Neutral Citation Number: [2012] EWHC 8 (Admin)

Case No: CO/1372/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2012

Before :

MR JUSTICE FOSKETT

- -

Between :

THE CHILDREN'S RIGHTS ALLIANCE FOR ENGLAND — **Claimant**

- and -

SECRETARY OF STATE FOR JUSTICE — **Defendant**

- and –

G4S CARE AND JUSTICE SERVICES (UK) LIMITED

and

SERCO PLC — **Interested Parties**

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- -

Richard Hermer QC and Alex Gask (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
James Strachan (instructed by **The Treasury Solicitor**) for the **Defendant**
Jason Beer QC (instructed by **DWF Solicitors)** for the **Interested Parties**

Hearing dates: 22-24 November 2011

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Approved Judgment

Mr Justice Foskett:

Introduction

1. This case arises out of allegations of unlawfully executed restraint of, or other physical interventions with, children and young persons held or, more likely, formerly held in one or other of the four Secure Training Centres in the UK.

2. The general purpose of a Secure Training Centre (an 'STC') was described by the Court of Appeal in *Regina (C (A Minor)) v Secretary of State for Justice* [2009] QB 657 as follows:

> "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."

3. These four institutions were established under section 43(1)(d) of the Prison Act 1952 as inserted by section 5 of the Criminal Justice and Public Order Act 1994. Each is operated by a private company under contract with the Secretary of State, currently 'G4S Care and Justice Services (UK) Limited' in relation to the STCs at Medway (in Chatham), Rainsbrook (near Rugby) and Oakhill (in Milton Keynes) and 'Serco PLC' in relation to the STC at Hassockfield (in County Durham). The first STC (Medway) was opened in April 1998 and the last of the four (Oakhill) was opened in August 2004.

4. The contracts to which the STCs are subject set out detailed operational requirements with which each is expected to conform. Medway, Rainsbrook and Hassockfield STCs are each subject to contracts managed by the Youth Justice Board ('YJB') on behalf of the Secretary of State. Oakhill STC is operated under a contract directly with the YJB. The YJB is "an executive non-departmental government body set up under the Crime and Disorder Act 1988": see Blake J in *Pounder v HM Coroner for the North and South Districts of Durham and Darlington and others* [2009] EWHC 76 (Admin) at paragraph 3. I will say more about the function of the YJB in this context in due course (see paragraph 80 below).

5. There is no issue that the children and young persons who may have been affected by the matters that arise in this case were potentially very vulnerable. In her principal witness statement in these proceedings, Ms Michelle Dyson, a deputy director within the Justice Policy Group of the Ministry of Justice who leads on youth justice policy, which includes policy matters relating to the use of restraint on young people in custody, said this:

> "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."

6. Those detained will not, of course, have been in any of the STCs other than for reasons associated with established wrongdoing or, for those on remand awaiting trial,

for alleged wrongdoing. Many will, of course, have had very troubled backgrounds for the reasons given by Ms Dyson. For many reasons, some will have presented the staff with very considerable difficulties in terms of their management because of their behaviour. It follows that some of those detained will from time to time have exhibited behaviour which would be difficult, if not impossible, to deal with without the staff at the STC resorting to some level of force or physical restraint. It is the use of physical restraint in certain circumstances and the use of certain specific techniques on children detained in STCs up until, it is said, about July 2008 or possibly later that forms the background to these proceedings. It is also not in issue that during a fairly prolonged period (see paragraphs 43-77 and 91 below) restraint techniques were used in these STCs for unlawful purposes. It is those unlawful actions that underlie the claim made in these proceedings.

The Claimant in these proceedings

7. The Claimant in these judicial review proceedings is the Children's Rights Alliance for England ('CRAE') which is a small registered charity and company limited by guarantee. It was founded in 1991 and seeks to protect the rights of children through lobbying, by bringing or supporting test cases and by using national, European and international human rights mechanisms to highlight issues concerning the rights of children. It also provides free legal information and advice to assist children in accessing and enjoying their fundamental rights.

8. An issue has been raised by the Defendant concerning the standing of CRAE to bring these proceedings. Although, strictly speaking, it goes to the question of whether there is jurisdiction to hear the substantive application for judicial review in so far as that application is based on Convention rights (cf. *R. v. Social Services Secretary, ex p. CPAG* [1990] QB 540, 556, *per* Woolf LJ), I propose to deal with those arguments in due course after addressing the merits of the claim (see paragraphs 212-225 below). I am unaware of the extent to which the point, though plainly taken by the Defendant prior to the oral hearing before Collins J, was deployed at that hearing. Since the issue could go only to reliance upon Convention rights and the Claimant was seeking also to rely upon the common law, it is possible that the issue was left to one side. At all events, the point has been argued fully before me and I will address it as appropriate in due course.

The relief sought and the competing arguments in a nutshell

9. In the Amended Grounds, submitted after Collins J had granted permission at an oral hearing following rejection on the papers by Mitting J, the Claimant seeks an order requiring the Defendant "to provide information, or to facilitate the Claimant providing information, to the following categories of children (and/or their carers) on the unlawful nature of the legal status of restraint techniques used in STCs and their consequential legal rights:

(a) Children who were subjected to restraint for 'good order and discipline' in STCs between the opening of the STCs and the introduction of the new PCC Manual on 19 August 2010;

(b) Children who were subjected to nose, rib or thumb 'distraction techniques' or other deliberately painful compliance techniques in STCs between the opening of the STCs and the introduction of the new PCC Manual on 19 August 2010."

10. PCC stands for 'physical control in care' and the Manual referred to is the 'Physical Control in Care Training Manual'. Ms Dyson says that the PCC training manual was developed by what is now known as the National Tactical Response Group ('NTRS') within the National Offender Management Service ('NOMS') which is part of the Ministry of Justice. The 2005 version was issued by HM Prison Service Training and Development Group which I assume was the forerunner to the NTRG.

11. As will become plain, the PCC Manual was changed at various times during the material period. In her principal witness statement Ms Dyson says this:

> "The manual was first produced in 1997 in preparation for the opening of the first STC in 1998. The manual itself was republished in 2003 and again in 2005, but the techniques in any particular version of manual are also subject to changes from time to time …. Thus the 2005 version was subject to a number of modifications, before the manual was replaced in its entirety in July 2010 …."

12. Ms Dyson also says that it is important to note that the PCC Manual itself is a training manual for instructors and learners to use when being trained in the use of PCC and that it is not, in itself, a policy or governance document. That is no doubt correct, but it does fall to the Secretary of State to approve the PCC Manual before it is used. He will do so only if the PCC techniques in the manual have been endorsed by a panel of medical experts specifically appointed to consider "the methods of physical control of children as developed by the Prison Service College and to comment on the suitability of these methods for use by custody officers performing … custodial duties at STCs …". It would, in my judgment, be natural, in those circumstances, for the manual to be the authoritative source of reference for those employed as custody officers in an STC in order to confirm, if there was any doubt, the permitted techniques. All such officers were required to be trained in these techniques in any event: see Rule 38(2) of the Secure Training Centre Rules 1998 set out in paragraph 26 below.

13. Ms Dyson confirms that the approach referred to in the preceding paragraph "applies to distraction techniques as well as holds" and, given that to be so, this is an appropriate point at which to define or describe the two types of physical intervention that the Claimant refers to in the claim for relief as set out in paragraph 9 above. The distinction between the two was referred to in paragraph 10 of *Regina (C (A Minor)) v Secretary of State for Justice*, but I propose to amplify somewhat what was said there:

(a) <u>restraint (or physical restraint)</u>

This comprises a variety of techniques employed forcefully to restrain a detainee. The 2005 PCC Manual (which was replaced in July 2010) describes a system of holds designed specifically for use on young people which are not intended to involve pain in order to regain control. The holds were designed to enable physical control to be applied by either one, two or three members of staff, depending on the level of intervention required, though it can extend to further

members of staff if necessary. The level of intervention moves up through various phases depending on the seriousness of the position that has to be addressed, though the ultimate objective is systematically to downgrade and ease any hold or holds applied as soon as it is practical and safe for all involved. Simply by way of example, the holds included the Double Embrace, the Figure of Four Armlock, the Wrap Around Arm Hold, the Double Wrap Around Arm Hold, the Double Embrace Lift and various transfers between these holds.

(b) distraction techniques

The 2005 PCC Manual describes three distraction techniques – nose, thumb and rib distraction. The distraction techniques involve, it is said, the measured application of pressure in the areas specified in order to cause a short, controlled burst of pain. The essential purpose is to distract the individual momentarily from whatever serious behaviour is taking place to enable the incident to be brought to a swift and safe conclusion by, for example, then enabling a restraint hold to be applied which otherwise would not have been possible.

14. That then is the essential distinction between the two types of intervention. It will be clear that a distraction technique could be employed as part of a physical restraint if the behaviour of the detainee warranted it. Because this is a judicial review claim, I have not had the benefit of oral evidence about these techniques and the circumstances in which they would ordinarily be deployed legitimately. It is right, of course, to treat each as separate - and undoubtedly "restraint" does not necessarily involve the use of a "distraction technique". Conversely, whilst it is just about possible to envisage the use of a distraction technique in isolation from a restraint procedure, it would seem much more likely that such a technique would be employed as part of the process of, or as a preliminary to, imposing a restraint hold (see further at paragraphs 34-42 below).

15. The precise form of the relief sought (and the manner in which the information might be conveyed to those affected) became less prescriptive as the arguments were developed before me, but the essence of the Claimant's case is that the Defendant is under a positive obligation to inform those who might have been subjected to unlawful restraint procedures that they may have been so subjected. The purpose of providing this information would be to enable those informed to investigate the position and to consider whether they wish to seek some form of redress in relation to what, if it occurred, would have constituted an assault or trespass to the person or a breach of their Article 3 and Article 8 rights under the European Convention on Human Rights (the 'ECHR').

16. The Claimant contends that it is unlawful and/or irrational for the Defendant to decline, as he has done, to take these steps.

17. The Defendant challenges the Claimant's entitlement to such relief, both on the grounds of 'standing' (to which I have referred briefly at paragraph 8 above) and on the grounds that there is, in any event, no obligation in law to provide information of the kind specified in the claim and that it is not irrational not to take the steps requested.

The background in more detail

General

18. A great deal of the background to this claim can be found in the judgments in the two cases to which I have already made passing reference, namely, the Court of Appeal decision in *Regina (C (A Minor)) v Secretary of State for Justice* (which, for convenience, I will refer to simply as '*C*') and the decision of Blake J in *Pounder v HM Coroner for the North and South Districts of Durham and Darlington and others* (which, again for convenience, I will refer to simply as '*Pounder*'). I propose, therefore, to summarise the essentials for present purposes.

19. The circumstances in which the two types of intervention referred to in paragraph 13 above were permitted are crucial to this case and I will deal with those circumstances as I rehearse the essential chronology.

20. By way of introduction to the essential chronology, it should be noted that Mrs Carol Pounder is the mother of Adam Rickwood who, at the age of 14, committed suicide on 8 August 2004 at Hassockfield STC. One feature of the background to his suicide was the way he had been handled by staff at the STC that evening. That aspect of the background is set out in *Pounder* at paragraph 10 of Blake J's judgment. It included application of the nose distraction technique. Inquiries into Adam Rickwood's suicide and the death by asphyxiation a few months earlier on 19 April 2004 of Gareth Myatt, a 15-year old detainee in Rainsbrook STC, whilst being restrained by staff utilising what was called a Double Seated Embrace, led in due course to the revelation of the practices that form the backdrop to this application. That backdrop is now well documented.

21. I will start with the statutory and regulatory framework governing the use of force in STCs.

The statutory and regulatory framework

22. Section 9 of Criminal Justice and Public Order Act 1994, as originally enacted, was in the following terms:

> **"Powers and duties of custody officers employed at contracted out secure training centres.**
>
> (1) A custody officer performing custodial duties at a contracted out secure training centre shall have the following powers, namely -
>
> (a) to search in accordance with secure training centre rules any person who is detained in the secure training centre; and
>
> (b) to search any other person who is in or who is seeking to enter the secure training centre, and any article in the possession of such a person.
>
> ….

> (3) A custody officer performing custodial duties at a contracted out secure training centre shall have the following duties as respects those detained in the secure training centre, namely -
>
> (a) to prevent their escape from lawful custody;
>
> (b) to prevent, or detect and report on, the commission or attempted commission by them of other unlawful acts;
>
> (c) to ensure good order and discipline on their part; and
>
> (d) to attend to their wellbeing.
>
> (4) The powers conferred by subsection (1) above, and the powers arising by virtue of subsection (3) above, shall include power to use reasonable force where necessary."

23. Section 7(2) of the Act stipulates that a contracted out STC "shall be run subject to and in accordance … with secure training centre rules subject to such adaptations and modifications as the Secretary of State may specify …."

24. The importance of these statutory provisions, as the two cases to which I have referred make clear, is that, whilst the statutory power exists for the authorisation of the use of "reasonable force", amongst other things, "to ensure good order and discipline on [the] part" of detainees, an STC must be run subject to and in accordance with "secure training centre rules". In other words, the rules govern the position.

25. It follows that, unless the rules provided for the use of reasonable force to "ensure good order and discipline", the use of force for that purpose would be unlawful.

26. The relevant parts of the Secure Training Centre Rules 1998 (SI 1998/472), which came into force on 16 April 1998, were in the following terms:

> **Rule 37. – Use of Force**
>
> (1) An officer in dealing with a trainee shall not use force unnecessarily and, when the application of force to a trainee is necessary, no more force than necessary shall be used.
>
> (2) No officer shall act deliberately in a manner calculated to provoke a trainee.
>
> **Rule 38. – Physical Restraint**
>
> (1) No trainee shall be physically restrained save where necessary for the purpose of preventing him from –
>
> (a) escaping from custody;
>
> (b) injuring himself or others;

> (c) damaging property; or
>
> (d) inciting another trainee to do anything specified in paragraph (b) or (c) above,
>
> and then only when no alternative method of preventing the event specified in any of the paragraphs (a) to (d) above is available.
>
> (2) No trainee shall be physically restrained under this rule except in methods approved by the Secretary of State and by an Officer who has undergone a course of training which is so approved.
>
> (3) Particulars of every occasion on which a trainee is physically restrained under this rule shall be recorded within 12 hours of its occurrence.

27. It is clear on the face of Rule 38 that it does not permit the use of physical restraint to "ensure good order and discipline". That is not one of the permitted categories provided for by the rule. That has plainly been the position since the first STC was opened.

28. Whilst some might question how good order and discipline could be enforced without the last resort of some physical intervention by the staff being available if faced with complete recalcitrance on the part of a detainee, there is no doubt that the omission from the rules of this objective as a legitimate use of restraint was not an oversight: it reflected a considered policy decision. This is demonstrated by a Ministerial Submission dated 2 February 1998 relating to what I imagine was a proposal at the time to make what is now Cookham Wood YOI an STC. The following paragraph appeared:

> "The contract for Cookham Wood stipulates that physical restraint may only be used as a last resort when no alternative is available and only to prevent a child from escaping, from harming him/herself or others, from damaging property, or to prevent a child from inciting another to do any of these things. The use of physical force for any other purpose, including to secure compliance with staff instructions is prohibited. These requirements will be reflected in the STC Rules."

29. The conclusion that the omission of 'good order and discipline' ('GOAD' for short) as a legitimate objective of restraint was deliberate was reflected in the findings of the House of Lords and House of Commons Joint Committee on Human Rights in its report published on 7 March 2008 (several years after the events to which this section of the judgment is devoted) entitled 'The Use of Restraint in Secure Training Centres'. The following appears at paragraph 42 of that report:

> "We have not been able to establish conclusively why the phrase "good order and discipline" was not included in the original STC Rules, but we think it is entirely reasonable to

> infer from its absence that it was deliberately omitted, and that the reason for that omission was that it is inappropriate in the context of detention of children. Children and young people in detention are in a uniquely vulnerable position. Whilst everyone in detention must be treated with dignity and respect, children in detention have particular needs, distinct from the adult prison population, given their age and stage of development. The use of violence on vulnerable children and young people in detention can rarely be acceptable and risks breaching international human rights standards."

