consulted on closing this specific care centre
- CA: this was unlawful

Belhaj v Straw

- Claims regarding provision of intelligence to Libya, whose agents then performed "rendition"
- State immunity did not prevent the claim
- Act of state doctrine was a defence to the claim

ACCESS TO JUSTICE AND AUSTERITY

Gudanaviciene v Director Legal Aid

Challenge to exceptional funding regime

- Failure to properly apply Art 8 and Art 6 ECHR, and Article 47 of the Charter of Fundamental Rights on immigration cases access to justice (decision from CA pending)
- *"It seems to me to be clear that the key considerations are that there must be effective access to a court and that there must be overall fairness in order that the requirements of Article 6 are met. One aspect of effective access must be the ability of a party to present all necessary evidence to make his case and to understand and be able to engage with the process. … It must be borne in mind that both before a tribunal and a court the process is adversarial. Thus the tribunal cannot obtain evidence where there are gaps in what an applicant has been able to produce. … I think the words 'practically impossible do set the standard at too high a level, but, as Chadwick LJ indicated, the threshold is relatively high. No doubt it would generally be better if an appellant were represented, but that is not the test. Nevertheless, the Director should not be too ready to assume that the tribunal's experience in having to deal with litigants in person and, where, as will often be the case, the party's knowledge of English is non-existent or poor, the provision of an interpreter will enable justice to be done."*

Residence Test
R (PLP) v S0SJ

Proposal to introduce a residence test to the grant of legal aid

"…the effect of this amendment will be to exclude those who have a better than fifty-fifty chance of establishing a claim, the subject-matter of which is judged as having the highest priority need for legal assistance, but without the means to pay for it, on the grounds that they lack a sufficiently close connection with the country to whose laws they are subject."

- Proposal was discriminatory
- Legal aid not analogous to distribution of welfare benefits
- No lawful justification

R *(Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697

- No right to legal assistance for persons abroad

Concluding Thoughts

- Courts robust in defending access to justice
- Less willing to grant relief where requiring government to spend money outside access to justice context

Section 4: APPROACH TO ECJ – THE COURTS INCREASING "INDEPENDENCE"

The Position in Theory

- The final court should make a reference to CJEU when the CILFIT criteria met – to avoid a reference nationals courts must be convinced that that the matter is equally obvious to the courts of other member states and the ECJ

- Classic statement of the approach domestic courts should take to Strasbourg case-law is Lord Bingham in Ullar 2004 2 AC 323:-

> "… should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court…This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court…. a national court should not without strong reason dilute or weaken the effect of the Strasbourg case law….It is..[possible].. to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention… ..since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

CAUSES OF FRICTION - CJEU

- In terms of the CJEU, senior domestic judges have plainly been unhappy about the impact on the domestic proceedings from both delay and lack of clarity in the ultimate outcome.
- Also some signs of a more fundamental questioning of the "hierarchical" relationship between the CJEU and domestic courts
- Both factors present in the Supreme Court decision in HS2 2014 1 WLR 324, a constitutionally important case with major long term implications
- For a survey of domestic approach to references in environmental law, see Heyvaert Thornton and Drabble 2014 130 LQR 413

CAUSES OF FRICTION - STRASBOURG

- There have been historic examples of a belief by domestic judges that the ECtHR has simply misunderstood the way the common law operates
- Nature of the Strasbourg case-law can appear to produce short formulaic tests which are readily capable of misapplication – see eg X v UK, a Commission decision on legal aid and article 6 being considered by CofA next week in exceptional funding cases
- Case-law changes over time
- Strongly expressed extra-judicial statements by domestic judges that Strasbourg has exceeded its brief

Domestic pronouncements on CJEU – examples

- In Morge 2011 1 WLR 268 Lord Brown, explaining lack of reference, observed:-

"It seems to me unrealistic to suppose that the Court of Justice would feel able to provide any greater or different assistance than we have here sought to give."

- In a case where he had to consider a notoriously obscure line of cases concerning "end of waste" Carnwath LJ observed:

"a search for logical coherence in the Luxembourg case-law is probably doomed to failure" [OSS 2007 EWCA Civ 611]

- Accordingly, it appears that there is a clear feeling that the CJEU often fails in its function of providing clear guidance. This may partly be a result of drafting style.

The Supreme Court judgment in HS2

"Had the [issue] come before the Supreme Court without there being any [ECJ] decision to assist, we would unhesitatingly have reached the same conclusion as Kokott…. [and] have concluded that that "the legislature clearly did not intend" plans and programmes not based on a legal obligation to require an environmental assessment… We would also have regarded this as clear to the point where no reference under the CILFIT principles was required. The reasons given by the Fourth Chamber …would not have persuaded us to the contrary. While they allude, in the briefest of terms, to the fact that the Governments made submissions based on the clear language… and on the legislative history, they do not actually address or answer them or any other aspect of [AG's] reasoning. In the result, a national court is faced with a clear legislative provision, to which the [Court] has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend… we would…. have wished to have the matter referred back to the… Court of Justice for it to reconsider, hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision." [paragraphs 187 to 189].

And on Article 9 of the Bill of Rights

" … whether it is in the public interest to proceed with a project of national importance.. may be a matter of national political significance. It is partly for that reason that such decisions may be considered appropriate for determination by the national legislature …… whose decisions are likely to be influenced.. by the policy of the dominant Parliamentary party….. there is nothing either in the text of article 1(4) of the EIA Directive, or in the exegesis of that text by the Court of Justice, to suggest that national courts are required not only to confirm that there has been a substantive legislative process and that the appropriate information was made available to the members of the legislature, but must in addition review the adequacy of the legislature's consideration of that information, for example by assessing the quality of the debate and examining the extent to which members participated in it. These are not matters which are apt for judicial supervision. Nor is there anything to suggest the inevitable corollary: that national courts should strike down legislation if they conclude that the legislature's consideration of the information was inadequate…The separation of powers is a fundamental aspect of most if not all of the constitutions of the member states. The precise form in which the separation of powers finds expression in their constitutions varies; …."

Correcting misunderstandings in Strasbourg

- For the classic example of House of Lords and the ECtHR engaging in an iterative process in which initial (radical) misconceptions by the latter about the nature of domestic law see Z v UK 2001 34 EHRR 97
- For another example in which the House of Lords proceeded on the basis that the EctHR has misunderstood the position see R v Spear 2003 1 AC 734:

"It goes without saying that any judgment of the European Court commands great respect, and section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does. There were, however, a large number of points in issue in Morris, and it seems clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion. It is true that the junior officers who sit on courts-martial have very little legal training….."

Clear and consistent line?

- Domestic courts show an increasing willingness to hold that there is no clear and consistent line to be found in the Strasbourg case law. This may be helped by the fact that different chambers will sometimes have their own preferred analysis.
- In Quila 2012 1 AC 621 Lord Wilson said:-

"Having duly taken account of the decision in Abdulaziz…. we should .. decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, … are inconsistent with it. There is no "clear and consistent jurisprudence" of the ECtHR which our courts ought to follow…."