Neutral Citation Number: [2013] EWCA Civ 581

Case No: C1/2013/0456

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MRS JUSTICE GLOSTER, DBE &
MRS JUSTICE NICOLA DAVIES, DBE
CO/862/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2013

Before:

MASTER OF THE ROLLS
LORD JUSTICE ELIAS
and
LORD JUSTICE PATTEN

- -

Between:

THE QUEEN on the application of LINDSAY SANDIFORD	**Appellant**
- and -	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Respondent**

- -
- -

Aidan O'Neill QC (Scot), Adam Straw and Joanna Buckley (instructed by **Leigh Day & Co**) for the **Appellant**
Martin Chamberlain QC and Malcolm Birdling (instructed by **The Treasury Solicitor's Department**) for the **Respondent**

Hearing date: 22 April 2013

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Approved Judgment

Master of the Rolls:

1. This appeal concerns the Secretary of State's decision to adhere to his policy of refusing to provide funding for legal fees and expenses to UK nationals who are facing the death penalty abroad.

The factual background

2. The appellant is a UK national. She is 56 years of age and is a vulnerable person suffering from physical and mental health problems. On 19 May 2012, she was apprehended at the airport in Bali, Indonesia, by customs officials who found 10 packets of cocaine in her luggage. She was later charged with offences relating to trafficking in narcotics contrary to articles 112(2), 113(2) and 114(2) of Law 35, year 2009. Two of the charges carry the death penalty. On 20 December 2012, the Indonesian prosecutor requested a sentence of 15 years' imprisonment. On 22 January 2013, the judges of the District Court of Denpasar found her guilty of contravention of article 113(2) and sentenced her to death by firing squad. She appealed against conviction and sentence to the High Court of Denaspar.

3. On 24 January 2013, she issued judicial review proceedings in England seeking a mandatory order requiring the Secretary of State "to make arrangements forthwith for the provision of an adequate lawyer to represent the [appellant's] interests" in relation to her pending appeal. On 31 January, the Divisional Court (Gloster and Davies JJ) granted her permission to apply for judicial review, but dismissed her application. Full reasons were given in the judgment of Gloster J which was handed down on 4 February.

4. On 10 April, the High Court of Denpasar dismissed the appeal. The appellant now wishes to appeal further to the Supreme Court of Indonesia. She wishes to instruct Mr Agus, an Indonesian lawyer, to represent her. He is willing to do so, but he requires a sum equivalent to approximately £8,000 to cover the cost of his work (at a discounted rate), his expenses and the expenses and salaries of his two assistants. The appellant does not have the means to pay this sum. The only potential sources of funds to pay Mr Agus are by means of third party donations or monies provided by the UK Government. By the time the appeal from the decision of the Divisional Court was heard by us, some part of the sum required had been donated to the appellant. It seems that, since the date of the hearing, she has received by third party donations the whole of the sum that is required. It may, therefore, be that the appellant no longer has an interest in the outcome of the appeal. But the appeal raises points which have implications for other UK nationals facing the death penalty abroad.

5. In view of the imminent deadline for the lodging of the appeal papers in Indonesia, we were requested to announce our decision immediately or shortly after the conclusion of the hearing. We announced our decision to dismiss the appeal on 22 April. This judgment contains my reasons for doing so.

The relevant policy

6. The Secretary of State's current policy on funding for legal representation which was applied to the appellant's case and which is under challenge in these proceedings is contained in *Support for British Nationals Abroad: a Guide.* This policy was first

published on 7 June 2007. Although it has been updated seven times since it was first published, the material parts of the policy have remained unchanged. It includes the following:

> "Although we cannot give legal advice, start legal proceedings, or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although we cannot pay for either. "

7. It is the longstanding policy of the UK to oppose the death penalty in all circumstances as a matter of principle. Its strategy and policy in relation to the death penalty is set out in the *HMG Death Penalty Strategy: October 2010.* The Strategy confirms that the goals of the UK Government are to increase the number of abolitionist countries or countries where a moratorium exists on the use of the death penalty; to seek further restrictions on the use of the death penalty in countries where it is used and a reduction in the number of executions; and to ensure that EU minimum standards are met in countries which retain the death penalty. The first involvement of the Foreign and Commonwealth Office ("FCO") in cases where British nationals are arrested and detained abroad (including in cases where they may face the death penalty) is following notification of their arrest by the host State's authorities. The consular assistance that may be provided in potential death penalty cases includes (i) contacting the national within 24 hours of being notified of their arrest; (ii) making enquiries about his or her welfare and treatment; (iii) conveying messages from the detained national to their families, legal representatives or other organisations; (iv) providing information about NGOs which provide assistance to British nationals abroad (including *Reprieve* in death penalty cases); (v) offering basic information about the local legal system, including whether a legal aid scheme is available, as well as providing a list of local interpreters and local lawyers if requested; (vi) making representations to relevant police authorities, prosecuting authorities, senior government officials and Ministers and Heads of Government and State; and (vii) giving consideration to making representations to judicial authorities, by way of an *amicus curiae* brief (if admissible under local law), and where inadmissible to making representations through more informal means

