Neutral Citation Number: [2013] EWCA Civ 34

Case No: C1/2012/0542

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

MR JUSTICE FOSKETT

CO/1372/2011

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 06/02/2013

**Before:**

LORD JUSTICE LAWS

LORD JUSTICE SULLIVAN  
and

LADY JUSTICE BLACK

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**Between:**

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|  | **The Queen (on the application of)**  **The Children’s Rights Alliance for England** | Appellant |
|  | **- v -** |  |
|  | **The Secretary of State for Justice** | Respondent |
|  | **- and -** |  |
|  | **(1) G4S Care and Justice Services (UK) Limited**  **(2) Serco Plc** | Interested Parties |
|  | **- and -** |  |
|  | **The Equality and Human Rights Commission** | Intervener |

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**Mr Richard Hermer QC and Mr Stephen Broach** (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**

**Mr James Strachan** (instructed by**The Treasury Solicitor**) for the **The Secretary of State**

**Mr Jason Beer QC** (instructed by **DWF Solicitors**) for the **Interested Parties**

**Mr Jason Coppel** (instructed by **EHRC**) for the **Intervener**

Hearing dates: 30 and 31 October 2012

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**Judgment**

**LORD JUSTICE LAWS:**

***INTRODUCTION***

1. This is an appeal, with permission granted by Maurice Kay LJ on 3 April 2012, against the judgment of Foskett J given in the Administrative Court on 11 January 2012 ([2012] EWHC Admin 8), by which he dismissed the appellant’s application for judicial review seeking an order that the defendant Secretary of State provide or facilitate the provision of information to stated categories of children as to the illegal use of restraint techniques on them when they were detained in Secure Training Centres (STCs) in the United Kingdom.
2. There are four STCs. They were established under s.43(1)(d) of the Prison Act 1952 as inserted by s.5 of the Criminal Justice and Public Order Act 1994. They are operated by private companies under contract with the Secretary of State: three of them by G4S Care and Justice Services (UK) Ltd, and the fourth by Serco plc. The companies have participated in these proceedings as interested parties before Foskett J and in this court.
3. At paragraph 2 of his judgment Foskett J cited the description of the general purpose of an STC given by this court in *Regina (C (A Minor)) v Secretary of State for Justice* [2009] QB 657 (to which I must return: I will refer to the case as *C*):

“STCs accommodate persons who either have been sentenced to custody or have been remanded in custody by a court. Their population contains males aged between 12 and 14; females aged between 12 and 16; and males aged between 15 and 17 and females aged 17 who are classified as vulnerable.”

In 2008 there were some 272 places in all four STCs and about 250 were filled. It is appropriate to refer to the inmates as trainees.

1. The genesis of the case lies in the fact, summarised by Foskett J at paragraph 91 and not disputed in this court, that probably until July 2008 (and possibly until 2010) there was widespread unlawful use of bodily restraint techniques upon many of the children and young persons within the STC system; and very few, if any, of them appreciated at the time that what was done to them was unlawful.
2. The appellant is a registered charity whose purpose is to protect the rights of children. It says that the respondent Secretary of State is responsible for the trainees’ ignorance of the fact that they have suffered a legal wrong. On its behalf Mr Hermer QC submitted that in the particular circumstances (he was at pains to disavow any “floodgates” effect) the law required the Secretary of State to take steps which would enable the trainees to discover the wrong, and thereby realise the legal rights which they possess in consequence. The amended judicial review grounds sought an order that the Secretary of State provide information to that end.
3. Mr Hermer’s primary argument is that the common law’s well established insistence on access to justice entitles the appellant to an order to that effect. There are two further arguments. One is that even if the Secretary of State owes no duty in the name of access to justice to provide the material information, still it is unreasonable of him (in the public law sense of the term) to decline to do so. The other is that the Secretary of State’s failure to make the information available violates the trainees’ rights under the European Convention on Human Rights and Fundamental Freedoms (ECHR). Mr Hermer was supported by the Equality and Human Rights Commission (EHRC) which was permitted to intervene in the appeal. The EHRC carried the burden of this last argument, because by s.30(3)(a) of the Equality Act 2006 it may bring judicial review proceedings to make good the Convention rights unconfined by the restriction of standing to a “victim”, imposed by s.7(1) of the Human Rights Act 1998 (the HRA). The appellant does not have the advantage of s.30(3)(a) or any equivalent provision and therefore is not so unconfined. For his part, however, Mr Hermer sought to deploy the Strasbourg jurisprudence as a steer to the common law’s direction.

***BACKGROUND***

1. The relevant history is fully and carefully described in the judgment of the court below. Foskett J also noted (paragraph 18) that a great deal of the background is to be found in the judgments in two other cases: *C*,and *Pounder v HM Coroner for the North and South Districts of Durham and Darlington & ors* [2009] 3 AER 150, [2009] EWHC Admin 76.
2. I will not replicate those descriptions, to which the reader may refer for a fuller understanding of the background. The account which follows suffices for the resolution of the issues on the appeal, and is fashioned so as to confront what Mr Hermer described as the four key features in the case. These were claimed to be: the trainees’ vulnerability; the Secretary of State’s wrongdoing towards them; their lack of knowledge that what was done was unlawful; and the Secretary of State’s responsibility for that ignorance. There is little contention as to the first three. The bite of the fourth depends on the sense ascribed to “responsibility”.

# *(1) Vulnerability*

1. The trainees’ vulnerability in general terms is very clear. It is spoken to at length in the appellant’s evidence. Many will have had very troubled backgrounds. Some will have behaved in such a way as to confront the staff at the STC with very considerable difficulties of management. Foskett J noted the statement of Michelle Dyson, a deputy director within the Justice Policy Group of the Ministry of Justice who leads on youth justice policy:

“It is unequivocally accepted by the Defendant that children in custody are amongst some of the most vulnerable and socially disadvantaged and that they have specific needs which may not be common to the wider population of young people.”

Mr Hermer would no doubt also adopt the reference in *McGowan (Procurator Fiscal, Edinburgh) v B* [2011] 1 WLR 3121 and [2011] UKSC 54 (paragraph 68) to “the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings” leading of course, in the case of the trainees, to incarceration in a closed institution.