30. Whatever may have been the rationale for the omission, there is further, more contemporaneous evidence of what was intended when the STC regime was being put in place. In the contract for Hassockfield STC (which was awarded in 1999), the following provision appeared:

> "Each Trainee in custody at [the STC] will only be subject to physical restraint as a last resort when no alternative is available and only to prevent him/her from escaping or from harming him/herself or others or from damaging property, or to prevent him/her from inciting another Trainee to harm him/herself or others or to damage property. Physical force will not be used at [the STC] on any Trainee for any other purpose nor will it be used on any Trainee simply to secure compliance with staff instructions. When all other approaches have been exhausted and there is no realistic alternative to the use of physical force, the only methods of physical restraint which may be used on a Trainee in custody at the [STC] will be those specifically approved by the Authority and only as used by Staff certified as Custody Officers by the Authority."

31. The evidence received by the Carlile Inquiry (see paragraphs 63-65, 77, 127 and 180 below) was to the effect that a provision such as that appeared in all STC contracts.

32. The Director's Rule at Hassockfield STC, dated 29 April 2002 and issued apparently as a replacement for a Rule issued on 28 July 1999 (but not thought to be materially different from that earlier Rule), contained the following passage:

> "Physical force will be used only:
>
> - To prevent a trainee from escaping
> - To prevent a trainee from harming him/herself or others
> - To prevent a trainee damaging property
> - To prevent a trainee from inciting another trainee to harm him/herself or others or damage property.

> Physical force will not be used for any other reason or simply to obtain compliance with staff instructions, it will be a measure of last resort."

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 to which I will refer shortly (see paragraphs 43-77) 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.

34. Before dealing with that aspect in more detail, I should interrupt the narrative to deal with the lawfulness or otherwise of distraction techniques (see paragraph 13 above). Mr James Strachan, for the Secretary of State, has submitted that distraction techniques are, unlike restraint techniques for GOAD, not unlawful *per se*. That is, strictly speaking, correct because Rule 38 deals only with "restraint" and does not deal expressly with distraction techniques. 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. However, should the lawfulness of a distraction technique used for any reason other than for any purpose authorised by Rule 38 fall to be considered, it would, Mr Strachan contends, fall to be assessed by reference to Rule 37 (see paragraph 26) which, as I understood the argument, was to be treated as the over-arching provision concerning the use of force.

35. As I have observed previously (see paragraph 12), the manual would be the source to which reference would be made by those employed as custody officers in an STC in order to confirm the permitted techniques. Whether the use of such a technique in particular circumstances was or was not lawful would depend on those particular circumstances and not simply upon whether it happens to be regarded as legitimate within the terms of the manual.

36. Simply so that the picture is as clear as the documentation permits, I will record briefly what the 2005 Manual said about the three distraction techniques to which I have previously referred (see paragraph 12(b) in particular).

37. In relation to Nose Distraction, the following is said:

> "In incidents where the Trainee has physically grabbed hold of either another Trainee or a member of staff then the following techniques can be applied to gain control before application of [approved] PCC holds.
>
> If two Trainees are involved then ideally two members of staff will work simultaneously to separate the Trainees."

38. The manual then goes on to describe the technique of Nose Distraction itself.

39. So far as Rib Distraction is concerned, the following is stated:

> "There may be occasions when trying to separate a Trainee that the Nose Distraction is not possible. This may be the case if the Trainees are grappling or if they have a member of staff or Trainee trapped against a wall and their head is positioned in such a way that staff cannot safely apply the Nose Distraction, in such circumstances the Rib Distraction can be used."

40. The manual then goes on to describe how the Rib Distraction technique is applied.

41. The manual indicates that the Thumb Distraction technique may arise for legitimate use if it has been impossible to separate two trainees involved in the fight or a trainee who has a member of staff pinned to the floor having used what is described as a 'Figure of Four Arm Hold' to effect a release of the trainee's arms in order to gain initial control of the trainee. The manual says this:

> "If the Figure of Four Arm Holds cannot release the Trainee's arms then the staff can use a Thumb Distraction to effect release.
>
> As with all distraction techniques the Thumb Distraction is an extreme measure and can only be used if justified. If it is used then the previously described procedures must be followed."

42. All the situations in which the use of any of these techniques is said by the manual to be appropriate (albeit as a last resort extreme measure) would come within the authorisation conferred by Rule 38(1)(b) of using force to prevent the detainee from "injuring himself or others". In principle, therefore, it would be within the rules and thus not unlawful on that account. If, in the circumstances, it amounted to more than "reasonable force", then it could offend Rule 37 and thus be unlawful.

What was happening

43. I must now return to the chronology and to what was happening in practice notwithstanding the terms of the regulatory framework. The precise chronology is not easy to present in the clearest fashion because of the existence of a number of overlapping inquiries and investigations following the two tragic incidents in 2004. However, as a starting point and against the background set out above, there can be little doubt that from the outset the policy and the rules consequent upon that policy prevented physical restraint from being used to maintain GOAD, whether or not a distraction technique was applied in the restraint process.

44. Although it did not emerge publicly for some years, it seems clear that this policy and the rules reflecting it were not observed universally throughout the STC system. The first manifestation of evidence in written form about this, albeit evidence not put into the public domain until 2007, was the report in October 2004 of Mr David Waplington, the former Head of the Juvenile Panel of the Prison Service. Following the deaths of Adam Rickwood and Gareth Myatt (see paragraph 19 above) he produced a report to the YJB in which he reviewed behaviour management in STCs. It was entitled '*Report on Use and Effectiveness of PCC in STCs*', and sent by e-mail dated 25 October 2004 to Mr Peter Mant, Head of STC Contracts at the YJB. Mr Waplington had visited all four STCs and discussed PCC techniques at some length

and in some detail. He recorded the views of all the staff he spoke to as being that PCC "was an inadequate method of control" and that "the recent suspension of the seated Double Embrace" (see paragraph 13 above), which was described as one of the most frequently used holds "had made PCC even less effective." For completeness it should be noted that this technique was suspended from use "until further notice" in mid-June 2004 following the death of Gareth Myatt 2 months earlier. A letter from Mr Paul Bowers, then the Director of Service Delivery at the YJB, dated 17 June 2004 was sent to the directors of the YTCs to this effect. It appears that the purpose of the suspension was to undertake "a full review of the potential medical complications of the hold."

45. Mr Waplington also said this:

> "All of the STCs routinely use PCC to gain compliance. It was probably one of the main reasons for its use. Current rules do not permit the use of PCC for compliance but I believe that it is sometimes necessary. STCs run to strict timetables. They could benefit from the introduction of greater flexibility but at some stage they need to enforce movement. We can and should develop improved behaviour management but when somebody refuses to move from the sports field or simply will not go to their room they cannot always be permitted to stay where they are. We should not dress up the use of PCC in these cases as necessary for safety or security."

46. He went on to say this:

> "I was surprised at the high level of PCC recorded in every STC. Hassockfield's use of force figures are typical. In the year ending March 2004 they recorded 912 PCC incidents. 773 of these were planned. The Double Embrace (mostly with head support) was used on 574 occasions. This is a very high total compared to the rate of [control and restraint] in [young offender's institutions]. The high number of planned interventions is also worrying. At two centres I asked whether the officer supervising had any guidance about alternatives to consider prior to use of force. They did not. One director said that he would welcome guidance. I think it is an essential tool and would be easy to develop."

47. The report ended with the assertion that PCC "is regularly used to gain compliance". That was the position in October 2004.

48. To complete the picture in the few months prior to then, as previously indicated (paragraph 20) Adam Rickwood had committed suicide on 8 August and on 31 August the Chief Executive of the YJB wrote to the directors of all the STCs informing them of the review to be undertaken by Mr Waplington and seeking their cooperation. The letter emphasised that the use of force was only lawful when it was "an absolute necessity", that no more force than was necessary was to be used and that it needed to be proportionate to the seriousness of the circumstances. That was amplified by saying that "absolute necessity" meant that force was "a last resort …

when all other methods [had] failed". The following paragraph also appeared in the letter:

> "It also means that the force must be necessary for one of the purposes in STC Rule 38: in order to prevent the trainee from escaping, from injuring himself or others, or from damaging property."

49. The letter did not emphasise specifically that force for the purposes of enforcing GOAD was not permitted, but it did emphasise that STC Rule 38 was the rule that should be adhered to.

50. The Commission for Social Care Inspection ('CSCI') made, as I understand it, two unannounced Inspection Visits to Hassockfield STC in August and October 2004, presumably in response to Adam Rickwood's suicide. Based upon the visit in August 2004 a draft report was prepared which was submitted to the YJB for comment. Paragraph 4.7 of the draft report was in the following terms:

> "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. This was despite the contract between Premier Training Services and the YJB and the PCC (Physical Intervention) Manual stipulating the grounds explicitly and all staff having the requirements reinforced during their mandatory training. 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." (Emphasis added.)

51. In a response from Mr Mant (see paragraph 44 above) dated 16 November 2005, the following representations were made in respect of that paragraph:

> "The second sentence which states 'Subsequent to the inspection the YJB clarified its position having taken advice from the Home Office Legal Advisers' is misleading since it implied that the YJB was unsure of the position prior to the inspection. This is not the case. Nor are we aware that staff were confused about the basis in which physical intervention is permitted with young people.
>
> 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. The YJB sought legal advice only because of the police decision to arrest the staff and refer to the CPS. This legal advice confirmed the YJB's understanding of what was permitted by law and this was passed on to the Hassockfield operator by way of reassurance. In the event the CPS did not lay charges.
>
> 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.
>
> The same paragraph states further on that "the YJB have also clarified the "exceptional circumstances" in which forms of physical intervention other than approved PCC holds can be used." We are not aware of having issued any such clarification and do not know to what this refers. The same considerations apply as above. If these references are to be retained they should not lead the reader to conclude that the YJB has been in any doubt as to what is permitted under legislation.
>
> This whole paragraph 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."

52. The final report was altered in the light of those representations and the relevant paragraph was in these terms:

> "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".

53. Mr Hermer suggested that the representations of the YJB were designed to persuade the statutory inspectors (namely, the CSCI) not to publish a report highlighting a potential issue as to the legality of restraints used. I do not think that that is necessarily the correct construction to be placed upon those representations: if Mr Mant's response was given in November 2005 (well over a year after the CSCI's visits), the report of Mr Bleetman and Mr Boatman had been published several months earlier and the general issue of unauthorised restraints was dealt with in that report (see paragraph 61 below). Nonetheless, whatever the motivation for the

representations may have been, the representations do, to my mind, reflect some confused thinking about the legal position. It is difficult to reconcile the apparent view that restraint could be used for the purposes of enforcing GOAD with the view, expressed in the letter from the Chief Executive of the YJB referred to in paragraph 41 above, that any force used must be "for one of the purposes in STC Rule 38" given that Rule 38 did not permit the use of force for the purposes of enforcing GOAD. It also conflicts with what Mr George Reilly is recorded as having said at the meeting referred to below (see paragraph 57). The confused thinking at the time is evidenced by the response of the YJB to the draft report of the Prisons and Probation Ombudsman for England and Wales into Adam Rickwood's death at Hassockfield. The report was dated April 2006, but a footnote in the final report was in the following terms:

> "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."

54. Observations to similar effect by the solicitors then acting for Serco are recorded in that report. The same points emerged in the evidence given to the Carlile Inquiry (see paragraphs 64-65 below) in January 2006. In that evidence reference was made to the provision about the use of force in each STC contract (see paragraph 30 above) and the terms of section 9 of the 1994 Act (see paragraph 22 above) and the following observation advanced:

> "Whilst the YJB contract is clear that staff may not use force simply in order to secure compliance with staff instructions, it may be the case that a refusal to follow instructions impacts on the order and discipline of the Centre. In these circumstances it will ultimately be for the staff concerned using force to make the case that it is necessary in the circumstances to do so."

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*.

56. Since the correct legal position has been clarified by virtue of the two cases referred to in paragraphs 2 and 4 above, these observations concerning what appears to have been confused thinking are only of marginal relevance to the issues that arise in this case. It might be said, however, that the existence of the confused thinking reinforces the proposition that had any detainee complained about his or her rights concerning the use of restraint, the answer given may well have been that the staff were perfectly entitled to use it for the purposes of enforcing GOAD (see further at paragraph 88 below).

57. Following the availability of Mr Waplington's report, Mr George Reilly (of the YJB) convened and/or chaired a meeting of the PCC Review Panel on 25 November 2004. Mr Waplington was an 'observer' at the meeting. It was an occasion when the PCC national trainers, assisted by PCC trainers employed by the operational STCs, demonstrated what was described as "the existing PCC package" together with proposed amendments and additions to the PCC restraint system. The panel, which consisted of a Consultant Child Adolescent Forensic Psychologist, a Consultant Paediatrician in Community Child Health, a Consultant Trauma and Paediatric Orthopaedic Surgeon, one other medically qualified person, the Lead Inspector for the Commission for Social Care Inspection ('CSCI') and a representative of a secure children's home, considered and commented on what they had seen during the demonstration. The minutes of the meeting, apparently dated 10 December 2004, record the following at paragraph 5:

> "George Reilly also provided a summary of the lawful use of force. He pointed out that force could only be used where it is necessary, and that no more force than is necessary may be used. No trainee shall be physically restrained save where necessary for the purposes of preventing him from:-
>
> (a) escaping from custody
>
> (b) injury himself or others
>
> (c) damaging property or
>
> (d) inciting another trainee to cause injury or damage property."

58. The minutes also recorded that "Tony Bleetman, a specialist in trauma medicine, and his partner Peter Boatman had been engaged to examine the training needs of staff in [STCs] in respect of behaviour management."

59. The plan had been that there was to be a further meeting of the panel in February 2005. Another meeting took place in March 2005, a meeting which appears to have been the forerunner to the publication of the revised PCC Manual in December 2005.

60. Prior to the availability of the report to be prepared by Mr Bleetman and Mr Boatman, in April 2005 two members of staff at Hassockfield were arrested in connection with an alleged assault on Adam Rickwood. In August the CPS decided to take no further action, apparently on the basis that section 9 of Criminal Justice and Public Order Act 1994 (see paragraph 22 above) gave the power to use restraint for GOAD.

61. In the meantime the report prepared by Mr Bleetman and Mr Boatman became available in June or July 2005 and was, I understand, published. It affords evidence, based on their inquiries, of the extent to which restraint was used at that time to enforce GOAD. The following section of the report should be noted:

> "Another issue is that PCC skills are deployed against trainees for non-compliance, as well as for violent behaviour. For instance, PCC is used to overcome resistance when trainees refuse to attend education, move location, or go to bed. Data

> from the reporting process at one STC show that over a quarter of PCC was undertaken to overcome non-compliance. Further data showed that, in one month, a third of PCC was undertaken to overcome non-compliance, while around a fifth of all PCC skill was undertaken to overcome non-compliance.
>
> Based on staff and trainee interviews, trainees are aware of, and able to manipulate, the weaknesses of the current PCC program. By the same token, it would appear that the STC rules are often manipulated in order to bring an incident within the authority to use force. One such stretching of the rules is where a staff member initiates low-level physical contact with the trainee, following non-compliance. When the trainee responds in a manner that can be perceived as putting staff or others at risk of assault or violence, the need to use force is established. Reports may then include the fact that the trainee's behaviour was such that there was a risk to staff or other trainees. This approach and type of manipulation puts the organisation and individual staff members at risk of assault – as well as possibly exposing them to prosecution."

62. The report contained a comprehensive list of recommendations, one of which was that there should be greater clarity in setting out the powers of the staff in use-of-force matters and, it was said, account needed to be taken of the powers within the Criminal Justice and Public Order Act 1994 which, it was said, "authorise staff to use reasonable force, where necessary, to ensure good order and discipline." It is not entirely clear what this recommendation was intended to convey, but it affords yet further evidence of what appears to have been the confused thinking at the time about the legal justification for any restraint used.

63. The work undertaken by Mr Bleetman and Mr Boatman was, of course, commissioned by the YJB. The CSCI became involved in the manner I have identified above (see paragraph 50). After the death of Gareth Myatt, the Howard League for Penal Reform invited Lord Carlile of Berriew QC to head an independent 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". In September 2004 a panel of experts was established to advise the inquiry, one member of the panel being Ms Carolyne Willow, the National Coordinator of the Claimant. The report following the inquiry was published on 17 February 2006.