8. The policy that was in operation before the publication of the Guide was expressed in slightly less uncompromising terms on the funding issue. As at January 1997, the policy was described as follows:

> "Central government funds are not available to fund legal representation for British nationals facing charges overseas, including those appealing against execution. If a British national is unable to pay for legal representation, and if legal aid is not available, it is our normal practice, if asked, to approach relatives or friends of the detained to provide financial help. If there is no possibility of obtaining funds, we will consider whether, exceptionally, a loan can be made from public finds against an undertaking to repay."

9. In her second witness statement, Louise Proudlove (Head of Consular Assistance, Consular Directorate, of the FCO) says that no record has been found of any case in

which funds were made available for legal representation pursuant to the previous policy. Funding was, however, made available in two cases for expert evidence in the form of a loan against an undertaking to repay.

10. Ms Proudlove explains in her two witness statements the reasons for the current policy in relation to the funding of legal representation for British nationals in overseas cases (including death penalty cases). I discuss these when I deal with the challenge to the rationality of the policy at para 51 below.

The issues

11. On behalf of the appellant, Mr Aidan O'Neill QC submits that the Secretary of State's refusal to fund the instruction of Mr Agus is unlawful for three reasons. First, the appellant's situation falls within the material scope of EU law and the Secretary of State is in breach of the duty to protect the appellant's rights under the Charter of Fundamental Rights of the European Union ("the Charter"). Secondly, the appellant is within the jurisdiction of the UK for the purpose of article 1 of the European Convention on Human Rights ("the Convention") and the Secretary of State is in breach of article 6 of the Convention. Thirdly, the policy of the Secretary of State never to fund legal representation in death penalty cases regardless of the circumstances is irrational and therefore unlawful as a matter of domestic law. The Divisional Court rejected the appellant's case in relation to each of these issues. Mr O'Neill submits that it was wrong to do so.

The first issue: is there a breach of the Charter?

12. The appellant says that her case falls within the material scope of EU law because her situation is within the scope of the Framework Decision 2004/757/JHA ("the Framework Decision") which lays down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. The Divisional Court rejected this case on the grounds that (i) the Framework Decision does not purport to regulate the type or extent of assistance provided by Member States to their own nationals when they are charged with drug trafficking offences in third countries; and (ii) in any event, so far as the UK is concerned, the Framework Decision is not part of the corpus of EU law.

Within the material scope of the Framework Decision?

13. The Charter provides that human dignity is inviolable and must be respected and protected (article 1); everyone has the right to life and no one shall be condemned to the death penalty (article 2); and everyone whose rights and freedoms guaranteed by EU law are violated is entitled to a fair and public hearing before an independent and impartial tribunal and shall have the possibility of being advised, defended and represented and legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice (article 47). Article 51(1) provides:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the

> rights, observe the principles and promote the application thereof in accordance with their respective powers. ”

14. The question arises whether, in refusing to make available resources to the appellant to ensure that she can be advised and represented in her appeal to the Supreme Court of Indonesia, the Secretary of State is implementing EU law within the meaning of article 51(1) of the Charter.

15. The appellant's case is that, since the offences with which she is charged (drug trafficking offences) are the subject of the Framework Decision, her situation falls within the material scope of EU law. The Framework Decision is intended to have extra-territorial effect as evidenced by article 2(1)(a) which provides that it applies to:

> "the production, manufacture, extraction, preparation, offering, offering for sale distribution, delivery, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, importation or exportation of drugs".

16. Article 8 is entitled "Jurisdiction and prosecution". It provides:

> "1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2 and 3 where:
>
> (a) the offence is committed in whole or in part within its territory;
>
> (b) the offender is one of its nationals; or
>
> (c) the offence is committed for the benefit of a legal person established in the territory of that Member State.
>
> 2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) where the offence is committed outside its territory.
>
> 3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2 and 3 when it is committed by one of its own nationals outside its territory.
>
> 4. Member States shall inform the General Secretariat of the Council and the Commission when they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies."