# *(2) The Secretary of State’s Wrongdoing*

1. Under this head it is first convenient to describe the nature of the techniques with which we are concerned. They took two forms. First there is restraint, or physical restraint, properly so called. This includes a number of holds (such as the Double Embrace, the Figure of Four Armlock, the Wrap Around Arm Hold, the Double Wrap Around Arm Hold, and the Double Embrace Lift) designed to enable up to three members of staff to obtain physical control over an inmate; they were not intended to inflict pain. On 19 April 2004 a 15-year old trainee at Rainsbrook STC, Gareth Myatt, was asphyxiated while being restrained in one of these approved holds. Secondly, there are “distraction techniques”. The PCC Training Manual for 2005 (PCC stands for “physical control in care”) describes three such techniques: nose, thumb and rib distraction. These involve the measured application of pressure on those parts of the body in order to cause a short, controlled burst of pain administered to distract a trainee who is seriously misbehaving in order to bring the incident to a swift and safe conclusion. The nose distraction technique had been applied to a 14-year old called Adam Rickwood, who committed suicide at Hassockfield STC on 8 August 2004. His mother was the applicant in the *Pounder* case.
2. At the core of this appeal is the fact that officers at the STCs who applied these various restraint techniques at the material time genuinely but mistakenly believed that the law entitled them to do so for the purpose of maintaining good order and discipline (GOAD). It was definitively established that there was no such entitlement only after the deaths of Adam Rickwood and Gareth Myatt: see paragraphs 14 and 35 of the judgment of the Divisional Court in *C* ([2008] EWHC Admin 171). The legal position, put very shortly, is as follows. S.9(3)(c) of the Criminal Justice and Public Order Act 1994 as originally enacted imposed an obligation upon custody officers “performing custodial duties at a contracted out [STC]... to ensure good order and discipline on the part [of the trainees]”. But s.7(2) required that STCs be run “subject to... and in accordance with secure training centre rules”. Until July 2007 Rule 38(1) of the Secure Training Centre Rules 1998 prohibited the physical restraint of any trainee save where necessary for purposes specified in the Rule; and the purposes did not include GOAD. In June 2007 the Secretary of State laid before Parliament the Secure Training Centre (Amendment) Rules 2007, which added GOAD as one of the permitted purposes. But on 28 July 2008 the Amendment Rules were quashed by this court in *C* (overturning the Divisional Court) for want of proper prior consultation and the timely production of a Race Equality Impact Assessment, and violation of ECHR Articles 3 and 8. Moreover the contracts for the STCs (the judge at paragraph 30 cites the Hassockfield contract, awarded in 1999) confirm that it was specifically intended that physical restraint should not be used for GOAD.
3. The omission of GOAD as a legitimate objective of restraint was clearly deliberate: see paragraph 42 of the report of the House of Lords and House of Commons Joint Committee on Human Rights published on 7 March 2008 and entitled “The Use of Restraint in Secure Training Centres”, cited by Foskett J at paragraph 29 of his judgment.
4. Before Foskett J it was submitted for the Secretary of State that there was a relevant distinction between restraint and distraction techniques: the latter were not on the face of it outwith Rule 38, which dealt only with “restraint” properly so called. Nothing now turns on this. Foskett J observed at paragraph 34:

“However, a distraction technique used as part of, or as an adjunct to, the restraint of a detainee for GOAD would be unlawful because it would have been used as part of an unlawful restraint procedure.”

1. The judge summarised the position on this part of the case at paragraph 33:

“As I have said, the position concerning the legality of using restraint on detainees was established clearly from the outset: it was dealt with in the rules to which each STC was subject and provided for expressly in the contracts by which each of the Interested Parties in this application were bound to run the STCs for which each was responsible. It is, however, clear from the evidence... that the practice ‘on the ground’ for a good number of years was that restraint techniques were used to maintain GOAD in each of the STCs.” (Foskett J’s emphasis)

And he proceeded to describe the relevant evidence. Purely by way of example, the evidence showed 912 recorded PCC incidents at Hassockfield (whose figures were said to be typical) in the year ending March 2004 (judgment paragraph 46), and 7020 across all four institutions during the period January 2004 to August 2005 (paragraph 64).

1. As regards the use of PCC in order to maintain GOAD, Foskett J noted that figures relating to Hassockfield STC for the period January - December 2004 and January - December 2005 had been provided, and said this:

“69... The figures were presented in the form of a bar chart... Broadly speaking, looking at, for example, the six-month period from March to August 2004, of the approximately 570 reported instances of restraint at Hassockfield, about 185 were recorded as having been for ‘non-compliance’. In the same period for the following year, of the approximately 470 instances of restraint, in the region of 200 were attributed to non-compliance.

70. After the end of 2005, and thus from the beginning of 2006 onwards, the bar charts [sc for Hassockfield STC] were presented in the form of discriminating between ‘unacceptable behaviour’ (the new expression for ‘non-compliance’) and ‘other’ reasons. In the four-month period from January to April 2006 no instances of restraint for ‘unacceptable behaviour’ were recorded out of the total of 298 instances in total. However, from May onwards this reason was recorded and, by way of example, in May it would seem that exactly half of the 22 instances were attributed to ‘unacceptable behaviour’ and in June and July the majority of the occasions when restraint was used were so attributed. Over the next four months, proportionately speaking, the use of restraint for ‘unacceptable behaviour’ was less, but by December and then into the following year for the first five months or so, proportionately the majority of instances were attributed to ‘unacceptable behaviour’. From June through to December 2007, the proportion (and indeed the absolute numbers) diminished significantly. In the first three months of 2008 there were some instances recorded, though none in April, May and June of that year. In July 2008 about five occasions out of a total of 50 occasions were attributed to ‘unacceptable behaviour’. Thereafter no such instances were recorded.”

Later in the judgment:

“76... [I]t is highly likely that a large number were indeed the subject of unlawful force at times during their detention, probably from the beginning of the STC regime until at least July 2008. Whilst the use of restraint for GOAD after July 2008 could, of course, have occurred, it is probable that no-one sought formally to justify the use of restraint for such a purpose after the judgment of the Court of Appeal in *C*.