64. The report detailed the evidence received by the inquiry from the YJB in January 2006 into the prevalence of the use of PCC techniques in the STCs in the period from January 2004 to August 2005. The evidence was as follows:

> "The total number of Physical Control in Care interventions used in Secure Training Centres during the period January 2004 to August 2005 was 7,020 …. Statistics for each of the four Secure Training Centres are set out below:
>
> Medway 3282

Rainsbrook 1081

Hassockfield 1719

Oakhill (from August 2004) 938*

*Oakhill has not been at full capacity during this period."

65. Whilst my attention was drawn specifically to the evidence given to the inquiry by the YJB, I have taken the opportunity to look more generally at the report in order to understand more precisely its terms of reference and the material presented to it. I have noted that evidence was given to the inquiry about the use of restraint to secure compliance:

> "The Inquiry received evidence that restraint was used by staff simply to secure compliance. Both staff and children reported that disobedience or refusal to comply with an instruction could result in physical restraint. This was particularly an allegation made about regimes in the secure training centres."

66. I will return to this in the context, in particular, of the overall conclusions to be drawn from what has emerged about the scale of the possible use of unlawful force in STCs during the material period.

67. All these inquiries and reviews were taking place on or about the dates indicated. In the middle of this the new PCC Manual was issued in December 2005 by HM Prison Service Training and Development Group (see paragraph 59 above). Under a heading entitled "Policy on the use of force", the following appears:

> "<u>The use of force will be justified, and therefore lawful, only</u>:
>
> - If it is reasonable in the circumstances
> - If it is necessary
> - If no more force than is necessary is used
> - If it is proportionate to the seriousness of the circumstances
>
> <u>Reasonable in the circumstances</u>
>
> The interpretation of reasonable is a key issue concerning a use of force. The issue of reasonableness is a matter of fact to be decided in each individual case. Each set of circumstances is unique and are to be judged on their own merits. Factors to be taken into account when deciding what is 'reasonable' will be things such as the size, age and sex of both the trainee and the member of staff concerned in the use of force and whether any weapons are present.
>
> <u>Necessary</u>

> The action must have been necessary.
>
> The first distinction to make is between force used in 'self defence' (can more easily be demonstrated to be 'necessary') and force used because someone has refused to obey a lawful order. It is not enough that a trainee be given any 'lawful order' to do something and has refused to do so. (Emphasis added.)
>
> It is important to take into account the type of harm that the member of staff is trying to prevent – this will help to determine whether force is necessary in the particular circumstances they are faced with. 'Harm' may cover all of the following risks:
>
> - Risk to life
> - Risk to limb
> - Risk to property
> - Risk to the good order of the establishment
>
> It is clearly easier to justify force as 'necessary' if there is a risk to life or limb.
>
> Deciding whether force is 'necessary' in order to maintain the good order of the establishment may be complicated – the member of staff must take into account the consequences of the trainee not complying with his/her lawful instruction.
>
> …." (Emphasis added.)

68. The Manual goes on to identify the rules that govern the use of force and cites, amongst other sources, STC rules 37 and 38 and section 9 of the Criminal Justice and Public Order Act 1994. No further guidance or commentary on the conflict between the rules and the Act is provided in the Manual.

69. The number of occasions upon which restraint was used in all four STCs between January 2004 and August 2005 is set out in paragraph 64 above. Those figures did not discriminate between the occasions upon which restraint was used for GOAD or for other reasons. Figures relating to Hassockfield STC for the period January-December 2004 and January-December 2005 have been provided, breaking down the reasons for the use of restraint as between "non-compliance" and "other" reasons. The figures were presented in the form of a bar chart and the precise numbers are a little difficult to discern. However, for present purposes total accuracy is unnecessary. 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 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.

71. These figures are, of course, for only one STC, but appear broadly to reflect the findings of Mr Bleetman and Mr Boatman for the period they scrutinised (see paragraph 61 above).

72. It is possible that the apparent cessation of the use of PCC for non-compliance during the first four months of 2006 reflected a changed pattern of the reporting of incidents following the promulgation of the new PCC Manual in December 2005. The "dip" after June 2007 is almost certainly to be explained by the reaction of the STC to a letter from the Chief Executive of the YJB dated 25 May 2007. The letter was sent after Mrs Pounder's solicitors (the solicitors acting for CRAE in these proceedings) had written a pre-action protocol letter to the Treasury Solicitor (acting for the YJB) drawing attention to what had been revealed during the first inquest into Adam Rickwood's death, namely, that restraint was being used for non-compliance in breach of the STC rules. The material part of the letter was in these terms:

> "The legal position is that the STC Rules describe the only circumstances in which the powers provided for in section 9 of the Criminal Justice and Public Order Act 1994 can be used by officers in carrying out their duties.
>
> This means that restraint can only be lawfully used in circumstances described in rule 38 of the STC rules. This position reflects the terms and conditions of the contract."

73. The letter continued thus:

> "I want to reassure you that the YJB has been working closely with the Ministry of Justice and previously the Home Office to amend the STC rules in line with previous consultation with yourselves. I am advised that changes are imminent. In the meantime, it is your responsibility to ensure that the use of force within your establishment is being carried out lawfully."

74. That paragraph in the letter foreshadowed the presentation before Parliament of an amendment to the STC rules designed expressly to permit the use of restraint for GOAD. I need not set out the history of what occurred thereafter: reference to the case of *C* will demonstrate the relevant history.

Conclusions

75. Mr Hermer has submitted that it is an irresistible inference that many hundreds, possibly thousands, of children and young persons were the subject of unlawful force from the inception of the STCs until at least July 2008 as a result of the erroneous view taken by those running and supervising the STCs of the circumstances in which restraint may be used. Indeed he suggests that the use of unlawful force may have continued until July 2010 when the 2005 version of the PCC Manual was replaced with the present version. His point in relation to the 2005 version of the manual is that it contains a worked example which sanctions the use of PCC, apparently as a last resort, when a trainee offers no resistance, but refuses to comply with a reasonable request or a direct order to do something. In other words, it appears to sanction PCC for the maintenance of GOAD.

76. I do not think it is possible, or indeed appropriate, for me to draw any definite conclusion about the precise numbers of detainees who may have been affected in this way; but equally I do not think that there is any sensible conclusion other than that it 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. Given the evidence put before the Carlile Inquiry (see paragraph 64 above), it would seem that even at a time when Oakhill was not at full capacity, the number of PCC interventions across the four STCs during that period was running at about 350 per month. Even if only 20-25% (which may be conservative) of such interventions were to enforce GOAD, there 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 (see paragraphs 13 and 33-41) 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. The children and young persons sent to STCs were sent there because they had acted unlawfully and to learn to obey the law, yet many of them were subject to unlawful actions during their detention. I need, I think, say no more.

79. It is also a legitimate comment that until the deaths of Gareth Myatt and Adam Rickswood, and the investigations and inquiries that resulted from those deaths, none

of the agencies in place to monitor what took place within an STC had identified and/or acted to stop the unlawful nature of what was happening.

80. The YJB was established by 'The Youth Justice Board for England and Wales Order 2000', an order made under section 41(6) of the Crime and Disorder Act 1998. In her comprehensive witness statement, Ms Dyson says that the "YJB is a separate non-departmental public body responsible for overseeing the youth justice system for England and Wales." She draws attention, in particular, to its role in monitoring STCs. I will set out what she says in this regard:

> "25. The YJB have a concurrent power to appoint a monitor of an STC by virtue of article 4(2)(k)(i) of the [2000 Order]. The functions of a monitor can be found in section 8(3) of, and paragraph 3 of Schedule 2 to, the 1994 Act and in the STC Rules. Among these is the duty to keep under review and to report to the YJB (by virtue of the [2000 Order]) on the running of the STC.
>
> 26. The YJB deploys monitors into all secure establishments that accommodate children and young people. Monitors use a range of tools and techniques to form a view as to whether the establishment is delivering a safe and effective service to children and young people. They then work with YJB Contract Management colleagues to resolve any issues identified and to improve performance with the objective of delivering the safest and most effective service possible.
>
> 27. The role of monitors is, in part, to ensure that the accommodation and services commissioned by the YJB are being appropriately delivered. However, the monitors also assist in enabling the YJB to discharging certain of its statutory responsibilities. These include the monitoring, making known and promotion of good practice in the operation of the youth justice system and the provision of youth justice services. Monitors consider areas of practice, for example behaviour management, in each establishment they visit. They identify areas where they can either encourage that establishment to share their practice with others or to direct providers towards areas of practice elsewhere that can help them become more effective.
>
> 28. The YJB's deployment of monitors is a core method of assessing the performance of these providers, but it in no way diminishes the responsibility of providers themselves to manage their own services."

81. This case is concerned with the system of monitoring in operation during the period from the inception of the STCs until July 2008 (or July 2010) and not with any improvements that may have been made in response to reviews carried out in the light of the two deaths in custody in 2004 (see paragraph 20). However, there 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. Given the "confused thinking" to which I have referred (see paragraph 53) and, as part of that, the apparent active promotion by the YJB of the proposition that restraint for GOAD was legitimate, it is, perhaps, not surprising that this should have been so if, of course, the existence of the unlawful practices had been noted at all.

82. There is some tacit acknowledgement of the inadequacies of the system at that time in another part of Ms Dyson's witness statement. She refers to various reviews that have taken place (the earliest she mentions, incidentally, is Mr Waplington's review in October 2004) on the issue of restraint in the young offenders' part of the "secure estate", including an independent review into the use of restraint in Young Offender Institutions, Secure Training Centres and Secure Children's Homes by Mr Peter Smallridge and Mr Andrew Williamson (the 'Williamson and Smallridge Review') who reported on 20 June 2008. She then said this:

> "In its response to the Williamson and Smallridge Review, the Government accepted the recommendation that techniques incorporating pain needed to be available, for the protection of staff and other young people, as a last resort in exceptional, defined circumstances. However, the Government was clear that this must go hand in hand with enhanced training for staff in de-escalation techniques and behaviour management in order to embed a culture where restraint is only ever used when all other avenues have been exhausted. In addition, the government considered that the systems for reporting and monitoring the use of restraint must be enhanced and additional safeguards put in place for the protection of young people who have been restrained."

83. The need to "embed a culture" of effective last resort for the use of restraint and the need to enhance "the systems for reporting and monitoring the use of restraint" following the publication of that report suggests a recognition by the Government of the day that matters in both respects had not been satisfactory in the past. The need for "additional safeguards [to be] put in place for the protection of young people who have been restrained" suggests that the complaints system also required improvement.

84. As it seems to me, the principal focus concerning "monitoring" must be upon the YJB given its statutory responsibility for monitoring and supervising STCs. Mr Hermer has also said that none of the Commission for Social Care Inspection, the Independent Persons and Advocacy Service, Ofsted (which had a role in inspecting STCs), the Local Safeguarding Children Board for each STC or the police had uncovered the fact that unlawful practices were being employed. That may be so, but the primary responsibility for ensuring the lawful use of restraint was upon the STCs themselves, supervised and monitored as they should have been by the YJB and its appointed monitors.

85. What is suggested by Ms Dyson is that those other channels for complaint negate the suggestion that children and young persons detained in an STC did not have access to advice to identify whether any particular use of restraint was unlawful. The existence of a channel is, of course, important but if, in reality, it leads nowhere, then there is no

effective access to what is at the end of the channel. Ms Dyson describes the STC Grievance Procedures in her witness statement. She says that the procedure is intended to be "accessible to young people and their parents [and] provides young people with the opportunity to make complaints about any aspect of their custody and treatment in the STC, as well the ability to challenge decisions made about them while in custody at the STC and to raise any genuine concerns which they may have about the STC …." She says that where there is dissatisfaction "with the outcome of any request or complaint made … under the grievance procedure [the child or young person] may appeal against the outcome … to the monitor that each STC must have in place." The monitor, she indicates, "would hear the appeal and conduct a review of the STCs investigation into the complaint" taking into account any information necessary, including what the complainant says, "in order to form a view about whether to uphold the complaint or not."

86. Ms Dyson's essential position on behalf of the Defendant is that if a child had felt that he or she 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. Her evidence is that complaints concerning restraint were made during the relevant period which arguably indicates that system was operating satisfactorily. Mr Hermer has submitted that "no-one ever complained". That is not strictly accurate, but not significantly inaccurate on the evidence presented. Extracting information from a table that appears in Ms Dyson's witness statement, it shows that at Hassockfield in 2004 and 2005 there were 933 and 1051 instances of PCC recorded respectively and 29 and 18 complaints in each year respectively, the "majority of complaints [being] restraint related". This means that over that 2-year period a little over 2% of the total restraint techniques recorded produced a complaint on the assumption, of course, that the records were accurate.

87. At that stage there was no separate record of the use of distraction techniques and the precise nature of the complaint on each occasion is not revealed in the evidence. However, there would seem to be little doubt that the vast majority of restraint techniques that were employed during this period for GOAD were not made the subject of a complaint. That pattern was presumably mirrored in the other STCs.

88. Whilst, in the nature of things in an application such as the present application I have not received any oral evidence about what was happening during the relevant period which I have been able to evaluate, 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.

89. There is, of course, also the inevitable reluctance that there would have been on the part of a young detainee to "rock the boat" by making a complaint. That reluctance is evidenced by the unchallenged statement put before me in these proceedings from Sir William Utting whose distinguished career involved, amongst other things, service as the Chief Social Work Officer with the DHSS from 1976 to 1985 and then as Chief

Inspector of the Social Services Inspectorate for the DHSS (subsequently the Department of Health) from 1985 to 1991. In his statement he said this:

> "Another practical problem for the potential complainant (as it may be for staff in moments of crisis that require immediate action) is being able to distinguish between what the regulations permit and what they do not. Many have uncomplainingly submitted to ill-usage in the past because 'that is what goes on in these places' and they believe that what members of staff do is always authorised. The difficulties are even greater in institutions in which a culture of illicit violence such as bullying exists, when ill-treatment by staff appears insignificant in comparison. Self-reporting is not a reliable source of evidence about the incidence of violence in institutions. One returns inevitably to the need for clear and simple guidelines, proper recording and reporting, aggregated information, and responsible managerial and external scrutiny."

90. A statement from Ms Camila Batmanghelidjh, the founder of two children's charities, the 'The Place2Be' and 'Kids Company', also contributed another insight into how the complaints procedures would be viewed by young detainees when she said this:

> "7. Children in custody rely for their daily wellbeing on prison staff. As young people have developmental affiliative needs, they are more likely to be in a situation where they have a parental transference, seeing prison staff as parental figures on whom [they are] reliant. In view of the immense power discrepancies between the jailed child and the prison staff, it is likely that children will develop a compliant and fearful attitude towards these adults, often not daring to challenge them because they believe them to be all powerful. In this context children can experience prison staff as not following complaints procedures because they are 'powerful enough' not to. Children may also perceive complaints procedures being followed through but in the end they are not ruled in favour of the children.
>
> 8. In this way, the reputation for the uselessness of the complaints procedure spreads amongst the kids. Whilst at one end of the spectrum the complaints procedure is considered futile, at the other end children fear revenge, believing that if they make complaints their 'lives will be made hell' in custody."

91. I do not think that there is any true or realistic alternative to the conclusion (a) that probably up until July 2008 (and possibly, though unlikely, for another two years thereafter) there was widespread unlawful use of restraint within the STC system and many children and young persons were subjected to such restraint and (b) that very few, if any, of those who were subject to such unlawful restraint appreciated at the time that it was unlawful.

92. The Claimant asserts that the Defendant, as the Minister responsible for the system then in operation (including, for this purpose, the YJB), should take steps along the lines of those foreshadowed in paragraph 9 above to alert those who may have been affected to the position so that they can, if they wish, seek redress. It is asserted that it is either unlawful or irrational not to do so in the circumstances. The Defendant, supported by the Interested Parties represented by Mr Jason Beer QC, denies that there is any obligation to do so or that it is irrational not take any such step.