17. It seems to have been common ground before us that the Framework Decision applies to offences committed outside the EU. For the reasons that I give below, I do not consider that this is correct. But since we heard no argument on the point, I do not intend to decide the appeal on that basis. The reasons for my view are as follows. The Framework Decision is a Decision of the Council of the European Union. It would be surprising if an EU instrument were intended to make any provision in relation to offences committed outside the EU. There is nothing in the recitals or the

body of the document which indicates any such intention. I do not consider that article 2(1)(a) provides any clue. Such indications as there are point the other way. Of particular significance is the fact that the opening words are "Having regard to the Treaty on European Union ("TEU"), and in particular Article 31(e) and Article 34(2)(b) thereof". Article 31(1) provides that "Common action on judicial cooperation in criminal matters shall include:

> "(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States…
>
> (b) facilitating extradition between Member States;
>
> (c) ensuring compatibility in rules applicable in Member States, as may be necessary to improve such cooperation;
>
> (d) preventing conflicts of jurisdiction between Member States;
>
> (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. "

18. Article 34(2) provides:

> "The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
>
> (a) adopt common positions defining the approach of the Union to a particular matter;
>
> (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not be of direct effect."

19. It is clear from the reference to these articles of the TEU in the Framework Decision that its purpose is in relation to drug trafficking offences to facilitate cooperation *between* Member States, facilitate extradition *between* Member States, ensure compatibility in rules applicable *in* Member States, prevent conflicts of jurisdiction *between* Member States and produce an approximation of the law and regulations *of* the Member States. There is no hint in the relevant articles of the TEU that one of the purposes of any framework decision adopted by the Council pursuant to article 34(2)(b) would be to deal with offences committed in non-EU countries. This is consistent with the view expressed by the Commission in its report on the Framework Decision dated 10 December 2009. It commented at para 2.8 of the report that article

8(3) of the Framework Decision "no longer serves any purpose since the introduction of the European arrest warrant". Under the European arrest warrant scheme it is not necessary for a Member State to establish its jurisdiction over its nationals for offences committed in other Member States. The Commission would not have made this comment if it had been of the opinion that the reference in article 8(3) to an offence being committed "outside its territory" included an offence committed outside the EU.

20. Nevertheless, I shall proceed on the assumption that the Framework Decision does apply to offences committed outside the EU. At first sight, it might seem surprising that the Secretary of State's decision should be considered to involve any *implementation* of EU law. How does a decision *not* to fund legal representation in criminal proceedings in Indonesia for a criminal offence allegedly committed in Bali have anything to do with EU law? But it is common ground that a Member State implements EU law for the purposes of article 51(1) if it exercises a power of derogation from, or provided for by, a provision of EU law: see for example *Elleniki Radiophonia Tileorassi (ERT) v Dimotiki Eatairia Pliroforissis* [1993] ECR 1-2925. This case concerned the lawfulness in EU law of a Greek law authorising a single television company to exercise a monopoly throughout Greece. The EEC Treaty prohibited national rules which create such a monopoly where it gave rise to discriminatory effects to the detriment of broadcasts from other Member States unless the rules were justified on one of the grounds indicated in article 56 of the Treaty to which article 66 referred. Greece sought to justify the derogation from the general rule on that basis. The ECJ said:

> "43. In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules where are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Article 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the court.
>
> 44. It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court."

21. That was a case where the Member State decided by a legislative act to exercise the power conferred by the Treaty to derogate from a principle stated in the Treaty. The ECJ held that in such a case the national rules could fall within the exceptions only if they were compatible with fundamental rights. In exercising such a power of derogation, a Member State is operating within the material scope of EU law.

22. This principle was applied by Lloyd Jones J in *R (on the application of Zagorski) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), [2011] HRLR 6. Zagorski, a US citizen, was facing the death penalty in the United States. Execution was to be by lethal injection with an anaesthetic Sodium Thiopental. The judge dismissed the claimants' challenge by judicial review to the defendant's refusal to impose a ban on the export of the anaesthetic to the United States. Regulation 1061/2009 was the principal EU instrument establishing common rules for exports and regulating export controls. Article 1 provided that the exportation of product from the European Community "shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this regulation". Article 10 permitted Member States to derogate from this basic principle: "Without prejudice to any other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security…." Section 5(2) of the Export Control Act 2002 permits controls to be imposed on exports on certain specified grounds, one of which is for the purpose of giving effect to any Community provision or other international obligation of the United Kingdom. The Secretary of State, therefore, had the power to derogate from the basic EU principle stated in article 1 of the Regulation (which was itself replicated in section 5(1) of the Act). At para 70 of his judgment, the judge said:

> "We are concerned here with the question whether, in taking a decision, the defendant is acting within the material scope of EU law. The field in question—the imposition of export restrictions—is one occupied by EU law which nevertheless includes a power of derogation to Member States. It would be surprising if the answer to the question whether the defendant was acting within the material scope of EU law depended on which way his decision went. Nor do I consider that to be the case. Rather, in deciding whether or not to exercise the power of derogation the defendant is implementing EU law in the sense of applying it or giving effect to it and he is bound to do so in accordance with the fundamental principles and rights which form part of EU law."

23. The claimants in that case, therefore, succeeded in showing that their case fell within the material scope of EU law. But they also had to show that they fell within the personal scope (*ratione personae*), ie that they had sufficient personal connection with EU law to be entitled to rely on its provisions. They failed to do this because they were US nationals in prison in the US. In the present case, there is no doubt that the appellant is within the personal scope of EU law because she is a UK citizen.

24. Gloster J explained why the appellant's case did not fall with the material scope of EU law in these terms:

> "53. Mr. O'Neill's first argument as to why the claimant's situation falls within the material scope of EU law was that, by reference to the Framework Decision, the United Kingdom, by not seeking the claimant's extradition, is exercising a derogation under Article 8(2) of the

> Framework Decision. But in order to establish that the claimant's situation falls within the material scope of EU law, she has to establish that the defendant's decision not to pay for a lawyer to act on her behalf is one which falls within the material scope of EU law. In my judgment, it is not sufficient for her simply to say that she is charged with offences of that kind that are dealt with in the Framework Decision. The Framework Decision regulates Member States' actions, amongst others, with respect to criminal sanctions associated with drug trafficking into, and within, the European Union. It does not purport to regulate the type or extent of assistance provided by Member States to their own nationals when charged with drug trafficking offences in third countries. Moreover the fact that Article 8(1) of the Framework Decision requires each Member State to take necessary measures to "establish its jurisdiction" over drug trafficking offences committed outside its territory (subject to a derogation in Article 8(2)) does not change this position. This provision is directed at ensuring that nationals of a Member State can be prosecuted in that Member State for offences committed in third countries. But these proceedings are not directed at any decision of the UK Government either to exercise jurisdiction (i.e. to prosecute the claimant) or to decline to exercise such jurisdiction (i.e. to decline to prosecute her). I accept Mr. Chamberlain's submission that the question of exercising jurisdiction, in the sense in which that term is used in the Framework Decision, simply does not arise in this case. The UK cannot exercise jurisdiction over the claimant because she is in Indonesia. It is that State alone which is exercising jurisdiction over her in the relevant sense. Moreover, in my judgment, none of the decisions of the CJEU referred to by the claimant at paragraph 28 of her grounds, provide any support for the proposition that her situation falls within the material scope of EU law."

25. Mr O'Neill submits that this passage is erroneous in law in that it conflates two distinct questions, namely (i) whether the appellant's situation is one that falls within the material scope of EU law for the purposes of article 51(1) of the Charter (the "ambit" question) and (ii) if so, whether, in the circumstances of the case, the acts or omissions of the Member State are compatible with the provisions of the Charter (the "compatibility" question). He submits that the appellant was not required to demonstrate that the Secretary of State's decision not to pay for a lawyer for her appeal fell within the material scope of EU law. Instead, she was required to demonstrate only that the (prior) decision of the Secretary of State not to establish criminal jurisdiction for the purpose of article 8(2) of the Framework Decision was one which fell within the scope of EU law. Whether the Secretary of State was obliged to pay for a lawyer for the appellant was to be considered in determining what

remedy was required effectively to protect the appellant's Charter rights, once it was established that her situation could be said to fall with the ambit of EU law.