77... [T]here can be little doubt that a large number of detainees were treated unlawfully at various times during this period. There is no reason to suppose that the situation was materially different at any other time in the history of the STCs at least until July 2008. There is other evidence in the material before me (that I do not need for this purpose to set out in detail) that distraction techniques... were also used as a regular part of the repertoire of force used in STCs. It is, as I have suggested before (see paragraph 14), difficult to see how a distraction technique would ordinarily be used in isolation from a restraint technique. If used as part of a restraint for GOAD, a painful (and often injury-producing) technique would have been used for an unlawful purpose.

78. Leaving aside any conclusion that may be drawn in due course about what the court could or should do about all this, it is, to say the least, a sorry tale...”

1. Foskett J proceeded to describe the role of the Youth Justice Board (the YJB), established by the Youth Justice Board for England and Wales Order 2000 made under s.41(6) of the Crime and Disorder Act 1998, in monitoring the STCs. He stated at paragraph 81:

“[T]here is no escaping from the conclusion that the ‘monitoring’ of the STCs by the YJB appointed monitors during the period certainly up to mid-2004 failed to identify and/or act in relation to the unlawful use of force in the way subsequently revealed to have taken place.”

1. And so, as I have indicated, the judge concluded at paragraph 91 that probably until July 2008 (and possibly until 2010) there was widespread unlawful use of bodily restraint techniques upon many of the children and young persons within the STC system.

# *(3) The Trainees’ Lack of Knowledge*

1. At the end of paragraph 91 Foskett J stated that very few, if any, of the trainees appreciated at the time that what was done to them was unlawful. Earlier he had said this:

“88... I do not think that there can be any doubt that in the vast majority of cases the detainees made the subject of a restraint technique would simply have accepted it as part and parcel of the routine in an STC. Furthermore, at least during the period with which this case is concerned, it is likely that if a complaint had been made, the substantive answer to it would have been that the officers who used the restraint techniques were justified in using the force considered necessary at the time.”

# *(4) The Secretary of State’s Responsibility for the Trainees’ Ignorance of their Rights*

1. Mr Hermer’s first case is that the Secretary of State perpetrated an impediment – a hindrance or obstacle – to the trainees’ right of access to justice, and that on authority the court should make good the fault, so that their right may be vindicated. In his reply at the hearing he submitted that the trainees were led to believe, by actions of the Secretary of State, that the restraints used on them were lawful. Hence the proposition that the Secretary of State is “responsible” for their ignorance is critical.
2. A range of meanings may be attributed to the term “responsible”, of which it is useful to isolate two. A person may be said to be responsible for a result if he is a cause of it. Or he may be responsible for the result if he has knowingly willed it to happen. Mr Hermer sought to establish responsibility on the part of the Secretary of State in the secondsense. I do not mean he sought to demonstrate that the Secretary of State knew that the trainees had been or were being legally wronged and with that knowledge sought to conceal the fact from them: but that he took deliberate steps to prevent exposure of any concerns about the use of restraint for GOAD.
3. Mr Hermer’s submissions on responsibility start with the uncontentious proposition that the Secretary of State was, indeed, the cause (or perhaps more accurately, a cause) of the trainees’ ignorance because he created the regime in which the unlawful acts of restraint took place. I have already described the facts. On this part of the case Mr Hermer also cited the evidence given at the inquest into the death of Adam Rickwood by Mr Paul Bowers, a senior member of the executive of the YJB (quoted at paragraph 26 of Blake J’s judgment in *Pounder*):

“Rule 38 was very clear and specific about the circumstances under which PCC could be used. However, the 1994 CJPOA did give this authority to use reasonable force to maintain order and discipline and the advice that the YJB were giving at the time was that reasonable force could be used under those circumstances and that our preference was for PCC to be used in the first instance because staff had been trained in that technique… That was our view at the time. Having said that I would say I think there’s some confusion around our view but that’s my recollection of how it was”.

1. As Mr Hermer pointed out, one consequence of this understanding that force could be used to maintain GOAD was that if a trainee had complained of being treated in that way he would have been met with the riposte that it was perfectly permissible. But Mr Hermer went further; as I have said, he submitted that the Secretary of State took active steps to prevent exposure of any concerns about the use of restraint for GOAD.
2. To support that position Mr Hermer referred first to a draft report from the Commission for Social Care Inspection (CSCI) made following two unannounced inspection visits to Hassockfield STC in August and October 2004 in response to Adam Rickwood’s suicide. Paragraph 4.7 of the draft report contains these observations:

“During the course of this inspection we became aware that staff remained confused about the basis in which physical intervention is permitted with young people... We were told of occasions when young people had been restrained for failing to comply with instructions rather than because they threatened security or posed a risk to safety as laid down in STC Rules. The YJB Regional Manager and staff told us that although Incident Report Forms giving the reasons for and means of restraint were monitored by managers and submitted to the YJB, there had been no challenges about the grounds used. It is important therefore that effective means of scrutiny are also developed to assure all essential information is gathered and considered. It will be important to define the roles and responsibilities of the STC staff and managers and the YJB in this process.”

On 16 November 2005 this was responded to by Mr Peter Mant, Head of STC Contracts at the YJB, who denied that “the YJB was unsure of the position prior to the inspection” or that “staff were confused about the basis on which physical intervention is permitted with young people”. He continued:

“The YJB has always been aware that Section 9 of the Criminal Justice and Public Order Act 1994 permits the use of reasonable force to ensure good order and discipline. The fact that staff at Hassockfield used the approved PCC restraint system to enforce good order and discipline indicates that they were equally aware of their powers. The ‘confusion’ arose over the police decision to arrest two members of Hassockfield staff for using a restraint. It is the police who were confused as to what was or was not permitted under the legislation. It is possible that the CSCI Inspectors were equally confused by this development...

It is detrimental to the reputation of both the YJB and Hassockfield STC to imply that either party was confused as to whether what was being practised was permitted under the law. We will advise Home Office Ministers accordingly...

This whole paragraph [sc. paragraph 4.7 of the draft report] might well be omitted since it is difficult to understand how this is relevant to the report, arising as it does from an apparent misunderstanding of the law by the police.”