93. Is the Claimant right that relief of this nature should be granted?

The submissions of the parties

94. In contending that the claim for relief is not well-founded, Mr Strachan draws attention to the acceptance by Mr Hermer and Mr Gask in their Skeleton Argument that they cannot point to a precedent, either in domestic law or within the Strasbourg jurisprudence, that confirms the existence of the specific obligation contended for by the Claimant. In order to put the concession in context, I should say that Mr Hermer and Mr Lask simply say that the lack of precedent cannot of itself defeat the claim whether the court considers the matter by reference to the Convention or to the common law as informed by the State's International Law obligations. They contend that there is no precedent that can be taken to deny the existence of the obligation. At all events, the Secretary of State, supported by the Interested Parties, submits that what is contended for, whether upon the basis of the common law or the Convention, is a novel obligation unrecognised by precedent and not capable of being fashioned by the court by way of incremental or analogical development from existing principles. If accepted, it would, it is argued, give rise to a radically different legal culture from the culture that presently exists.

95. Mr Hermer contends that the obligation, which is dictated by the particular and possibly unique circumstances of this case, represents a component of the fundamental right of those potentially affected by the unlawful treatment to access to the court. He accepts, as I understood the argument, that an analogical development of established principles may be required to make good the existence of the obligation, but says essentially that the question is simply whether relief of the kind sought is necessary to secure a right of access to the court by those who may have been affected.

96. Much of the Claimant's Skeleton Argument is based upon the suggestion that the Convention yields the foundation for the obligation contended for, whereas Mr Hermer's oral argument focused, certainly at the outset, on the common law as its primary source. Compartmentalising the arguments about the juridical basis for the relief claimed in this way may not in reality be the most helpful approach since each may cross the boundary of the other. The arguments may have been presented in this way because of the perceived difficulties with reliance by the Claimant on the Convention (see paragraphs 212-225 below). Nonetheless, it is the way the submissions were fashioned and I will endeavour to address them in the same way. The common law is where Mr Hermer started, and indeed was where the Amended Grounds started in respect of the law, and it is where I will start.

The common law

97. The starting point for the purpose of this argument is the proposition that at common law everyone is entitled to the free and unimpeded access to the court. There is, of course, no dispute about the principle. The dispute is about whether it embraces, or should be developed to embrace, the obligation contended for in this case.

98. Mr Hermer reminded me of the oft-quoted words of Lord Diplock in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, where he said this:

> "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory."

99. It was a case that engaged the attention some of the most distinguished judges of its generation, with submissions from equally distinguished Counsel, and is at the very least memorable for the arresting manner in which Lord Denning MR engaged the attention of the reader of (and in those days, the listener to) his judgment by referring in its first sentence to "a sandwich-man wearing a top-hat". The case was all to do with arbitration and was far removed from the circumstances of this case. The principle enunciated by Lord Diplock is, of course, undisputed.

100. Mr Hermer also referred to what the Court of Appeal said in *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198. This was a case concerning the issue of censorship of a prisoner's correspondence with his solicitor. After referring to the principle of unimpeded access to the court, Steyn LJ, as he then was, giving the judgment of the court, said this:

> "Now we turn to a principle of greater importance. It is a principle of our law that every citizen has a right of unimpeded access to a court. In *Raymond v Honey* … Lord Wilberforce described it as a "basic right." Even in our unwritten constitution it must rank as a constitutional right. In *Raymond v. Honey*, Lord Wilberforce said that there was nothing in the Prison Act 1952 that conferred power to "interfere" with this right or to "hinder" its exercise. Lord Wilberforce said that rules which did not comply with that principle would be *ultra vires*. Lord Elwyn-Jones and Lord Russell of Killowen agreed with Lord Wilberforce. It is true that Lord Wilberforce held that the rules, properly construed, were not ultra vires. But that does not affect the importance of his observations. Lord Bridge of Harwich held that the rules in question in that case were ultra vires. He agreed with Lord Wilberforce on the basic principle.

> But he went further than Lord Wilberforce and said that a citizen's right to unimpeded access could only be taken away by express enactment. Lord Lowry agreed with both Lord Wilberforce and Lord Bridge. It seems to us that Lord Wilberforce's observations rank as the *ratio decidendi* of the case, and we accept that such rights can as a matter of legal principle be taken away by necessary implication.
>
> Equally clearly established is the important principle that a prisoner's unimpeded right of access to a solicitor for the purpose of receiving advice and assistance in connection with the possible institution of civil proceedings in the courts form an inseparable part of the right of access to the courts themselves. The principle was laid down by the European Court of Human Rights in *Golder v United Kingdom* … and it was clearly enunciated as part of our domestic jurisprudence by the Divisional Court in *Reg v Secretary of State for the Home Department, Ex parte Anderson* …." Goff L.J., in giving the judgment of the court, said:
>
> > "As we can see from *Raymond v Honey* … itself, an inmate can initiate civil proceedings without making any formal complaint, simply by despatching the necessary documents to the court by post. Such a communication cannot be stopped by the governor, and it is not therefore, under the standing orders, subject to the simultaneous ventilation rule: see order 5B 33(a). It must, we consider, be inherent in the logic of the decision of the House of Lords in *Raymond v Honey* that an inmate's right of access to a solicitor for the purposes of obtaining advice and assistance with a view to instituting proceedings should be unimpeded, in the same way as his right to initiate proceedings by despatching the necessary documents for that purpose by post is unimpeded."
>
> It follows that section 47(1) of the Act of 1952 does not authorise the making of any rule which creates an impediment to the free flow of communications between a solicitor and a client about contemplated legal proceedings. This, too, is a rule of fundamental importance."

101. Mr Hermer submitted that obtaining advice was an integral part of the right to access to a court because without the opportunity to take advice an individual cannot be said to have unimpeded access to a court. He suggested that this case was a stronger example of the need to recognise that proposition because the fact of ignorance of a possible right to redress on the part of those children and young people potentially affected by the unlawful restraints was based in large measure on the acts or omissions of the Defendant. I will return to this theme in due course.

102. Mr Hermer next drew attention to *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, another case raising issues about prisoners'

correspondence with their lawyers, Lord Bingham of Cornhill (with whom all their Lordships agreed) said this at paragraph 5:

> "Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment."

103. Mr Hermer places reliance on what Lord Cooke of Thorndon said in *Daly* at paragraphs 30 and 31:

> "First, while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.
>
> To essay any list of these fundamental, perhaps ultimately universal, rights is far beyond anything required for the purpose of deciding the present case. It is enough to take the three identified by Lord Bingham: in his words, access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. As he says authoritatively from the woolsack, such rights may be curtailed only by clear and

> express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment. The point that I am emphasising is that the common law goes so deep."

104. He next drew on *Regina v Secretary of State for the Home Department, Ex p. Simms* [2000] 2 AC 115. This case concerned a challenge to the policy of the Home Secretary which prevented a serving prisoner from speaking to a representative of the media in a face-to-face interview unless the journalist concerned was prepared to sign a written undertaking not to publish any part of the interview. The prisoners who sought to challenge the policy wanted to enlist the support of the media in pursuing cases that suggested that they had been victims of a miscarriage of justice. He drew attention to what Lord Steyn said at page 129:

> "For my part I am reasonably confident that once it is accepted that oral interviews with prisoners serve a useful purpose in exposing potential miscarriages of justice the Home Secretary would not wish his present policy to be maintained. But, if I am mistaken in that supposition, my view is that investigative journalism, based on oral interviews with prisoners, fulfils an important corrective role, with wider implications than the undoing of particular miscarriages of justice. Nevertheless, I must directly address the counter arguments advance by the Home Secretary.
>
> Latham J. was unimpressed with the reasons advanced in opposition to the applicants' limited claim in the first affidavit of Audrey Wickington. In my judgment the judge was right. The two new affidavits make a case that any oral interviews between prisoners and journalist will tend to disrupt discipline and order in prisons. In my view these affidavits do not take sufficient account of the limited nature of the applicants' claims, viz to have interviews for the purpose of obtaining a thorough investigation of their cases as a first step to possibly gaining access through the Criminal Cases Review Commission to the Court of Appeal (Criminal Division). The affidavits do not refute the case that until 1995 such interviews enabled a substantial number of miscarriages to be undone. Moreover, they do not establish that interviews confined to such limited purposes caused disruption to prison life. In any event, the affidavits do not establish a case of pressing need which might prevail over the prisoners, attempt to gain access to justice: see decision of the Court of Appeal in [*Leech*], the correctness of which was expressly accepted by counsel for the Home Secretary."

105. In *Regina (Anufrijeva) v Secretary of State for the Home Department and Another* [2004] 1 AC 604, the issue was whether income support, which ordinarily is payable to an "asylum seeker", ceased to be payable to the Appellant asylum seeker under the relevant regulation when her claim for asylum was recorded as having been determined by the Secretary of State even though the result of that determination had not been communicated to the Appellant. The majority of the House of Lords held

that communication of the decision was necessary before it could have legal effect. Mr Hermer invited specific attention to paragraphs 24-28 of the speech of Lord Steyn (with whom all their Lordships except Lord Bingham of Cornhill agreed) which I will not set out fully in this judgment, save perhaps the substance of paragraph 26 where he said this:

> "The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system …."

106. At paragraph 30 he said this:

> "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. In *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787, Lord Diplock explained the position:
>
> > "Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision."
>
> Where decisions are published or notified to those concerned accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication."

107. Mr Hermer contends that this decision is important because it demonstrates that knowledge of an adverse determination so that it can be challenged in court is a component of the fundamental constitutional right of access to a court. There can, he submits, be no logical difference between the requirement to know about an adverse decision in order to challenge it and a requirement that an individual should be told that his rights have been infringed so that he is put in a position to decide whether to challenge, or seek redress in relation to, such an infringement. He submits that the argument is even stronger when the victim has been actively misled by the perpetrator of the infringement as to the legality of the (unlawful) actions - something, he submits, that occurred in this case.

108. The final case to which Mr Hermer invited me to attach significance is *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin), a decision of Silber J which I was informed had been upheld by the Court of Appeal. As Silber J said in paragraph 1, it arose from a "challenge to the lawfulness of the policy of the Secretary of State for the Home Department … which came into effect on 11 January 2010 and which … gives individuals, who fall into certain specified categories and who have made unsuccessful claims to enter or to remain in the United Kingdom, little or perhaps no notice of their removal directions, which are the specific arrangements made for their removal from the United Kingdom."

109. Mr Hermer drew attention to paragraph 60 of Silber J's judgment which was in the following terms:

> "I have already explained that to have access to justice, the person subject to removal (other than those who wish to be removed and have consented in writing) need in the limited time available prior to removal to have a genuine opportunity to find a legal adviser who is ready, willing and able to provide legal advice and who (if appropriate) would after providing the relevant advice be ready, willing and able in the limited time available prior to removal to challenge the removal directions. Otherwise he or she would not have access to justice and. I have already explained … how this genuine opportunity was something which the Secretary of State explained in the 2007 policy document that the United Kingdom Border Agency needed to ensure."

110. Silber J's conclusions were as follows:

> 171. The main challenge of the claimant to the 2010 exceptions was that it abrogated the constitutional right of access to justice. This right means that every individual must be in a position to challenge a decision in the court. This right was acknowledged by the Secretary of State in the 2007 policy document which stated that "we need to ensure that persons, subject to removal enforced removals have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]". Further the Chief Executive of UKBA stated in a letter dated 1 March 2007 in relation to the minimum 72-hour time frame that "in setting the revised minimum time frames for notification of removal we have had to balance the need to ensure proper access to court with the public interest in establishing a robust removal process that makes sufficient use of limited detention facilities."
>
> 172. Unfortunately, the 2010 exceptions do not take account of "the need to ensure proper access to the courts" as they permit the Secretary of State to depart from the standard policy of giving a minimum of 72 hours' notice of removal including at least two working days with the last 24 hours being

> on a working day. The effect of the 2010 exceptions is that in practice in the limited time available between serving the removal directions and the actual removal, it is frequently almost impossible that somebody served with removal directions will be able to find a lawyer who would be ready, willing and able to provide legal advice within the time available prior to removal let alone in an appropriate case to challenge those removal directions. There is a very high risk if not an inevitability that the right of access to justice is being and will be infringed. Miss Rose suggested that the Secretary of State could have provided at her expense an independent lawyer to advise those served with abridged notice.
>
> 173. Unfortunately, there are no adequate safeguards built in to the present policy which would ensure that removal could not take place. If somebody had been given very short notice of removal and then in the time available before removal it was impossible for him to contact a lawyer and to obtain advice …."

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. He submits that this does not, or would not, give rise to a general principle that tortfeasors must inform their victims that their rights have been breached. He says, however, that the principle does, or should, apply in the very unusual circumstances of this case where (i) it is highly likely that those potentially affected will not know that what happened to them was, or may have been, unlawful, (ii) that their lack of knowledge is materially due to the commissions and omissions of the wrongdoer and (iii) that the victims were vulnerable children detained by the State. He submits that the court has never been presented with facts such as these before and that the common law develops as it meets new facts. Relief of the nature sought is required to facilitate access to justice in this case and to ensure that fairness is achieved.

112. There is a seductive quality to aspects of Mr Hermer's submissions. Whatever legal foundation there may be for the argument in favour of the relief sought, no court would wish to – or would wish to be seen to – reach a conclusion in a case relating to vulnerable children and young people that in any way prevented the revelation to them of actions taken in respect of them by the State which either were or may have been unlawful. For that reason also, whilst the practical implications of affording the relief sought in this case (see paragraphs 199-208 below) cannot be overlooked, it would be wrong for the court to be overly influenced by arguments on behalf of the agency of the State responsible for the unlawful actions that "it is all too difficult" now to inform the potential victims of the position. Equally, for my part, I am not greatly impressed with the argument, advanced by Mr Strachan and Mr Beer, that the alleged victims are all likely now to be adults and/or no longer detained in an STC and that, in consequence, there is, or should be, no obligation to take steps to inform them. To my mind, if I were to conclude that there had been an obligation on the part

of the Defendant to inform the alleged victims of the position when they were below the age of 18 (which must be the logic of what is asserted by the Claimant), I would not see the fact that they are now over that age as any reason not, albeit belatedly, to discharge that obligation. I do not see that consideration as offending the principle that the Defendant's decision not to take the steps requested by the Claimant must be judged by the position at the time the decision was taken and not at any earlier time.

113. The essential question is whether the obligation exists. Notwithstanding the attractive way the arguments have been deployed by Mr Hermer and indeed the strong factual background upon which they are based, I cannot accept that the law demands that the Defendant should undertake the kind of dissemination of information exercise that the claim for relief seeks. I have reached this conclusion both on the narrower approach of considering what the common law requires so far as access to justice is concerned and on a broader appraisal of the factual situation that underlies the claim - although to some extent the latter informs the former.

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.

115. Mr Strachan and Mr Beer submit that the statements of principle enunciated in cases such as *Raymond v Honey* and *R(Daly) v Secretary of State for Home Department* (see paragraphs 100-102 above) arose from situations where there was a potential hindrance or interference with the right to access justice. The same, it is argued, is to be said for *R (Medical Justice) v Secretary of State for the Home Department* (see paragraphs 108-110 above) where the concern about access to justice arose from the step of removing persons from the UK with insufficient notice to enable them to seek legal advice and/or to bring proceedings to challenge their proposed removal. These situations, it is argued, are far removed from the situation that obtains in this case that it would be impermissible, whether by analogy or incremental development, to utilise the statements of principle in those cases to accommodate the factual position in this case. That, in my judgment, must be so. There is, to my mind, a further reason why caution should be shown before developing the implications of these statements of principle along the lines contended for to which I will turn shortly (see paragraph 118 below).

116. Mr Strachan has argued that the principle of providing access to justice and legal advice has not been infringed here because the systems that existed in the secure settings for young people, particularly in STCs, were designed to ensure that there was a range of appropriate and different available methods by which the detainees could raise any concerns and seek legal advice about their rights. Whilst no system is perfect, he submits that the systems in place were proportionate and reasonable and such as to ensure that those who wanted to complain could do so with the opportunity of access to advice and support in relation to any such complaint and their treatment generally.