1. This prickly response drew an amendment to paragraph 4.7 from the CSCI, so that the final report had this:

“During interviews with staff and managers it became clear that they were confused about the basis on which physical intervention is permitted with young people. Following the inspection the YJB provided clarification of this.”

1. The judge considered (paragraph 53) that this confusion was further evidenced by a footnote to the final report of the Prisons and Probation Ombudsman for England and Wales into Adam Rickwood’s death:

“Commenting on a draft of this report, the YJB advised the report does not provide a complete picture with regard to PCC. The Criminal Justice and Public Order Act 1994 (s.9) provides for custody officers to use reasonable force to ‘ensure good order and discipline’. This power remains available to Custody Officers even though it is not repeated in the STC rules.”

Foskett J cited other materials to like effect. He observed (paragraph 55):

“That there was confused thinking seems to have been acknowledged on behalf of the YJB at the first inquest into Adam Rickwood’s death in April/May 2007: see the evidence of Mr Paul Bowers, a senior member of the executive of the YJB and at the time of the inquest, Director of Secure Accommodation, quoted at paragraph 26 in *Pounder*. It was a matter taken up by the coroner with the Secretary of State thereafter: see paragraph 32 of the judgment in *Pounder*.”

1. Mr Hermer’s comment was that when outside agencies sought to raise issues concerning the use of restraint for GOAD, the YJB’s response was that nothing was wrong; and that, as he put it, “had an impact”. But confused thinking is one thing; active steps to prevent exposure of concerns relating to the use of restraint to maintain GOAD quite another. Mr Hermer’s contention, moreover, that the Secretary of State was responsible for the trainees’ ignorance of the legal wrongs done them – that he was more than its cause, but willed it to happen – was itself advanced, as it seems to me, in equivocal terms: an equivocation between the two meanings of “responsible” which I have outlined. In reply he submitted that the Secretary of State created an impediment to the trainees’ access to justice, because they will have been led to believe that their restraint was lawful; but in the same breath he asserted that the Secretary of State was responsible because his acts or omissions had “resulted” in that belief.
2. Foskett J went on to discuss (judgment paragraphs 61 – 62) the terms of a report produced in June or July 2005 by Tony Bleetman, a specialist in trauma medicine, and his partner Peter Boatman, who had been engaged to examine the training needs of staff in STCs as regards behaviour management, and also a report by Lord Carlile of Berriew QC published on 17 February 2006 following an inquiry “into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children’s homes” (paragraphs 63 – 65). Both reports afford evidence of the extent to which restraint was used at that time to enforce GOAD.
3. As Foskett J stated at paragraph 88 (cited above), “in the vast majority of cases the detainees made the subject of a restraint technique would simply have accepted it as part and parcel of the routine in an STC”. It is obvious that the Secretary of State was responsible for this state of affairs in the sense that he caused it: it was brought about in and by the STC regime, and by the confused thinking within the regime (and the YJB) as to the reach of the power of restraint. But the undisputed evidence shows no more than this. Mr Hermer has not established that the Secretary of State was responsible in the second sense which I outlined: that he took active steps to prevent exposure of any concerns about the use of restraint for GOAD.

# ***THE COMMON LAW – ACCESS TO JUSTICE***

1. The common law recognises access to the Queen’s courts as a constitutional right: see for example Lord Diplock’s speech in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909; *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198; and *R (Witham) v Lord Chancellor* [1998] QB 575. It marches with two further rights, closely related to each other as well as to access to the courts: “the right of access to legal advice, and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege”: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, *per* Lord Bingham of Cornhill at paragraph 5.
2. Within this family of closely associated rights Mr Hermer would also locate a further right, namely the right to have notice of an executive decision before it can have legal effect. He cites *R (Anufrijeva) v Secretary of State for the Home Department and Another* [2004] 1 AC 604, where the appellant’s right to income support ceased, under the relevant regulations, upon her asylum claim being determined by the Secretary of State; but the determination had not been communicated to the appellant. The majority in the House of Lords held that communication of the decision was required before it could have legal effect. Lord Steyn (paragraph 30) put the matter in terms of fairness. In similar vein, submitted Mr Hermer, was Silber J’s judgment in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC Admin 1925, which concerned the want of timely notice (in certain cases) to the affected person of a removal notice issued by the Secretary of State.
3. Foskett J summarised what Mr Hermer sought to take from this learning as follows:

“111. Drawing together the strands that emerge from each of these cases, the central strand being the right of an individual to an effective access to justice, Mr Hermer submits that it is but a small step to conclude that there is an obligation on the part of the Defendant to inform those potentially affected by the unlawful use of force during the relevant period that they may have been so affected.” (Foskett J’s emphasis)

I have already stated that Mr Hermer was at pains to insist that no “floodgates” effect should be attributed to his argument. He would have the court accept that the case turns entirely on its own facts. But his submission entails a particular (and striking) view of the scope of the common law’s insistence on access to justice. It means that at least in some circumstances a potential defendant to a civil suit must declare himself as such. If there is any force in such a proposition, we cannot in my judgment presume that it is uniquely applicable in this case.

1. But stated as baldly as I have stated it, the proposition cannot be right. In the first place, it could not apply to a potential defendant who is not an emanation of the State. The burden of the cases shows that the courts will not allow the State to impede the individual’s right of access to justice; but there is no learning which remotely suggests that a non-State party, in any circumstances, might owe a duty to seek out or notify another of a claim which that other might have against him. Apart from anything else, the imposition of such a duty on a private litigant would be repugnant to the common law’s adversarial system of justice; and if it were expressed as a duty owed in *private* law, it would be alien to every other such duty: not vouched by agreement, nor by the neighbour principle, nor the avoidance of harm to person, property or reputation. It would be like a colour not known on the spectrum.
2. For these reasons I do not think there is any possibility of a private tortfeasor being fixed with a duty of the kind contended for. Such a duty could only arise (if at all) in public law, as a duty owed by the State. In fairness Mr Hermer at one point submitted as much, though it did not come across as his argument’s clear and consistent theme. Might such a duty be made good?
3. As I have said the law recognises a duty owed by the State not to *impede* access to justice. An overview of the principal cases suggests that this is their true reach. Thus *Raymond v Honey* [1983] 1 AC 1 was concerned with acts in a prison setting which interfered with the right to file proceedings for libel. *Ex parte Leech*, another prison case, confronted the censorship of a prisoner’s correspondence with his solicitor. In *Witham* the challenge was to court fees set by the Lord Chancellor at a level which effectively prevented a would-be litigant without resources from issuing defamation proceedings. *Ex parte Simms* [2000] 2 AC 115 and *Daly* were again prison cases. In *Simms* a prisoner had been prevented from speaking to a media representative about his having been victim of a miscarriage of justice (as a first step towards approaching the Criminal Cases Review Commission), unless the journalist signed an undertaking. *Daly* involved interference with privileged correspondence between a prisoner and his lawyer.
4. *Anufrijeva* was, I think, a rather different case. Fairness required the asylum decision to be communicated to the claimant before it could have effect to deprive her of what would otherwise have been her right to income support. It must be elementary that an adverse executive decision by the State can have no potency unless it is notified to the affected individual. Lord Steyn said (paragraph 30):

“Until the decision in *Ex p Salem* it had never been suggested that an uncommunicated administrative decision can bind an individual. It is an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law.”

Mr Hermer, and also Mr Coppel for the EHRC, placed considerable emphasis on *Anufrijeva.* Indeed Mr Coppel went so far as to submit that it offered a close analogy with the present case. I should say at this stage that I do not think it is anything of the sort. The House in *Anufrijeva* was concerned to require that notice of the *fact* of a decision was given before the decision could operate to the detriment of affected persons. Here the claim is quite different: Mr Hermer seeks notice not of any fact or event, but of the legal quality of acts done to the trainees. *Anufrijeva* does not assist him.

1. In *Medical Justice* (in which Silber J’s judgment was upheld by this court) it was held that directions to remove an entrant from the United Kingdom had to allow time, before the removal took effect, for a lawyer to be consulted with a view, if appropriate, to challenge the directions. Like *Anufrijeva*, this is quite unlike the present case.
2. The learning, in various formulations, tends to speak of the constitutional right of access to the courts. But I think it will make for clarity if we articulate it rather as a constitutional duty owed by the State; and then ask how far the duty extends. As I have made clear, the authorities suggest that it is a duty not to *impede* access to justice. That the duty is so limited is no coincidence, but a matter of principle. If there were a positive duty upon the State to provide a potential claimant with the legal elements of his case, that would be as discordant with the common law’s adversarial system of justice as if it were suggested that a non-State party might owe such a duty. More: unless this positive duty were owed universally, it would be to provide selected beneficiaries with a distinct advantage over other potential litigants who may one way or another lack the information required to mount a claim, but to whom, nevertheless, the duty was not owed. Such a state of affairs would be inimical to a signal feature of access to justice: that it should be even-handed. But plainly the duty could not be owed universally – to every potential litigant ignorant of his rights. That would not merely be to strike a discord with the common law’s adversarial system of justice. It would be to abolish it. Equally, the duty could not in reason be owed in this single case only; if by judicial *diktat* we held that it was, that would simply be eccentric. And there is no principled basis upon which to identify a class of beneficiaries beyond these trainees but short of all potential litigants, so that the duty’s reach is neither unique nor universal but somewhere in between. For these reasons the case for such a positive duty is in the end arbitrary. In *Myers v DPP* [1965] AC 1001 Lord Reid said this at 1021:

“I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty.”

I think these observations are especially applicable here.

1. In all these circumstances the constitutional right of access to the courts should in my judgment be understood as a duty, owed by the State, not to place obstacles in the way of access to justice. That it is a *constitutional* duty there can be no doubt, for it is inherent in the rule of law. As was said by the Strasbourg court in *Golder v UK*  (1975) 1 EHRR 524, para. 34, “in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts”. In that light I acknowledge, of course, that the State owes more fundamental duties relating to the administration of justice: most basic of all, perhaps, the provision of an effective, impartial and independent judiciary. But in the constitutional landscape we possess, access to justice is to be understood as I have described it. So understood it cannot in my judgment avail Mr Hermer, given my earlier discussion (paragraphs 20 ff) of his endeavour to fix the Secretary of State with responsibility for the trainees’ ignorance of their rights, and my conclusion (paragraph 28) that he has not demonstrated that the Secretary of State took active steps to prevent exposure of any concerns about the use of restraint for GOAD, or (in short) knowingly willed the trainees’ ignorance. This is not a case in which the Secretary of State has broken his duty not to place obstacles in the way of access to justice. The judge summarised the position correctly at paragraph 114:

“On a strict analysis of the authorities as they exist, I do not consider that it can be said that by failing to undertake such a dissemination exercise the Defendant is impeding the access to justice of those potentially affected. By not doing so he may not be inviting them positively to consider accessing justice, but that, as a matter of principle, is something entirely different from putting up an obstacle to accessing justice.” (Foskett J’s emphasis)

1. Mr Hermer asserted what he called a secondary position: even if the court were not satisfied that the Secretary of State was “responsible” for the trainees’ ignorance of their rights, still he owed a duty, in the name of access to justice, to take steps which would enable the trainees to discover the wrong done them. But this contention cannot survive my rejection of his principal argument.
2. Mr Coppel sought to supplement the common law case by praying in aid two further legal imperatives: the principle of fair dealing as expressed in *R v Tower Hamlets LBC ex p Chetnik* [1988] AC 858, and the law of fiduciary obligations. But *Chetnik* concerned the proper exercise of a statutory discretion which, exercised one way, would have enabled a public authority to refuse restitution where money had been paid by an individual under a mistake of law; in short, it confronts the withholding of money to which the State is not entitled; a state of affairs which cannot, it seems to me, be assimilated to the facts of the present case. As for fiduciary obligations, the State’s relationship with the trainees is not analogous to the parent/child or doctor/patient relationship. As Mr Hermer states in his supplementary skeleton argument (paragraph 4), the STC did not assume parental responsibility for the children. Parental responsibility remained with their parents and, in the case of children who were the subject of a care order, with the designated local authority. The duties owed by the State to the individual trainee sit alongside other duties which spring from its overall responsibility for the STCs: duties to the other trainees, to the staff, to the public. These duties, which may in some concrete situations be in conflict with one another, must nevertheless be conformed in practice. The concept of fiduciary obligation is not an apt template for their simultaneous fulfilment. And even if it was, that would not obviously translate into a requirement that the Secretary of State provide information as contended for by Mr Hermer and Mr Coppel.
3. For these reasons Mr Coppel’s additional arguments, based on fair dealing and fiduciary obligations, are in my judgment an attempt to erect a legal structure on foundations which cannot support it.