117. In terms of the actual provision of avenues for complaint and eventual access to the courts, I consider that these submissions are justified. For reasons I have given earlier

(see paragraphs 79-84 above), I do not think there can be any doubt that the systems in operation did not identify the widespread unlawful use of restraint that occurred, but that seems to me to be a different matter from saying that the systems in place were of themselves sufficiently inadequate to give rise to a positive obligation on the part of the Defendant now to endeavour to contact all those affected, or potentially affected, by what took place. There is some evidence of some complaints about restraint techniques (see paragraphs 86-87). What, of course, is not known is precisely what the nature of each of those complaints was and how each was resolved, if it was resolved.

118. I would, for my part, take the view that a court should be very reluctant to fashion, by analogical or incremental development of the common law or indeed by way of novel creation, a remedy designed solely for the circumstances of the present case without a clear appreciation of how the reasoning that leads to the grant of that remedy might be used as a springboard for suggesting expanded obligations of disclosure in other situations. Although it is said that there could be no warrant for contending, on the basis of granting relief in this case, that there would emerge a requirement that every tortfeasor should inform a victim of a potential claim, it is not difficult to envisage situations in which arguments to similar effect as those in this case could be advanced. Confining the situation, for present purposes, to events experienced by a child, then incidents at school, incidents within a local authority setting and incidents in a hospital or other medical setting are potential candidates for arguments to like effect. If one extended the potential landscape to that of an adult with a potential vulnerability (perhaps associated with a permanent or temporary mental or physical health issue or some learning disability), incidents within an educational, employment or medical setting could give rise to this kind of argument. It does not seem to me, as will be apparent from the scenarios I have foreshadowed, that the arguments to this effect would be confined to those who at the material time were detained by the State.

119. It could, as Mr Strachan rightly says, lead to a significant change in the legal culture from the present culture. There is some force in his submission that limitation periods in certain situations would become redundant or would serve no purpose. If any such change of culture is to take place it would, as it seems to me, be something that should emerge in a more considered way than by way of a piecemeal development of the common law designed to meet what may seem to be a strong case on the merits. I am troubled by the thought that granting a remedy of the nature sought in this case would represent the thin end of an ever-expanding wedge without a clear appreciation of where the expansion would lead.

120. All these concerns might, of course, have to be put to one side if it were the case that, without the kind of relief sought, those potentially affected by the unlawful conduct might never know, or never get to know, about it and about how it may have affected them in a way that enables them to do something about it. I do not consider that such a conclusion 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. I will deal with each separately although, as I have said, they are potentially interlinked.

Limitation

121. There is no need for a detailed exegesis on the law of limitation. However, on the basis that the most likely cause of action for any detainee who was restrained unlawfully would be a claim for personal injuries (including psychological damage) based upon an assault or series of assaults, the 3-year primary limitation period will not start running until he or she is aged 18 and then there is scope for extension of that period, either by virtue of section 14 or section 33 of the Limitation Act 1980, if the circumstances permit.

122. The kind of issues that might arise have already been considered by the courts in cases involving the long-term effects of child abuse: see *KR and others v Bryn Alyn Community Holdings Ltd* [2003] 1 QB 1441 (CA) and *A v Hoare* [2008] 1 AC 844 (HL).

123. I say nothing about what dates might be relevant to any individual's "date of knowledge" for the purposes of section 14 because it is a matter that may have to be resolved in an individual case, but it is not impossible to see arguments being advanced that it was not acquired, if at all, until some years after any relevant incident or incidents. There could, in any event, be the exercise of the discretion under section 33 which was emphasised in *A v Hoare* to be "unfettered" (*per* Lord Hoffmann at paragraph 40): see also *Horton v Sadler* [2007] 1 AC 307. The issue in any case might be what a detainee could reasonably have done to acquire the relevant knowledge. Whilst, as I have said, it will fall to be decided in an individual case whether, if it has expired, the primary limitation period should be extended, I do not think that Mr Strachan is necessarily right when he suggests that "many of these claims are very likely to be time-barred in any event" if by that he means that there is no prospect of any extension in any case.

Information in the public domain

124. What is in the public domain about the use of unlawful restraint in STCs and when did the information emerge into the public domain?

125. As I have observed previously (see paragraph 79), there is little doubt that until the two tragic deaths in 2004 nothing concerning the use of unlawful restraint emerged even into the semi-public domain of those who inhabited STCs, either as members of staff or as detainees. The families of the two boys concerned will have wanted answers and it is right to say that it was not for several years that the full, coronial process concerning both boys was completed. I will return to that shortly.

126. The first emergence of anything into the public domain concerning the unlawful use of restraint was the publication of the report of Mr Bleetman and Mr Boatman by the YJB in June/July 2005. I have dealt with what it said at paragraphs 61-62 above.

127. In February 2006 the Carlile Inquiry published its report which contained reference to the fact that restraint was used for GOAD unlawfully in STCs: see paragraph 65 above.

128. In April 2006 the Prisons and Probation Ombudsman finalised his report into Adam Rickwood's death although it was not published until May 2007. It raised the question of the unlawful restraint technique used.

129. In April/May 2007 the first inquest into Adam Rickwood's death took place. The circumstances of the inquest are set out fully in the judgment of Blake J in *Pounder* and I need not repeat it. Some evidence was given that suggested that restraint for GOAD was not lawful (see paragraph 55 above), but this was not a conclusively defined issue at the inquest.

130. The inquest into Gareth Myatt's death commenced in February 2007 and I have been told that Mr Waplington's report was made available publicly for the first time then. The conclusion of the inquest was delayed until May because of judicial review proceedings taken concerning its scope. Following the conclusion of that inquest the letter of 25 May 2007 was written (see paragraph 72 above).

131. It was in June 2007 that the steps with a view to the amendment of the STC Rules to permit restraint for GOAD were being taken. Indeed the draft amendment rules were laid before Parliament on 13 June 2007 and came into force on 13 July 2007. What happened thereafter is revealed in *C*.

132. In the meantime, and before *C* was decided in the Court of Appeal, the House of Lords and House of Commons Joint Committee on Human Rights published its report entitled "The Use of Restraint in Secure Training Centres" on 7 March 2008. That revealed the practice of restraint adopted during the relevant period.

133. Following the decision of the Court of Appeal in *C* in July 2008, Blake J heard *Pounder* in December 2008 and gave judgment on 22 January 2009 quashing the verdict in the first Adam Rickwood inquest.

134. I have not been made aware of any public references to the issues between then and the matter referred to in the next paragraph, but I understand that, following a Freedom of Information Act request originally made in May or June 2007, the 2005 PCC Manual was disclosed to the Claimant on 13 July 2010. This version of the Manual remained in use in STCs until 19 August 2010. In relation to that matter, Ms Dyson said this in her principal witness statement:

> "53. The Claimant refers in its grounds of claim to events in May 2007, when the YJB was asked under the Freedom of Information Act 2000 to release the 2005 PCC manual to CRAE. Initially, pages 1-59 were released by YJB, and the remaining content withheld. This was because the remaining content was believed to be exempt from disclosure by virtue of Section 31(1)(f) of the FOI Act. Information is exempt in this category if its disclosure would be likely to prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained. YJB were of the view that the withheld sections gave detailed descriptions of how the holds were applied and that the release of this detailed information might then be used to undermine security in such

> institutions. It was therefore believed by YJB that it was not within public interest to disclose the whole manual.
>
> 54. This genuine belief by those dealing with the request at the time led to the commencement of an appeal against a decision by the Information Commissioner to provide such disclosure, However the YJB ultimately decided that the 2005 Manual could be disclosed, and this occurred in July 2010."

135. On 27 January 2011 the jury in the second Adam Rickwood inquest made the following findings of fact as part of its narrative verdict:

> "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."

136. After this, correspondence between the Claimant and the Treasury Solicitor on behalf of the Defendant ensued about what, if anything, the Defendant was going to do about the situation that had come to be revealed.

137. I have not been shown any press or other media coverage of the events I have identified in paragraphs 126-135 or their consequences, but it would be very surprising if there had not been some such coverage given the nature of the issues involved, particularly the issues that would have emerged during the second Adam Rickwood inquest. Equally, I have not been shown any internet material that revealed what was becoming known. Again, it would be surprising if material of that nature did not emerge. We do live in an age when news travels fast and access to information (accurate or inaccurate) on the part of many people via the internet is readily available.

138. Because I have not been shown such material as may be available from these sources, I am not in a position to evaluate how informative it is or how accessible it may be to those who may have been detainees during the relevant period. I recognise that it would be highly unlikely that any such detainee would have discovered the source materials I have identified in paragraphs 126-135 above. However, a charity such as the Claimant is well aware of that material and it would have been well known to the Howard League for Penal Reform which set up the Carlile Inquiry. I cannot believe that it is not well known to other organisations or charities that put at the forefront of their activities the interests of disadvantaged children and young people. There will be Members of Parliament who will have interested themselves in the issues. Whatever I may decide on the issues before me in this case, the judgment itself will be available via the internet and may be the subject of comment and analysis.

139. It probably requires just one former detainee, looking back at his or her experience in an STC and having conducted the necessary preliminary inquiries, to pursue a well-publicised claim and others will be alerted to the potential of pursuing matters. I have

not been told of any difficulties that an individual former detainee would face in making a request about whether he or she is recorded as having been the subject of restraint for GOAD. (The records still exist at the moment because part of the Defendant's response to this claim is the disproportionate amount of time it would take to trawl the records to identify those who may have been affected.) Any affirmative answer to such a request might (not, I emphasise, necessarily would) open the door to making a claim for redress.

140. Those factors have persuaded me that it is not necessary at common law to fashion a remedy of the sort contended for by the Claimant in order to open the door to the courts for any former detainee who wishes to pursue redress even had I thought it open to me to do so. I am unable to accept the Claimant's submission that "meaningful access to justice for the child victims of unlawful restraint in STCs requires the Defendant to act … through the provision of information" in the manner suggested by the broad terms of relief sought.

141. It follows that, in my judgment, the decision of the Defendant not to take the steps requested by the Claimant cannot be characterised as unlawful *per se*. I will deal with the rationality argument later (see paragraphs 199-211 below).

142. I must now turn to consider whether a positive obligation on the part of the Defendant to inform those potentially affected by the unlawful actions arises from the requirements of the ECHR.

The European Convention on Human Rights

143. As I have indicated previously, the Defendant and the Interested Parties have raised the issue of the Claimant's "standing" for the purposes of this application. Specifically, in relation to arguments based upon the Convention, it is contended that the Claimant does not possess "victim status" and, accordingly, is precluded from relying upon Convention arguments. Mr Strachan is joined by Mr Beer in making that submission. I will return to it when I have addressed the merits of the case.

144. The essential difference between the arguments of the Claimant based upon the common law and those based on the Convention is that the Strasbourg jurisprudence does recognise, in certain circumstances, a positive obligation on the part of the State to take steps to ensure the fulfilment of Convention rights. The nub of the argument advanced is that the kind of step set out in the claim for relief is necessary to ensure that the rights of the former detainees of STCs under Articles 3, 6 and 8 of the Convention can fully and effectively be enjoyed.

145. The contrary argument on the merits, in a nutshell, is that (a) no feature of the Strasbourg jurisprudence has gone so far as to impose the kind of obligation contended for in this case and (b) it is not open to the domestic courts to move ahead of the European Court of Human Rights in this regard (invoking the principle in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323).

Article 6

146. Mr Hermer recognised that the arguments he advanced in reliance upon Article 6 mirror to a large extent the arguments advanced under the common law. I have

already indicated my conclusion that, under common law principles, a failure by the Defendant to disseminate the information that the Claimant says should be disseminated does not constitute an obstruction or impediment to seeking justice. The question now is whether the Strasbourg jurisprudence takes matters further in a way that places upon the Defendant a responsibility for furnishing former detainees with information that might lead to them making a claim for redress.

147. Reliance is placed on the well-known case of *Golder v United Kingdom* (1975) 1 EHRR 524 where it was acknowledged (at paragraph 26) that a hindrance in fact can contravene the Convention just as a legal impediment can do so. Mr Hermer also drew attention to the following passages which demonstrate that Article 6 is engaged not merely when proceedings have been begun but by any impediment on the route to the beginning of those proceedings.

> " ... The Commission, for their part, attach great importance to the expression 'rule of law' which, in their view, elucidates Article 6 (1).
>
> The 'selective' nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 (1) according to their context and in the light of the object and purpose of the Convention.
>
> This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a member, refers in two places to the rule of law: first in the Preamble. where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 which provides that 'every Member of the Council of Europe must accept the principle of the rule of law …'.
>
> And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.
>
> 35. …

> The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 (1) must read in the light of these principles.
>
> Were Article 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook.
>
> It would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."

148. *Golder* arose out of a request by a serving prisoner to the Home Secretary 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 that he (Golder) had been involved in a violent incident. The request was refused. This was declared to be a breach of Article 6.

149. Attention is drawn also to the well-known case of *Airey v Ireland* (1979-80) 2 EHRR 305 which emphasised the need for practical and effective access to a court because the "Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." Mrs Airey wanted a judicially ordered separation from her physically abusive husband, but was unable to do so because she lacked the financial means to retain a solicitor in the absence of the availability of Legal Aid. The European Court of Human Rights held this was a violation of her right to access a court for determination of her civil rights and obligations under Article 6.

150. Mr Strachan argues that *Golder* concerned <u>hindrance</u> of access to the courts and that, for the reasons already put forward under the common law, there is no hindrance in this case. He argues that *Airey* concerned the principle that rights under Article 6 must be practical and effective which, he submits, they are in the UK and the principle enunciated in the case does not extend to the type of proactive burden of, as he puts it, "encouraging potential litigation that the Claimant seeks".

151. I am bound to say that each case appears to me to be far removed from the circumstances that arise in the present case and, even if I was free to extend the principles enunciated in each, I do not consider that I could extend them to accommodate this case. Mr Strachan is, in my view, right to submit that there is

nothing in Article 6 or in any identified case in Strasbourg which holds that the right to a fair trial also incorporates a proactive duty on the State to identify potential claimants and then to notify those persons of the possibility of making claims. That submission is, of course, made in the context of a case where the State is the alleged wrongdoer.

152. Mr Hermer is on arguably stronger ground when inviting attention to cases where a positive obligation to provide information in the context of proposed or actual litigation is concerned. He drew attention to *McGinley and Egan v. The United Kingdom* (1999) 27 EHRR 1 where the two applicants, who had been stationed on or near Christmas Island at the time of the British nuclear tests in 1958, complained that their rights to a fair hearing before the Pensions Appeal Tribunal (PAT) had been violated by the withholding of documents which would have helped them to ascertain whether there was a link between their health problems and exposure to radiation. The application was rejected because neither applicant had utilised a procedure available to them within the procedure of the PAT. However, the European Court of Human Rights said this of the obligation of disclosure:

> "2. Compliance
>
> 85. The Court will consider whether the non-disclosure of documents operated to deprive the applicants of effective access to the PAT or of a fair hearing before that tribunal.
>
> It observes that, in order to succeed before the PAT, the applicants had to raise, on reliable evidence, a reasonable doubt regarding the question whether or not their health problems were causally linked to their service in the armed forces. Since they alleged that the various conditions from which they suffered had been caused by their exposure to harmful levels of radiation during the Christmas Island tests, it was necessary for them to adduce reliable evidence giving rise to a reasonable doubt, *inter alia*, that the MOD's statement that they had not been so exposed was incorrect.
>
> 86. The Court considers that, if it were the case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing before the PAT that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6(1)."

153. However, this does not seem to me to take matters far enough to support the contention being advanced. The court was there saying little more than that, when an issue has been raised in the context of legal proceedings, there is an obligation of full and fair disclosure in relation to that issue in order for a fair hearing to take place. It does not support the existence of an obligation of the type contended for by the Claimant.

154. Other cases referred to in the Skeleton Argument and the Grounds, e.g., *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, do not support the existence of such an obligation under Article 6.