# ***IRRATIONALITY?***

1. Mr Hermer aspired in the alternative to anchor his case on the rationality principle (*Wednesbury* [1948] 1 KB 223). My impression is that this argument figured larger before the learned judge than in this court. However that may be, there is at once a difficulty. If as I would hold the imperative of access to justice cannot of itself carry the day for Mr Hermer, even on the footing that this is a special case, it is hard to see how the Secretary of State’s refusal to provide the trainees with the information sought can be categorised as irrational, since the basis on which irrationality is asserted must be that in the circumstances access to justice requires the information to be given: but this is the very proposition which for my part I have rejected. The irrationality claim is thus merely a surrogate for Mr Hermer’s earlier submission. In fact it is not even that: for reasons I shall give, it is an appeal to a form of judicial supervision which is necessarily more remote and less robust than what is given by the principle of access to justice.
2. Even if one sets these difficulties aside (though I am not sure how it could be done), there are in my view further insuperable obstacles, arising on the facts, which stand in the way of Mr Hermer’s irrationality case. The judge said this at paragraph 120:

“I do not consider that such a conclusion [sc. that the trainees might never get to know of the legal wrong done to them] can be justified. I say this for two potentially related reasons: first, whilst there is, of course, a law of limitation in the UK, it possesses a degree of flexibility where those who were ignorant of material facts at the time of the unlawful acts may obtain an effective extension of time for seeking redress; second, on the material presented to me there is availability already of information in the public domain about what happened within the STCs during the relevant period and steps could probably be taken even now by those affected if they wished to do so without the need to be told directly about it by the Defendant.”

Foskett J gives an account of the material information already in the public domain at paragraphs 124 – 139 (though his distinct treatment of the rationality argument comes later, at paragraphs 199 – 211). His account includes (in no particular order) the report of Messrs Bleetman and Boatman; the Carlile Inquiry report; the report by the Prisons and Probation Ombudsman into Adam Rickwood’s death; the first inquest into Adam Rickwood’s death; Blake J’s judgment in *Pounder*; the inquest into Gareth Myatt’s death; the amended STC Rules; the House of Lords and House of Commons Joint Committee on Human Rights report entitled “The Use of Restraint in Secure Training Centres”; the judgment in *C*; and the second Adam Rickwood inquest, at which these findings were made:

“Before and at the time of Adam’s death, PCC was regularly used at Hassockfield in circumstances not permitted by the contract between the Home Office and Serco, the STC Rules and the Director’s Rules.

Before and at the time of Adam’s death, [there was] a serious system failure in relation to the use of PCC at Hassockfield, giving rise to an unlawful regime.”

1. Foskett J also referred to other matters, including (paragraph 203) the Secretary of State’s contention that “[t]here was no justifiable basis under the Data Protection Act 1998 for the Defendant to process sensitive personal data of individuals in the way suggested without the consent of the data subjects in these circumstances”, although (paragraph 205) he reached no concluded view on that issue. He accepted, moreover, (paragraphs 116, 117) Mr Strachan’s submission that systems in place in the STCs, designed to ensure that there was a range of appropriate and different available methods by which the trainees could raise any concerns and seek legal advice about their rights, were proportionate and reasonable. The judge had earlier (paragraph 86) noted Ms Dyson’s evidence for the Secretary of State to the effect that

“if a child had felt that he or she had been treated wrongly, or was in any way aggrieved with the treatment received (whether or not he or she believed it to be lawful), there would be access to the complaints procedure, the advocacy service, helplines or independent legal advice and/or the police to raise these issues and then to seek redress.”

There were some complaints: though a very modest number. Foskett J noted (paragraph 86) that over a two year period at Hassockfield “a little over 2% of the total restraint techniques recorded produced a complaint on the assumption, of course, that the records were accurate”.

1. The judge did not marshal all these considerations in the specific context of the rationality challenge. But if one puts them together in order to assess that argument’s force, I think it impossible to conclude that no reasonable Secretary of State could have decided, or could now decide, not to undertake the kind of exercise urged by Mr Hermer.
2. It might (though it is difficult to state a practical example) be possible to construct a set of circumstances in which, perhaps by force of the doctrine of legitimate expectations rather than irrationality, a public body might come to owe a duty of the kind contended for. Mr Coppel, in support not of the *Wednesbury* case but of the first argument based on access to justice, relied on a government document entitled *Legal Entitlements and Administrative Practices*. He said this was an instance of government seeking to notify persons with claims against it of their rights. The document was in fact produced after officials had been investigated for withholding war pensions, following a decision to make payments only in known cases and not to take steps to identify others who were no less entitled to receive awards. It seemed to me that the nearest this might get to the basis of a claim of right was as the source of a legitimate expectation; but it was not advanced as such, and I by no means hold that it could have been. In his argument at the hearing Mr Coppel merely submitted that the document shows that there are at least some occasions when government thinks it right to proclaim itself a defendant; but we are concerned with legal obligation, and not merely good government practice. Like considerations apply to another document relied on by Mr Coppel in the same context (a Local Government Ombudsman report on the funding of aftercare under s.117 of the Mental Health Act 1983). In any case, even if enforceable legitimate expectations had arisen in those particular instances, that could not assist Mr Hermer in the different circumstances arising here.
3. Whether or not there could be a case where, on such grounds as legitimate expectation, government might owe a duty at common law to act as urged by Mr Hermer, I am clear for reasons I have given that no argument based on the rationality principle can run on the present facts. As is well known the paradigm of a *Wednesbury* complaint is the exercise of discretionary power by a public body on a basis which cannot in reason be supported. The court will not decide for itself how the discretion should have been exercised. So much is elementary, but it has a particular resonance for the present case, for it serves to contrast the rationality argument with Mr Hermer’s primary case on access to justice. When the latter is properly invoked, the court is centre stage; its role is not to review the reasonableness of possible contrasting opinions, but to dictate what access to justice requires. This is why, as I said earlier, the *Wednesbury* case is an appeal to a form of judicial supervision which is necessarily more remote and less robust than what is given by the access to justice principle. If that principle cannot carry the appeal, as I would hold it cannot, it is no surprise that there is nothing left in an appeal to rationality.