155. Mr Hermer also relied upon the recent case of *R.R. v. Poland* (2011) 53 EHRR 31 in support of the contention that Strasbourg recognises the right of an individual to information from the State in certain circumstances. The domestic law of Poland, which permits abortion in certain circumstances, provides under The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act 1993 that "[the] State and local administration shall ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening ailment." The applicant complained to the European Court of Human Rights that, as the result of the conduct of various doctors she consulted, she was denied access to prenatal genetic tests that would have confirmed that the foetus she was carrying had significant genetic abnormalities and that this gave rise, *inter alia*, to breaches of her rights under Articles 3 and 8. The Court held that the State had failed the applicant in relation to the positive obligations owed to her concerning the provision of prenatal information and her rights under each Article had been breached.

156. The principle of unimpeded access to a court is, of course, clear. Mr Hermer drew attention to the case of *R.R. v. Poland* as part of his argument under Article 6 and, as I understood that argument, it was simply to the effect that this is another example of a recognition by the Strasbourg court of a right to information from the State that, had it been given, would have enabled the applicant to exercise her own rights under articles 3 and 8 to obtain an abortion. Mr Strachan's response, in a nutshell, is that there is nothing unusual about the Strasbourg court recognising the right to information, but that it is not what the present case is about. It is, he submits, about the State being required to undertake a positive duty to provide an individual with information that he or she is not actively seeking, an obligation the existence of which, he submits, the Convention does not support.

157. In my judgment, Mr Strachan's argument is correct and that it would be impossible (irrespective of any application of the *Ullah* principle as to which see paragraph 183 *et seq* below) to spell out of the case of *R.R. v. Poland* any obligation of the sort contended for in this case.

158. After the conclusion of the hearing before me Mr Hermer drew my attention to the case of *McGowan (Procurator Fiscal, Edinburgh) (Appellant) v B (Respondent)* [2011] UKSC 54, the judgments in which having been handed down by the Supreme Court on 23 November. I received written submissions about the implications of the decision in that case.

159. The case arose from a police interview of a suspect without the presence of a solicitor and the issue was identified by Lord Hope of Craighead in the following way:

> "At no stage either before or during the police interview did the respondent receive advice from a lawyer on the question whether he should exercise his right of access to a solicitor before being questioned or during the questioning. Nor was he given an opportunity to seek legal advice on this matter before

> he decided whether or not he should exercise it. The question is whether he can be taken to have validly waived his right of access to a lawyer without having received advice from a lawyer on this point. In other words, does article 6(1) read with article 6(3)(c) of the Convention require, as a rule, that a person must have had legal advice before he can be taken to have waived that right?"

160. In expressing his conclusion (with which the majority agreed) Lord Hope said that "[the] jurisprudence of the Strasbourg court does not support the proposition that, as a rule, the right of access to legal advice during police questioning can only be waived if the accused has received advice from a lawyer as to whether or not he should do so." The issue is whether, on a consideration of all the facts and circumstances, the court is satisfied that it would be fair for the prosecution to lead and rely upon evidence of the answers that the interviewee gave during his police interview, the vulnerability of the interviewee being one factor to consider. In relation to those issues Lord Hope said this:

> "46. I do not think that the Strasbourg jurisprudence provides any support for the Lord Justice Clerk's statement in *Jude v HM Advocate* 2011 SLT 722, para 32 that the argument for the Crown that the appellants' right of access to a lawyer was capable of being waived failed because their consent to be interviewed was not informed by legal advice …. I would hold therefore that the statements in *Jude* … which indicate that there is such a rule should be disapproved. Where the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right, that he understands what the right is and that it is being waived and that the waiver is made freely and voluntarily.
>
> 47. There is however a theme that runs through the Strasbourg court's decisions which indicates that access to a lawyer may well be a necessary prerequisite of a valid waiver in some cases …. The court must be alive to the possibility that the words of the caution, and advice that the detainee has the right to a private consultation with a solicitor before any questioning begins and at any other time during such questioning which is required by section 15A(3), may not be fully understood by everyone. *Comprehending the Scottish caution: Do offenders understand their right to remain silent?* David J Cooke and Lorraine Philip (1998) Legal and Criminological Psychology 13, was written some time ago and does not fully reflect current practice. But it serves as a warning that it should not be taken for granted that everyone understands the rights that are being referred to. People who are of low intelligence or are vulnerable for other reasons or who are under the influence of

> drugs or alcohol may need to be given more than standard formulae if their right to a fair trial is not to be compromised."

161. Mr Hermer invites attention to what Lord Dyson said in the following terms:

> "66. As Lord Hope points out … there are several decisions of the court where all that was required for the purposes of a valid waiver was proof that the accused had been informed that he had the right to have a lawyer present when he was interviewed and he refused to exercise that right. Thus in *Yoldaş v Turkey*, for example, the accused was informed of his right to be assisted by a lawyer while he was in custody and he refused a lawyer's services. That was enough to persuade the court that the accused had sufficient foresight of the consequences of his decision to refuse the assistance of a lawyer to constitute a valid waiver. It was not necessary to go further and be satisfied that the accused understood precisely how the lawyer might have been able to assist him and from what pitfalls he might have been able to protect him. That could not have been done, not least because it would have been impossible to predict what course the interview would take.
>
> 67. On the other hand, if there are reasonable grounds for believing that the accused is vulnerable in some way and that he does not understand in general terms that a lawyer might be able to assist him at the interview, then it is not enough for the police merely to ask him whether he wishes to have the assistance of a lawyer. Additional safeguards are necessary to ensure that such a person does not waive his right to legal assistance at the interview without a proper understanding of the significance of what he is doing. The most obvious way of achieving this is by the provision of legal advice on the question of legal assistance. Depending on the circumstances, however, there may be other ways of ensuring that the accused understands the implications of refusing the assistance of a lawyer at interview.
>
> 68. It will be a question of fact in each case whether the accused can reasonably understand the implications of refusing the assistance of a lawyer at police interview. The ultimate question is what fairness demands in the particular case. Lord Hope has referred to a number of cases … where for one reason or another there were grounds for doubting whether an accused had sufficient understanding of the implications of refusing the assistance of a lawyer. Another case where the court held that the accused had not waived his article 6 rights because it had not been established that he would have understood the implications of his doing so is *Panovits v Cyprus* (Application No 4268/04) (unreported) 11 December 2008. At para 71, the court said:

> "Moreover given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning the investigation of a murder…"
>
> 69. The court had earlier emphasised "the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings" (para 68). He was 17 years of age at the material time."

162. Mr Hermer contends that the decision of the Supreme Court shows that whilst an express waiver of Article 6 rights will usually be sufficient, the Strasbourg jurisprudence shows that in certain circumstances advice from a lawyer will be necessary before that waiver is valid. He submits that this demonstrates the recognition of an ancillary right, imposing a positive obligation on the State, designed to ensure that the underlying right to a fair trial is protected. It also demonstrates, he argues, that this ancillary right is not of general application, but is one which arises as a result of the vulnerability of the individual concerned. He submits that there are clear parallels with the obligation for which the Claimant contends in the present case and that the reference to "fairness" resonates with the Claimant's reliance on the common law principle of fairness as underpinning the obligation for which it contends.

163. Mr Strachan and Mr Beer take issue with this. Mr Strachan emphasises that *McGowan* is concerned with the circumstances in which a well-established right of access to legal advice can be waived by an individual without having taken legal advice and is, therefore, a case concerning what may amount to a valid waiver of a specific right that the Strasbourg court already recognises as part of the right to a fair criminal trial. It is not, he submits, a case about the recognition of a new duty whereas the Claimant's claim concerns "the creation of a novel positive ancillary obligation which has never been recognised or articulated in any case (domestic or Strasbourg)". He also contends that if this novel duty exists, there would be no logical basis for confining it solely to being owed to vulnerable children in custody, but to any person depending on his or her state of knowledge and all other factors including his or her relative vulnerability. He also submits, and is supported specifically on this issue by Mr Beer, that the decision in *McGowan* undermines the Claimant's case by re-affirming the applicability of the *Ullah* principle to Convention rights and Strasbourg jurisprudence.

164. With respect to Mr Hermer's argument, I can find nothing in the judgments in *McGowan* that supports the proposition that Article 6 confers the basis for this court recognising the existence of the obligation for which he contends in this case. I will be dealing with the *Ullah* principle below (see paragraphs 183 *et seq*).

165. Those then are my conclusions on the Article 6 arguments. I will consider whether the UN Convention on the Rights of the Child 1989 ('UNCRC') makes a difference to the view to be taken of Article 6 when I deal with its implications under Articles 3 and 8 below (see, in particular, paragraphs 179-183).

Articles 3 and 8

166. The extent to which Articles 3 and 8 are engaged by the use of restraint and/or distraction techniques on detainees in STCs was considered fully by the Court of Appeal in *C*: see paragraphs 57-82, 84 and 87 and the helpful summary in *Pounder* at paragraph 40. In short, for this purpose, each Article is engaged.

167. At paragraphs 60-61, Buxton LJ draws attention to the influence that the UNCRC should have on the State's Article 3 responsibilities towards a child, a matter upon which Baroness Hale of Richmond had placed considerable emphasis in *R (R) v Durham Constabulary* [2005] 1 WLR 1184, at paragraph 26, and in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, at paragraphs 84 and 86.

168. Further emphasis of the importance of the UNCRC in the context of Article 8 of the ECHR is given in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, *per* Baroness Hale of Richmond JSC at paragraphs 21-33 and Lord Kerr of Tonaghmore JSC at paragraph 46, in particular. The essential proposition, in a nutshell, is that in making decisions concerning children, their best interests will be a primary consideration.

169. Mr Hermer has drawn attention to a number of features of the UNCRC which, he submits, assist in affording the basis for concluding that a positive obligation on the part of the Defendant to disseminate information in the manner contended for arises under the ECHR as informed by the UN Convention. He draws attention to Article 3 of the UNCRC first which is in the following terms:

> 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.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

170. Then he draws attention to Articles 19, 37 and 39 which are in the following terms:

> **Article 19**
>
> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or

abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse;

> torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

171. Mr Hermer also draws attention to certain of the General Comments made by the Committee on the Rights of the Child which are published as its interpretation of the content of human rights provisions. The first to which he referred was General Comment Nº 5 (2003) entitled 'General measures of implementation of the Convention on the Rights of the Child' and to paragraphs 24 and 25 in particular:

> **V. JUSTICIABILITY OF RIGHTS**
>
> 24. For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.
>
> 25. As noted in paragraph 6 above, the Committee emphasizes that economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.

172. The next matter to which he referred is derived from General Comment Nº 8 (2006) entitled 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment':

> 43. Where, despite prohibition and positive education and training programmes, cases of corporal punishment come to light outside the family home - in schools, other institutions and forms of alternative care, for example - prosecution may be a reasonable response. The threat to the perpetrator of other disciplinary action or dismissal should also act as a clear deterrent. It is essential that the prohibition of all corporal punishment and other cruel or degrading punishment, and the sanctions that may be imposed if it is inflicted, should be well disseminated to children and to all those working with or for

> children in all settings. Monitoring disciplinary systems and the treatment of children must be part of the sustained supervision of all institutions and placements which is required by the Convention. Children and their representatives in all such placements must have immediate and confidential access to child-sensitive advice, advocacy and complaints procedures and ultimately to the courts, with necessary legal and other assistance. In institutions, there should be a requirement to report and to review any violent incidents.

173. Finally he referred to paragraph 89 of General Comment Nº 10 (2007) entitled 'Children's rights in juvenile justice':

> 89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:
>
> - Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
>
> - Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
>
> - Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
>
> - The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
>
> - *Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of*

> *the staff who use restraint or force in violation of the rules and standards should be punished appropriately*;
>
> - Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;
>
> - *Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms*;
>
> - Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

174. He placed particular emphasis on those provisions in paragraph 89 which, for convenience of reference, I have italicized.

175. All those features of what might be termed the "enhanced consideration" that must be given by the State to the interests of children, when taken against the background of what must have been breaches of Articles 3 and 8 of the ECHR as a result of what happened within the STCs during the relevant period, Mr Hermer submits, should give rise to the positive obligation on the part of the Defendant to inform former detainees of the potential implications of their treatment. Whilst there are subtleties of argument about when and how these factors should have been considered by the Defendant when responding to the Claimant's invitation to take action (as to which see paragraph 210 below), 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.

176. Without reciting in detail the material he relied upon as demonstrating that Strasbourg jurisprudence does impose upon States certain positive obligations in order to ensure that Convention rights are real and not illusory, Mr Hermer drew attention (in addition to the cases to which I have already referred), *inter alia*, to *Storck v Germany* (2006) 43 EHRR 6, *Kroon v The Netherlands* (1994) 19 EHRR 263, *Botta v Italy* (1998) 26 EHRR 241, *Osman v UK* (1998) 5 BHRC 293 and *Guerra v Italy* (1998) 26 EHRR 357. In the domestic jurisdiction he drew attention in this context to *E v Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2009] AC 536.

177. The thrust of Mr Hermer's submissions can be summarised thus: State agents breached the Article 3 and Article 8 rights of those detainees made the subject of unlawful force, the State has also violated those rights by failing to have in place an adequate administrative framework to prevent the abuses taking place (e.g., by an adequate monitoring or inspection system), it has misrepresented the lawfulness of what occurred and has compounded those failures by, it is suggested, failing properly to investigate the allegations of breaches of Article 3 and failing to offer the victims appropriate compensation. He submits that unless the Defendant takes the steps sought in this application (or proposes any other sensible alternative) the State will remain in flagrant breach of its obligations under the Convention and, at the very least, the Defendant should enable the victims to take steps to compel the State to do so by providing them with the necessary information. Again, the context, of course, is the detention by the State of children and young persons.

178. In relation to the suggestion that there has been a failure to investigate properly he relies upon *R (AM) v SSHD & Kalyx Ltd* [2009] EWCA Civ 219.

179. Whilst Mr Strachan does not (or, at least, realistically could not) challenge the first of the propositions referred to in paragraph 177 above, he submits that a system was in place to prevent abuses and which enabled complaints to be made if they were sought to be made. He submits that a variety of mechanisms for children to obtain advice and support and to bring complaints and claims existed and that the provision of this system was a proportionate response to the need to provide such a system (including the enhanced need to do so because the potential victims were children). He suggests that there is evidence that complaints were made pursuant to this system and that, accordingly, it cannot be said to have been a wholly inadequate system notwithstanding the fact that, without doubt, it took several years for the full picture to emerge. So far as the investigative obligation is concerned, he submits that (a) the need will arise only when a victim of a credible breach of Article 3 asserts that there has been such a breach and (b) in any event that the obligation will ordinarily be met by the availability of criminal and civil proceedings. He submits that there is nothing in *Kalyx* that dictates the need for any such inquiry (and points, in particular, to what Elias LJ said at paragraph 112) and, of course, says that no inquiry is sought in the present application. Compensation is, of course, one aspect of redress and Mr Strachan argues that, since access to justice has not been barred by anything done by the State, the opportunity to obtain compensation still exists, subject to any limitation issue. This is also his effective answer to the suggestion that the UNCRC dictates the existence of a positive obligation on the part of the Defendant to inform former detainees of the position as part of the Article 6 requirement of securing a practical access to justice.

180. Plainly, I must confine myself to the issues before me. I express no view on whether, had an application been made for judicial review of a refusal to institute an independent inquiry, it would or would not have succeeded. There is no doubt that the Carlile Inquiry looked at matters in this context in some detail and the House of Lords and House of Commons Joint Committee on Human Rights also went into considerable detail. I do not say that that would necessarily have met the "parasitic" obligation of an inquiry into these matters, but it would be difficult to say that the general issues that have given rise to the concerns that have emerged in this case have not been subject to public investigation and analysis.

181. Nonetheless, it would equally be difficult to say that the fullest explanation has yet emerged for the way matters turned out as they did and why such little complaint seems to have been made about what does appear to have been the widespread use of unlawful force over a prolonged period. The essential question, however, is whether these concerns must be met now by the kind of remedy sought in this case.

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. Mr Beer was, I think, justified in saying that a case such as *Guerra v Italy* (1998) 26 EHRR 357, where a positive obligation to provide information to individuals was placed on the State in the particular circumstances, is a long way removed from the circumstances of this case.