# ***THE ECHR***

1. The EHRC, which did not participate in the proceedings below, submitted that the Secretary of State’s failure to provide the information sought violates the trainees’ rights guaranteed by Articles 3, 6 and 8 of the ECHR. Mr Coppel’s argument largely sought to sustain positions taken before Foskett J by Mr Hermer, though he deployed some further authority. Mr Coppel was able to rely directly on the ECHR because (as I have indicated), unlike Mr Hermer’s clients, the EHRC was relieved by s.30(3)(a) of the Equality Act 2006 of the restriction of standing to a “victim” imposed by s.7(1) of the HRA. At paragraph 143 Foskett J noted the submission, advanced by the Secretary of State and the interested parties, that Mr Hermer’s client was not a victim within the meaning of s.7(1) of the HRA, and stated that he would “return to it when I have addressed the merits of the case”: which he indeed addressed with great care and in considerable detail. Thereafter, following an extremely ample treatment of the decision of Gillen J in *Northern Ireland Commissioner for Children and Young People* [2007] NIQB 115, he upheld the submission that Mr Hermer’s client was not a victim within the meaning of s.7(1) and concluded (paragraph 225):

“If the Claimant’s case had rested solely on asserting the Convention rights of former detainees of the four STCs, I would have been obliged not even to consider the merits of the case before me.”

1. But as I have said, in fact he considered the merits of the ECHR arguments very fully. He dealt first, at paragraphs 146 – 165, with the case advanced under Article 6 (fair trial rights), and then at paragraphs 166ff proceeded to consider the effects of Article 3 (protection from torture and inhuman or degrading treatment) and Article 8 (right to respect for private and family life). In the course of doing so he paid close attention to the possible impact of provisions contained in the UN Convention on the Rights of the Child 1989 (UNCRC), and also to what has become known as the *Ullah* principle, encapsulated in the statement of Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at paragraph 20: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”. Foskett J’s conclusions in barest summary may be taken from two passages in the judgment:

“182. It is quite plain that there is no Strasbourg jurisprudence that identifies expressly the kind of positive obligation said to arise in this case, namely, an obligation, as Mr Strachan submits it is, that the State should take steps to contact potential victims having proactively sought to inspect the records of the STCs to identify such victims…

197… [T]he *Ullah* principle prevents this court from declaring that the kind of relief sought in this case is validly claimed on the basis of Convention rights.”

1. I agree with both of these conclusions. The first of them, being a negative proposition, on the face of it calls for no further elaboration; but I will make these following observations. First, it is to be noted that one of the principal cases relied on to support an interpretation of Article 6 which would impose an obligation of the kind contended for by Mr Hermer, *Golder v United Kingdom* (1975) 1 EHRR 524, is a plain instance of the duty owed by the State not to *impede* access to justice. It arose out of a request by a serving prisoner to the Secretary of State for permission to consult a solicitor with a view to taking civil action for libel in respect of a statement made by a prison officer. This is the very duty which, as I would hold, represents the length or reach of the access to justice principle; and for reasons I have given it cannot help Mr Hermer here.
2. I will not repeat Foskett J’s analysis (paragraphs 149 – 157), with which I agree, of other Strasbourg cases relied on before him in the Article 6 context, notably *Airey v Ireland* (1979-80) 2 EHRR 305, *McGinley and Egan v United Kingdom* (1999) 27 EHRR 1 and *RR v Poland* (2011) 53 EHRR 31. I also agree with his approach (paragraphs 158 – 164) to *McGowan* [2011] UKSC 54, upon which he received written submissions after the hearing. That case arose from a police interview of a suspect without the presence of a solicitor, and the issue was whether he could be taken effectively to have waived his right of access to a lawyer without having received legal advice about it. The Supreme Court concluded (in briefest summary) that the Strasbourg cases did not show that legal advice was a necessary prerequisite for a valid waiver of the right to have a lawyer present at a police interview. The question was whether it was fair in the particular case to allow the prosecution to rely on evidence obtained at the interview; the vulnerability of the person concerned would be a factor. In certain circumstances, advice from a lawyer would be necessary. Mr Hermer sought to extract from this reasoning “a positive obligation on the State, designed to ensure that the underlying right to a fair trial is protected” (Foskett J, paragraph 162). Foskett J accepted the submissions of Mr Strachan, and of Mr Beer for the interested parties, to the contrary.
3. *McGowan* is not directly an instance of the State’s duty not to impede access to justice; it might rather be seen as a case about the law of evidence, conditioned by ECHR Article 6. But it illustrates the protection which the State will afford to procedural requirements which serve and support the right of access to justice, and for that reason sits much more closely with the common law position as I have described it than with Mr Hermer’s putative duty.
4. More generally it seems to me that any attempt to find in Article 6 a duty of the kind contended for by Mr Hermer and Mr Coppel must founder on the same difficulties as beset the attempt to locate it in the common law. As I have said, the duty could not in reason be owed in this single case only; there is no proper basis upon which to identify a class of beneficiaries beyond these trainees but short of all potential litigants, so that the duty’s reach is neither unique nor universal but somewhere in between; the case for Mr Hermer’s positive duty is in the end arbitrary. It would be extremely surprising if the Strasbourg court had perpetrated such an unprincipled state of affairs, and I am clear that it has not.
5. The ECHR case advanced by Mr Coppel and (to the extent permitted him) Mr Hermer was not, of course, built entirely on Article 6. The jurisprudence shows that there is a varied range of circumstances in which the State will be required both to seek and to provide information, and that such obligations may arise in the context of different Convention rights, notably Articles 2 (the right to life), 3 and 8. Mr Coppel sought to mine this field, placing some emphasis in his oral submissions on *Guerra* (1998) 26 EHRR 357, *Roche* (2006) 42 EHRR 30 and *Weber* (App. No. 54934/00). These cases all included complaints of breach of Article 8. In *Guerra* (which Mr Hermer cited to Foskett J) it was said that the applicants’ Article 8 rights had been violated by the State’s failure to provide appropriate information about the risks of toxic emissions arising from the production of fertiliser near their homes. In *Roche* the applicant had suffered stress and anxiety arising from his uncertainty as to the health risks he might have run through his participation in nuclear tests at Porton Down, and claimed that he should have been given relevant and appropriate information to allow him to assess the risk. The first applicant in *Weber* was a journalist who complained of statutory measures providing for the interception and monitoring of telecommunications. The claims in *Guerra* and *Roche* succeeded; the application in *Weber* was dismissed as being manifestly ill-founded.
6. None of these cases, in my judgment, supports the position contended for by Mr Coppel. They are all instances (and there are others: see for example *Oneryildiz* (2005) 41 EHRR 20) of failure by the State to provide *factual* information which, for one reason or another, should have been given in order to secure the effectiveness of the Convention right. I incline to accept Mr Strachan’s submission (supplementary skeleton, paragraph 32) that there is no reason to suppose that a trainee seeking information about his or her time in an STC would be denied it.
7. There are two further points on the ECHR. First, despite the submissions at paragraphs 43 – 47 of Mr Coppel’s skeleton, this is manifestly not a case in which the obligation contended for could be seen as required to fulfil the State’s ancillary duty to investigate Article 3 ill-treatment (comparable with the well-established duty arising under Article 2 to investigate a death for which the State is or might be responsible). Mr Hermer does not in truth seek such an investigation. He seeks (in effect) an order that the trainees subjected to restraint for the purpose of GOAD be informed that what was done to them is actionable. Such an act would not be a species of investigation for the purpose of Article 3. Moreover, as I understand it, the ancillary duty to investigate was ventilated in pre-action protocol correspondence but the appellant chose not to pursue such a case in the claim as it was formulated in the proceedings. It is to be noted also that Mr Coppel submitted in terms at the hearing that for his part he did not contend for a duty to inform in any instance where the case was (as he put it) “speculative”. I should add that in my judgment the efficacy or otherwise of previous enquiries, or the effect of media coverage and other publicity, (Mr Hermer has supplied detailed notes about both) does not touch any of these points.
8. Next, Mr Hermer sought to rely on provisions contained in the UNCRC, together with a number of the General Comments of the Supervising Committee, to support the conclusion that the duty for which he contends is to be derived from the provisions of the ECHR. There is no doubt that the UNCRC “is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention” R (*R) v Durham Constabulary* [2005] 1 WLR 1184, *per* Baroness Hale of Richmond at paragraph 26). I will only cite Article 3(1) from the UNCRC materials themselves:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

1. Mr Hermer’s reliance on the UNCRC material – I mean no discourtesy – possessed a scattergun quality. So much is evident from the summary given by the judge at paragraph 175, where the argument’s first context is Articles 3 and 8, but Foskett J adds this:

“...the bottom line of the submission is that these considerations add up to an overwhelming need for the kind of action sought in the claim. He submits that the UNCRC and the comments made in relation to it add to the case under Article 6, and indeed the case under common law, that action of the kind sought is necessary to ensure effective access to justice.”

1. The judge rejected Mr Hermer’s argument based on the UNCRC, and so would I. The fact is there is nothing in the Strasbourg case law itself to uphold, or even suggest, Mr Hermer’s putative duty; and nothing, therefore, to show that the European Court of Human Rights has deployed the UNCRC as an interpretive tool in order to fashion such a duty. Were we to do so, that would not be an interpretation of the ECHR but an extension of it: and that would be contrary to the *Ullah* principle.
2. For all these reasons, in my judgment the ECHR case has no more force than the arguments founded on the common law. I think this unsurprising. The Strasbourg court’s recognition of State responsibility to take positive action has arisen in disparate circumstances. The court has not articulated any general principle from which individual instances of such an obligation may be derived; indeed it was stated in *Plattform Ärzte das Leben v Austria* (1991) 13 EHRR 204 that “[t]he Court does not have to develop a general theory of the positive obligations which may flow from the Convention” (paragraph 31). Mr Hermer and Mr Coppel can derive the duty contended for neither from Strasbourg’s particular instances, for none goes so far, nor from any single principle, for none is to be found in the jurisprudence.
3. I would dismiss the appeal.

# ***POSTSCRIPT: THE* ULLAH *PRINCIPLE***

1. The *Ullah* principle was invoked by the Secretary of State below. As I have shown Foskett J, being of opinion that nothing in the Strasbourg jurisprudence vouchsafed a duty such as that contended for by Mr Hermer, stated at paragraph 197 that

“the *Ullah* principle prevents this court from declaring that the kind of relief sought in this case is validly claimed on the basis of Convention rights.”

1. There is no doubt that in this court we are bound by the *Ullah* principle. It has been repeatedly affirmed in the House of Lords (see *R (Al-Skeini and others) v Secretary of State for Defence* [2008] 1 AC 153 *per* Lord Brown of Eaton-under-Heywood at paragraphs 105, 106) and in the Supreme Court (*Ambrose v Harris (Procurator Fiscal, Oban)* [2011] 1 WLR 2435 *per* Lord Hope of Craighead at paragraphs 19, 20 and Lord Brown at paragraph 86).
2. Foskett J was right as to the reach of the Strasbourg jurisprudence, and the application of the *Ullah* principle. But perhaps I may be forgiven for stating, with great deference to the House of Lords and the Supreme Court, that I hope the *Ullah* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases. It is a high priority that the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence. If the road to such a goal is clear, so much the better.

**Lord Justice Sullivan:**

1. I agree that this appeal must be dismissed for the reasons given by Laws LJ.

**Lady Justice Black:**

1. I agree with Laws LJ that the appeal should be dismissed for the reasons he sets out in the main part of his judgment.