183. That being so, even if the essential basis for supporting the grant of a remedy of the kind sought in this case was made out (which for the reasons I have given for rejecting it at common law and which for the reasons given in the submissions of Mr Strachan and Mr Beer on the Convention arguments, I do not think that it can), the Claimant's argument would also, in my view, run up against the buffers of the *Ullah* principle. This principle finds its expression in *R(Ullah) v Special Adjudicator* [2004] 2 AC 323 where Lord Bingham of Cornhill (with whom Lord Steyn, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell agreed) said this at paragraph 20:

> "20. In determining the present question, the House is required by *section 2(1) of the Human Rights Act 1998* to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295*, para 26. 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. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states 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 by national courts, 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."

184. This principle has found further expression in *Regina (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust and others intervening)* [2008] 1 AC 153 where Baroness Hale of Richmond said this:

> "While it is our task to interpret the *Human Rights Act 1998*, it is Strasbourg's task to interpret the Convention. It has often been said that our role in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead: no more, as Lord Bingham of Cornhill said in … *Ullah* … but certainly no less: no less, as Lord Brown says, at para 106, but certainly no more. If Parliament wishes to go further, or if the courts find it appropriate to develop the common law further, of course they may. But that is because they choose to do so, not because the Convention requires it of them."

185. Lord Brown of Eaton-under-Heywood said this:

> "105. The ultimate decision upon this question, of course, must necessarily be for the European Court of Human Rights. As Lord Bingham of Cornhill observed in … *Ullah* … "the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court." In the same paragraph Lord Bingham made two further points: first, that a national court "should not without strong reason dilute or weaken the effect of the Strasbourg case law"; secondly that, whilst member states can of course legislate so as to provide for rights more generous than those guaranteed by the Convention, national courts should not interpret the Convention to achieve this: the Convention must bear the same meaning for all states party to it. Para 20 ends: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."
>
> 106. I would respectfully suggest that last sentence could as well have ended: "no less, but certainly no more." There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual *can* have the decision corrected in Strasbourg. *Ullah*, of course, was concerned with the particular scope of individual Convention rights, there article 9, in the context of removing non-nationals from a member state. Lord Bingham's cautionary words must surely apply with greater force still to a case like the present. As the Grand Chamber observed in *Bankovic v Belgium* …

> 'the scope of article 1 … is determinative of the very scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection.'"

186. In *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] 1 WLR 2435 the *Ullah* principle was re-visited. Having referred to Lord Bingham's opinion in *Ullah* and to his opinion in *Brown v Stott* [2003] 1 AC 681, Lord Hope of Craighead DPSC said this:

> 19. …. The consistency between [the passage quoted from *Brown v Stott*] and what he said in [*Ullah*] shows that Lord Bingham saw this as fundamental to a proper understanding of the extent of the jurisdiction given to the domestic courts by Parliament. Lord Kerr JSC doubts whether Lord Bingham intended that his discussion of the issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they had been pronounced upon by Strasbourg: para 128, below. I, for my part, would hesitate to attribute to him an approach to the issue which he did not himself ever express and which, moreover, would be at variance with what he himself actually said. Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.
>
> 20. That is why, the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies."

187. Lord Brown of Eaton-under-Heywood said this:

> "86. Like Lord Hope DPSC, I too would in the present context give full weight to what has come to be known as the *Ullah* principle …. It would seem to me quite wrong for this court now to interpret article 6 of the Convention as laying down an absolute exclusory rule of evidence that goes any wider than Strasbourg has already clearly decided to be the case. And whatever else one may say about the Strasbourg jurisprudence, it can hardly be regarded as deciding the present issue clearly in the accused's favour."

188. Mr Hermer has contended that his argument does not founder on the *Ullah* principle for two reasons: first, he submits that the principle cannot mean that the domestic courts can only identify a specific obligation under the Convention if precisely the

same obligation has already been identified by Strasbourg. This approach, he argues, would render the objective of "bringing rights home" under the Human Rights Act 1998 redundant and it would also fail to reflect the extensive post-Human Rights Act jurisprudence where the domestic courts have applied principles from the Strasbourg jurisprudence to different facts to establish a breach of the Convention. He relies on *R (Purdy) v DPP* [2009] UKHL 45 in support of this contention. Second, he says that the Claimant is not asking the court to identify a right that Strasbourg itself would not recognise. The critical question, he suggests, is whether the Strasbourg Court would recognise the right as falling under the Convention? He draws attention to what Lord Dyson said in *Ambrose v Harris* when he said this:

> "100. I accept, however, that there is no "clear and constant" Strasbourg jurisprudence on the point. So the obligation in section 2 of the Human Rights Act 1998 to take account of judgments of the European court does not compel a decision one way or the other …. Nor is this a case where, although Strasbourg has not expressly decided the point, it can nevertheless clearly be deduced or inferred from decisions of the European court how the court will decide the point if and when it falls to be determined.
>
> 101. [Lord Dyson referred to the various statements of the *Ullah* principle.]
>
> 102. But these statements are not entirely apposite where Strasbourg has spoken on an issue, but there is no clear and constant line of authority. That is the case here because there is only one case in which the European court has expressly decided that the Salduz principle [Note: *a reference to Salduz v Turkey (2008) 49 EHRR 421*] does not apply in relation to the interrogation of a suspect who is not in detention …. Moreover, despite the view I have expressed earlier in this judgment, I accept that it is *arguable* that the language of para 55 of the judgment in Salduz's case … can and should be interpreted as holding that the Salduz principle does apply in such circumstances.
>
> 103. So what should a domestic court do in this situation? Recognising that it is our duty to give effect to the domestically enacted Convention rights, I think that the correct approach was suggested in the judgment of Lord Mance JSC in Smith's case [2011] 1 AC 1, para 199:
>
> > "However, it is our duty to give effect to the domestically enacted Convention rights, while taking account of Strasbourg jurisprudence, although caution is particularly apposite where Strasbourg has decided a case directly in point or, perhaps, where there are mixed messages in the existing Strasbourg case law and, as a result, a real judicial choice to be made there about the scope or application of the Convention."

> 104. The position here is that Strasbourg has decided a case which is directly in point …. The most that can be said on behalf of the accused … is … it is *arguable* that there are mixed messages in the Strasbourg case law as to whether the Salduz principle applies to evidence obtained from a suspect who has been interrogated without access to a lawyer outside the police station. To use the words of Lord Mance JSC, it follows that there is a real judicial choice to be made. Whether fairness requires the Salduz principle to apply in both situations raises questions of policy and judgment on which opinions may reasonably differ and as to which there is no inevitable answer ….
>
> 105 In these circumstances, I consider that caution is particularly apposite and that the domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. If it were clear, whether from a consideration of the Strasbourg jurisprudence or otherwise, that the Salduz principle applies to statements made by suspects who are not detained or otherwise deprived of their freedom of action in any significant way, then it would be our duty so to hold. But for the reasons that I have given, it is not clear that this is the case. In these circumstances, we should hold that the Salduz principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way."

189. Mr Hermer accepts that the claim is novel, but submits that that does not mean that the Strasbourg court would deny that the Convention provides for the relief for which he contends. He seeks to rely on the approach of Lord Dyson in *Ambrose v Harris*.

190. I am unable to accept that the normal application of the *Ullah* principle can be avoided in this way or, if it is being suggested, that Lord Dyson's approach departs from or dilutes in any way the well-established *Ullah* principle. Mr Strachan is, in my judgment, right when he submits that the expression "bringing rights home" simply means that Convention rights should be enforced in the domestic courts rather than having to go to Strasbourg to enforce them: see *R(SB) v Denbigh High School Governors* [2007] 1 AC 1000 at paragraph 29, where Lord Bingham of Cornhill said "the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg." The expression does not support the enlargement of Convention rights in a way not previously recognised in Strasbourg jurisprudence. Mr Beer, in my view, put it well and succinctly when he said that the domestic courts can, of course, apply existing principles of the Strasbourg jurisprudence to new facts, but there is no existing principle that the Claimant can point to in support of the present claim under the Convention. Whilst it is correct, he accepts, that the European Court of Human Rights has recognised that the Convention may impose positive obligations on Member States in certain circumstances, that is no basis for concluding that a positive obligation should be

created now on the basis of the facts in this case. Here, he argues, there is no "clear or constant" line of Strasbourg authority in support of the proposed obligation on the part of the Defendant or, alternatively, there is no basis for saying that the European Court of Human Rights would decide in favour of this approach if confronted with the facts of this case. On that basis, he submits, this court is being asked to engage in what he described as a "Strasbourg development" which is not permitted on the basis of the *Ullah* principle.

191. That does appear to me to be the correct analysis even allowing for the fact that the facts that have emerged in this case are arguably novel. As Baroness Hale of Richmond said in *Al-Skeini* (see paragraph 184 above), if "Parliament wishes to go further, or if the courts find it appropriate to develop the common law further", that, of course, may occur, but it is a matter of domestic choice rather than compulsion based on the Convention.

192. So far as reliance on *R (Purdy) v DPP* is concerned, Mr Hermer contends that the House of Lords in that case held that the lack of a policy statement from the DPP indicating in what circumstances he would exercise his discretion to prosecute in cases of alleged assisted suicide was not "in accordance with the law" for the purposes of Article 8(2). Ms Purdy, he says, "could not identify a precise obligation in this regard from the Strasbourg case law, but relied successfully on the principles laid down by the European Court of Human Rights to establish the obligation on the facts of her case". I confess to having had some difficulty in following that specific argument in relation to the present case.

193. An important first issue in *Purdy* was whether the House of Lords was free to depart from its earlier decision in *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800 given the contrary view formed by the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 that the right to respect for private life in article 8(1) is engaged in the situation that confronted the House. Lord Hope of Craighead, who gave the leading speech and with whom all their Lordships agreed on the main issues, said this:

> "34. The House is, of course, free to depart from its earlier decision and to follow that of the Strasbourg court. As Lord Bingham said in [*Ullah*] it is ordinarily the clear duty of our domestic courts to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights as the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles that, as the highest authority on the interpretation of those rights, it lays down. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 which was issued on 26 July 1966 states that, while the House will still treat its former decisions as normally binding, it would depart from a previous decision when it appeared right to do so. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 88, Lord Hoffmann drew attention to the evil which would follow if the power to overrule previous decisions of the Privy Council were exercised too readily: see also *R v Kansal (No 2)* [2002] 2 AC 69, paras 20-21, per Lord Lloyd of Berwick. But it is obvious

> that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights."

194. However, once that first issue was resolved and it was acknowledged that the right conferred by Article 8(1) was engaged, the requirement of Article 8(2) is that there should be no interference with that right except as is "in accordance with the law". That required the House to consider (i) whether there was a legal basis in domestic law for any such interference, (ii) whether the law or rule in question was sufficiently accessible to the individual affected and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he could regulate his conduct without breaking the law and (iii) whether it was being applied in a way which was arbitrary or disproportionate, all these principles having been enunciated in a number of decisions of the European Court of Human Rights. The House decided that the Code for Crown Prosecutors issued by the DPP under section 10 of the Prosecution of Offences Act 1985, which was to be regarded as forming part of the law in accordance with which an interference with the Article 8(1) right might be held to be proportionate and justified, did not satisfy the Article 8(2) requirements of accessibility and foreseeability for a person seeking to identify the factors which were likely to be taken into account by the DPP in exercising his discretion under section 2(4) of the 1961 Act.

195. Against that background the order made by the House was to the effect that the DPP should promulgate an "offence-specific policy" identifying the facts and circumstances which he would take into account in "deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act." Lord Neuberger of Abbotsbury summarised the effect and basis of the order in this way:

> "I would also like to express my agreement with Lord Hope when he says that the order which he proposes reflects the fact that our decision is simply that the article 8 rights of Ms Purdy entitle her to be provided with guidance from the Director as to how he proposes to exercise his discretion under section 2(4) of the 1961 Act. As judges, we are concerned with applying the law, not with changing the law: that is a matter to be decided by Parliament."

196. I am unable to see how the approach in that case could avail the Claimant (or those on behalf of whom the Claimant seeks to act) in the present case. The House of Lords was simply applying well-established Strasbourg-generated principles to the question of whether the State (through the DPP) had fulfilled an established legal obligation. It did not involve the establishment of a new obligation which is what is sought in this case.

197. Accordingly, I restate my conclusion 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.

Conclusion

198. For the reasons I have given, I am not persuaded that the common law or the Convention dictates that the Defendant should take the steps suggested by the Claimant that he should take in relation to the dissemination of information to former detainees. That means that I cannot characterise the refusal to do so on his behalf as unlawful.

Rationality

199. That conclusion does not necessarily mean that it would be impossible to characterise the decision as irrational in *Wednesbury* terms. Merely because the action of disseminating the relevant information is not required by the law does not mean that there is no obligation to consider whether some action is necessary if only as a matter of good and fair administration. The fact that those potentially affected were vulnerable children and young persons would, in my judgment, at least dictate the need for the Defendant to consider whether something ought to be done. It seems to me that it is at this point that the potential practical implications are at least a factor to be considered, though not necessarily the governing factor. But that is a matter of judgment. The practical implications have been raised. It is necessary, in the first instance, to see how they came to be raised.

200. The correspondence between the Claimant's solicitors and the Treasury Solicitor during the autumn of 2010 focused largely on what was the position of the Claimant at the time, namely, that there should be a "public judicial inquiry" into what had occurred. As part of the argument advanced by the Claimant at that stage it was suggested that steps should be taken to identify incidents of restraint where children had arguably been restrained in breach of Article 3 and then to inform those children and/or their carers that they could, if they wished, take legal advice about whether they were entitled to "just satisfaction" for any such breach and so that they could, again if they wished, participate effectively in a public inquiry into their treatment.

201. The position taken on behalf of the Defendant was that there were no arguable breaches of Article 3 in the past, but even if there were there was no requirement for an independent inquiry, any claims for an alleged breach would be time-barred, it was too late to seek an independent inquiry and that the Claimant would, in any event, not have "victim status" for the purpose of Article 3 in order to bring judicial review proceedings. Those were the points essentially repeated when the focus of the Claimant's position became more directed towards the relief sought in these proceedings. It was essentially the rejection of that approach in the correspondence that constitutes the decision under challenge in these proceedings. That rejection did not deal with the common law arguments (because they had not been articulated on behalf of the Claimant at that stage), nor did the response raise as an objection to what was sought the practical implications of the exercise (including what have subsequently been said to be the Data Protection Act issues).

202. There is little doubt that the Claimant's case went through a process of refinement up to and after the oral hearing before Collins J on 2 September 2011 - indeed even beyond that. The refined case has been responded to fully in the subsequent documentation lodged with the court and, of course, in the oral arguments advanced before me. It would be unrealistic, in those circumstances, to confine the analysis of the rationality of the decision simply to what was asserted on the Defendant's behalf in the earlier stages although, of course, that is, strictly speaking, what needs to be addressed.

203. The issues raised in connection with the practical implications were set out in the Detailed Grounds for resisting the claim served in response to the Amended Grounds in the following way:

> "(c) There is no … positive duty for the Defendant or any other person to seek out individuals who might potentially be aggrieved (whether they are or not), process their personal data and either provide their details (constituting sensitive personal data) to the Claimant organisation, or to use that sensitive personal data in order to contact such individuals himself, with a view to suggesting, encouraging or prompting them to institute proceedings where those individuals have not used any of the extensive existing available remedies if they had been or are aggrieved ….
>
> (d) There is 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, particularly given the normal rights and access to remedies that exist for individuals if they are aggrieved and the potential interference with their rights to private life in processing their data in the way suggested.
>
> (e) Even if there had been any legal basis for the claim, or for the existence of the failure of the type alleged … the timing of the claim and the events said to be in question mean that there is no justifiable or proportionate basis for requiring such action in any event."

204. The original formulation of the relief sought was that the information would be provided to the Claimant which would then contact those potentially affected. However, subsequently the Claimant has drawn back from that suggestion and the suggestion is now made that the Defendant should take steps to contact directly those who may potentially have been affected. In essence, however, the Claimant says that, if an obligation to disseminate the relevant information exists, it is for the Defendant to decide how to do it.

205. The Data Protection Act arguments, when deployed against the suggestion that the information should be supplied to the Claimant, commended themselves to Mitting J when dealing with this matter on the papers. I have been told that they commended themselves less to Collins J at the oral renewal hearing, but I am unclear as to what

extent the arguments had moved on by then. Mr Gask provided me with a helpful note on these issues, the effect of which was that the processing of the information and any contact made by the Defendant with former detainees would not infringe the Act. Because my overall decision in this case is based upon other reasons, I propose to draw back from reaching any concluded view on that issue. I would merely say, in relation to arguments of this nature, that the expression "where there's a will there's a way" is likely to be the watchword. I have little doubt that the Data Protection Act issues could be resolved in a way that would not prevent the kind of exercise contemplated in the application from taking place purely on that account alone provided it did not involve the provision of the names of former detainees to the Claimant or to any other body without the consent of the individual detainee.

206. During the course of argument, I raised with Mr Strachan the practical scenario of a letter, in fairly bland terms, being sent to all former detainees of STCs during the relevant period (records of which still exist) drawing attention to the broad issue raised in these proceedings and inviting them to request further information if they wanted to do so. It would not require an extensive trawl through individual records to see if someone had been subjected to restraint for GOAD or had been the subject of a distraction technique. I was told (though the material in support is not deployed in the evidence before the court) that the address that each STC would have for any such detainee would be the address to which he or she was released. For those released some years ago (and many would indeed have been released many years ago), there is no guarantee that any such letter would be received and there is, as it seems to me, a genuine concern that a letter could be opened by someone who did not know of the addressee's past record and, accordingly, private and sensitive information is thus divulged without the consent of the person affected. It is also to be questioned whether every former detainee would welcome such a letter: it may be that its receipt would generate memories of a time that was well in the past from which the individual concerned had "moved on".

207. These issues are, in my view, not easy and, if relied upon by the Defendant, could yield a rational basis for saying that there are good reasons for not undertaking the kind of exercise sought by the Claimant. I would not, for my part, regard the fact that it may take time and expense to carry out the exercise as necessarily a sufficient reason for not carrying it out: accepting such a proposition is tantamount to the court sanctioning the non-disclosure to potential victims of unlawful State actions on the simple basis that it is too expensive in terms of time and money to do so. It would, in my view, require some compelling circumstances to be demonstrated for that approach to be justified.

208. The conclusion I reach is that, if the Defendant's decision is to be judged by reference to the claim as originally formulated (namely, with disclosure of the identities of former detainees to the Claimant), I would regard the Data Protection Act issues, combined with there being no legal requirement to take the action requested, sufficient to constitute a rational basis for not carrying out the exercise. If matters fell to be addressed on the basis of the most recent arguments, I would say that the matters referred to in paragraphs 206-207 above, also against the background of there being no legal requirement for demanding such action, would afford a sufficient basis for holding that a decision not to proceed was rationally taken.

209. It follows, in my judgment, having looked at the issues raised by the Claimant without reference to its "standing" for the purposes of the Convention arguments, that the application must fail. Lest it be thought that I have overlooked it, I do not consider that the Claimant's reference to the need for the Defendant to observe the Ministerial Code would make any difference to this conclusion.

210. Because that is so, I do not have to address specifically what I have previously characterised as some "subtleties of argument" about how and when the Convention arguments fell to be considered (if at all) by the Defendant in the decision-making process leading to his rejection of the invitation from the Claimant to act as requested. I propose to say nothing about these issues save to say that it was the submission of Mr Strachan and Mr Beer that, if it is right that the Claimant has no standing for the purposes of the Convention arguments, it was no answer to say, as Mr Hermer sought to say, that the Convention arguments could be considered as part of the rationality challenge under the ordinary judicial review proceedings. The cases to which my attention was drawn in the context of this argument were *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 AC 696, *R. v Secretary of State for the Home Department Ex p. Ahmed and others*, 30 July 1998 (Lord Woolf MR, Hobhouse and Thorpe LJJ), *R. (Wilson) v Secretary of State for the Home Department* [2004] EWHC 2462 (Admin) and *Corner House Research v SFO* [2009] 1 AC 756.

211. Since I have rejected the claim on its merits without regard to the "standing" issue, strictly speaking, I do not have to deal with it as an issue. However, should this case go elsewhere, I should express my view about it, if only briefly. It does also raise a matter of some wider concern.

Standing

212. It is not contended that the Claimant possesses an insufficient degree of interest in the issues to disentitle it to standing (*locus standi*) for the purpose of the judicial review claim brought under the common law. What is said is that, because of the operation of section 7 of the Human Rights Act, it possesses no standing for the purposes of relying on Convention arguments.

213. As expressed, and in the light of the way the arguments have been developed and the case has been conducted by all parties, the point has an artificial feel to it. Given the serious nature of the issues raised concerning young and vulnerable individuals, it would seem strange that a reputable charity such as the Claimant should not be entitled to come to court and raise the kind of issues raised. Equally, had one "victim" been found who had sought to bring his or her own claim, the Claimant would undoubtedly have been entitled to be joined as an interested party and make the kind of submissions made on its behalf to me. Indeed Mr Hermer made the forceful point that it would be absurd to suggest that the Claimant is prevented from challenging the rationality and lawfulness of the Defendant's refusal to act because it is not a 'victim' when the whole point of the application is that the individual victims do not know that their rights have been violated. However, although the point is taken by the Defendant and by the Interested Parties, it is right to acknowledge, as will be apparent from the terms of this judgment already, that each has been prepared to argue the case on the merits and that, if I may say so, seems to me to have been an entirely proper course to take in the particular circumstances. Nevertheless, the point has been raised

and I must address it as I find it, intrinsically unattractive though it may be in the context of this case.

214. The relevant parts of section 7 of the Human Rights Act are as follows:

> **Proceedings.**
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) ….
>
> (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
>
> (4) ….
>
> (5) Proceedings under subsection (1)(a) must be brought before the end of -
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
>
> (6) In subsection (1)(b) "legal proceedings" includes -
>
> (a) proceedings brought by or at the instigation of a public authority; and
>
> (b) an appeal against the decision of a court or tribunal.
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

215. In *R. (on the application of Countryside Alliance) v Attorney General* [2007] QB 305, the Court of Appeal said this:

> "65. … section 7(7) provides that for the purposes of section 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights. By that article that court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. Strasbourg case law treats a person as a victim within the meaning of article 34 if they run the risk of being directly affected by a law or other act of state interference which violates their Convention rights (see Marckx v Belgium (1979) 2 EHRR 330; Institut de Prêtres Français v Turkey 92-A DR 15 (1998) Appl. No. 26308/95)."

216. The issue, therefore, is whether the Claimant would be regarded as a victim for the purposes of Article 34 of the Convention. Although I have not read the extract from Hansard to which Mr Strachan drew my attention in a footnote in his Skeleton Argument, I am aware that the Human Rights Act was passed with the specific intention of confining the class of persons who could bring a claim under the Act to someone who would be a victim within Article 34. There were distinguished voices who, at the time, expressed some concerns about this (see the quotation from paragraph 15 of Gillen J's judgment in paragraph 222 below) but the Act is the Act and if the consequence is that the Claimant has no right to rely on a Convention argument, then the appropriate conclusion must follow.

217. The Act does appear very clear on its face. Mr Strachan has drawn my attention to the fact that, where Parliament has decided to create an exception to this statutory requirement under section 7, it has legislated expressly. He has drawn attention to section 30 of the Equality Act 2006 which deals with the role of the Commission for Equality and Human Rights. It is in the following terms:

> **"Judicial review and other legal proceedings**
>
> (1) The Commission shall have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function.
>
> (2) The Commission shall be taken to have title and interest in relation to the subject matter of any legal proceedings in Scotland which it has capacity to institute, or in which it has capacity to intervene, by virtue of subsection (1).
>
> (3) The Commission may, in the course of legal proceedings for judicial review which it institutes (or in which it intervenes), rely on section 7(1)(b) of the Human Rights Act

> 1998 (c. 42) (breach of Convention rights); and for that purpose-
>
> (a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate,
>
> (b) the Commission may act only if there is or would be one or more victims of the unlawful act,
>
> (c) section 7(3) and (4) of that Act shall not apply, and
>
> (d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies);
>
> and an expression used in this subsection and in section 7 of the Human Rights Act 1998 has the same meaning in this subsection as in that section."

218. That seems a compelling argument.

219. He has drawn attention to a number of cases where the issue of "victim status" has been discussed including *R(Wildman) v Office of Communications* [2005] EWHC 1573 (Admin) and *Savage v South Essex NHS Trust* [2009] 1 AC 681 at paragraph 5.

220. The most compelling persuasive authority, however, is the decision of Gillen J in *In the Matter of An Application for Judicial Review by the Northern Ireland Commissioner for Children and Young People of Decisions Made by Peter Hain the Secretary of State and David Hanson the Minister of State* [2007] NIQB 115. In that case the Northern Ireland Commissioner for Children and Young People sought to challenge the legality of and to quash the decisions of the Secretary of State and the Minister of State to introduce a statutory provision that provided for a defence to a charge of assault of reasonable chastisement of a child. A major ground of challenge was that the proposed statutory provision breached Articles 3, 8 and 14 of the ECHR and the provisions of the UNCRC and was therefore unlawful.

221. The standing of the Commissioner to bring the challenge was raised. The argument for the Commissioner was that she was a "children's champion" and Parliament intended that she should be able to rely upon the Human Rights Act. It was, it was argued, the Commissioner's work to advance the interests of children and she was thereby at least an indirect victim of what was proposed.

222. Gillen J's conclusion was expressed in the following paragraphs of his judgment:

> "[14] However having reflected upon this matter at length I have reluctantly been drawn to the conclusion that the applicant is not a victim within the terms of Section 7(1) of HRA 1998 for the following reasons:
>
> [15] Claims under the HRA 1998 must satisfy a stricter test of standing than claimants for judicial review. The victim standing test has been adopted from the Strasbourg institutions by

Parliament. Mr O'Hara QC correctly drew my attention to the attempts that were made during the Committee stage of the Bill in the House of Commons as outlined in "Human Rights Law and Practice" 2nd edition by Lester and Pannick at para. 2.7.3 footnote 3 where the authors record:

> "It is understandable that the 'victim' test should be applied under the Act where Convention rights are relevant to private law proceedings where a plaintiff needs to have a personal interest. But the test is unsuitable for public law proceedings raising issues of general importance where reliance on Convention rights may form only part of the case being presented by an applicant who is not a victim but has a sufficient interest to bring judicial review proceedings on other grounds. Unless flexibly applied, the 'victim' test will have the unfortunate consequence that an applicant will be able to raise some grounds of challenge, but not others, and the court will be prevented from considering whether Convention rights are being denied. The dangers were explained by Lord Lester of Herne Hill, QC during the Committee stage of the Bill in the House of Lords on 24 November 1977 … and by Lord Slynn of Hadley and Lord Lester of Herne Hill QC during the third reading debate in the House of Lords on 5 February 1998 …. where the House of Lords rejected a proposed amendment to substitute a 'sufficient interest' test for raising Convention issues in judicial review proceedings. In a letter to the Lord Chancellor dated 17 February 1998, Lord Woolf MR expressed his concern, and that of other members of the judiciary, about the adoption of a 'victim' test."

I am confined by the considered wording of an Act of Parliament to an examination of a concrete case and I cannot review any system of domestic law *in abstracto* no matter how flexibly I strive to apply the victim test. There is no specific case before me where a child is a victim and I cannot permit a complaint against this law *in abstracto* simply because the Commissioner feels, however sincerely, it contravenes the Convention unless she is a victim.

[16] In addition to [*In the Matter of An Application by the Committee on the Administration of Justice and Martin O'Brien for Judicial Review* [2005] NIQB 25] that I have referred to in paragraph 9 of this judgment there are a number of decisions that a trade union or other organisation cannot itself claim to be a victim on the ground that it represents the interests of members (see Ahmed v United Kingdom (1995) 20 EHRR CD). A trade union may only be a victim if its own rights under the Convention have been breached. Equally it may provide assistance to individual applicants who are complaining about breaches of their rights. I consider that the

> role of the Commissioner is to be seen in a similar light. The 2003 legislation clearly empowers the Commissioner to protect children's rights in a number of disparate ways. This includes assisting members of the public understand what the rights of children are, setting out methods of vindicating those rights, advising Government about some of the powers open to the office and of course bringing proceedings in her own right. How the Office of the Commissioner discharges its duties and resources its functions are all matters for the Commissioner to decide. However I find nothing in the 2003 legislation which suggests that the applicant should become a major litigant in the human rights field. While recourse to the courts for vindication and redress is a fundamental necessity to protect human rights, there is nothing in the 2003 legislation, made five years after the HRA 1998, which suggests that the Commissioner becomes a victim within the Strasbourg jurisdiction simply because rights of children may be infringed. In my view to provide the Commission with a power, notwithstanding the provisions of s 7 of the HRA 98, to seek judicial review of the policies or actions or omissions of a Government body or public authority where it has reason to believe that such policies or actions or omissions have resulted, or are likely to result, in a violation of Convention rights, would require an amendment to s 7 of the HRA98 itself in circumstances where that power has not been conferred on the Commissioner in the 2003 legislation. To accede to Ms Higgins submissions, would require the Human Rights Act to be read alongside later legislation which impliedly amended it. I consider this would be inconsistent with its status as a constitutional statute setting out in one place the legal regime for the vindication of fundamental rights. This can only be achieved through a provision or amendment in the Commissioner's founding legislation. The notion of flexibly applying the "victim test" does not translate into express defiance of the express wording of s7 of the HRA98."

223. Gillen J reached the conclusion he did with evident regret. He was, of course, expressing that regret in relation to the position of a State official charged with the specific responsibility of seeking to protect children's interests. The Claimant in this case cannot claim the same status as the Northern Ireland Commissioner for Children and Young People, but its objective is the same and it has undoubtedly taken steps, both in relation to this particular matter and in relation to others, with the genuine desire to protect the interests of young people. Shutting such an organisation out of raising issues of the kind that have been raised in this application is a very unfortunate consequence of section 7 of the Human Rights Act, but Parliament took the view it did at the time it passed the Act and the Act must be respected.

224. In the light of the authorities to which I have been referred, and to the terms of the Act itself, I do not think that I would have had any alternative but to reach the same conclusion as Gillen J did in the case to which I have referred. I would have done so

with the same lack of enthusiasm, particularly given the nature of the matters that the Claimant has sought to raise in this case. However, as I have said, the court cannot re-write the statute and it must be applied.

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. Fortunately, the Claimant had sufficient standing at common law to enable it to bring to the court's attention matters that were legitimate matters to be raised even if, in the event, it has been necessary to deny the relief sought.

Overall conclusion

226. For the reasons I have endeavoured to articulate, my conclusion is that this application fails.

227. It fails primarily on the merits. As I have said, had it stood alone as a case based on Convention rights, I could have been obliged to dismiss it without considering the merits. Fortunately, the good sense and fairness of those presenting the case in answer to the Claimant's case have enabled the matter to be considered on the merits.

228. The Claimant has served well the interests of those for whom it is concerned by shining a light into a corner that might otherwise have remained in the dark. It remains to be seen whether, having done so, some of those who were the subject of unlawful restraint emerge to challenge and pursue what took place when they were detained.

229. I would simply observe in conclusion that, given the circumstances in which a court may (not necessarily will) extend the time for making a claim for personal injuries (see paragraphs 121-123 above) beyond the normal 3-year time limit after the event or events in question (or 3 years after the age of 18 if the event or events took place before the age of 18), the YJB (which Ms Dyson says in her witness statement is currently drafting a new data retention policy) may wish to consider that policy carefully. As presently drafted, it could involve the destruction of certain records six years after the 18th birthday of a former detainee sentenced to a total of three months or over or after one year from the date of discharge or the last action on file (whichever is the latest) in respect of any other young person received into custody (either on remand or after conviction). The YJB may wish to bear in mind when formulating its new policy that the continued availability of the records of trainees detained in each STC until July 2010 at the latest (see paragraph 75 above) may be as important to defending an unwarranted allegation of unlawful restraint as it is to establishing that an alleged incident took place.

Expression of thanks

230. I should like to express my appreciation to all Counsel for their industry in the preparation of their arguments and for the skill with which they were presented.