26. I accept Mr O'Neill's argument so far as it goes. But for the reasons that follow I do not accept that the Secretary of State has made a decision within the meaning of article 8(2) of the Framework Decision. As I have said, it is common ground that a decision by the Secretary of State not to take measures to establish jurisdiction over drug trafficking offences referred to in articles 2 and 3 of the Framework Decision would fall within the material scope of EU law and would be an implementation of EU law within the meaning of article 51(1) of the Charter. Mr Chamberlain QC has not sought to revive the argument that he advanced in *Zagorski* that, in deciding not to establish jurisdiction, a Member State cannot be described as "implementing EU law". What is important about *ERT* and *Zagorski*, however, is that, in both cases, the Member State had made a legislative *decision* to exercise a power recognised by EU law to derogate from an EU power or obligation. Similarly, article 8(2) of the Framework Decision provides that a Member State "may *decide*" (emphasis added) that it will not apply the jurisdictional rules set out in article 8(1)(b) and (c). Furthermore, the decision must be one that is capable of being notified to the General Secretariat of the Council and the Commission: see article 8(4).

27. There is no extradition treaty between the United Kingdom and Indonesia. No question can, therefore, arise of the Secretary of State *deciding* not to establish jurisdiction over drug trafficking offences committed in Indonesia by United Kingdom nationals. No *decision* has been made by the UK within the meaning of article 8(2) not to exercise jurisdiction in relation to drug trafficking offences committed in Indonesia. There is therefore no decision which is capable of being communicated under article 8(4). This is not surprising, since the making of an extradition treaty which would enable the United Kingdom to establish its jurisdiction does not depend on its unilateral decision. An extradition treaty is a bilateral agreement between two states. The contrast between cases such as *ERT* and *Zagorski* is obvious.

28. The implications of Mr O'Neill's argument are striking. If the Secretary of State has made a decision within the meaning of article 8(2) in relation to drug trafficking offences committed in Indonesia, then the appellant's situation falls within the material scope of EU law and (submits Mr O'Neill) the Secretary of State is obliged to respect the rights and observe the principles of the Charter in relation to her situation. Mr O'Neill accepts and indeed asserts that this includes that the Secretary of State is obliged to do everything in his power to secure the full panoply of the rights accorded by article 47 of the Charter. If he is right, this must include that the Secretary of State is obliged to do everything in his power to secure that UK nationals who face charges for any drug trafficking offence committed anywhere in the world should "have the possibility of being advised, defended and represented"; and that "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". I can see no scope for limiting this obligation to more serious charges, still less for limiting it to charges which attract the death sentence. It would be remarkable if the Member States had agreed by means of a framework decision (or indeed at all) to commit themselves to such a far-reaching obligation. I can find nothing to indicate that this is what they intended to do.

29. For all these reasons (which differ from those of the Divisional court), I would hold that there is no decision implementing EU law which is material to the present case. The United Kingdom has not decided to take the necessary measures to establish jurisdiction (article 8(1)) or not to do so (article 8(2)). To adopt the terminology used by Mr O'Neill, the answer to the "ambit" question is that the appellant's situation does not fall within the material scope of EU law.

30. It follows that I do not consider that, by having a policy not to pay for legal representation of UK nationals who are facing the death penalty abroad, the Secretary of State is implementing the Framework Decision. Such a policy is not therefore in breach of EU law.

31. It also follows that I do not need to consider whether the Divisional Court was correct in deciding that, so far as the UK is concerned, the Framework Decision is not part of the corpus of EU law. In reaching this conclusion, the court relied on the decision of the Supreme Court in *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 471. Mr O'Neill submits that this conclusion was wrong not least because the relevant observations made in *Assange* were themselves wrong.

The second issue: the Convention question.

32. The Divisional Court decided that (i) the appellant does not come within the jurisdiction of the UK within the meaning of article 1 of the Convention and (ii) even if she does, there has been no violation of her Convention rights by the UK since it has not contributed to the risk to which she is subject.

Is the appellant within the jurisdiction of the UK?

33. Article 1 of the Convention provides: "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention". The appellant's case is that, although she had been arrested at the airport, placed in custody, tried and convicted in Indonesia and remained in prison there, she is within the "jurisdiction" of the UK because of the engagement by, and activities of, the FCO and its consular officers in Indonesia in connection with her case.

34. These activities have been described in the first witness statement of Ms Proudlove. The accuracy of the summary given by Gloster J at para 20 of her judgment has not been challenged. She said:

> "These activities were described in Ms Proudlove's witness statement. So far as consular staff in Indonesia were concerned, these activities variously included: visiting the claimant in custody and discussing her case with her, providing her with consular assistance and support, raising concerns about her welfare with the police and prison authorities, attending Court, liaising with *Reprieve* and her family in relation to the obtaining of legal representation, contacting Mr. Agus to enquire whether he would be willing to act, informing the claimant of the requirement to and the time limits for,

> filing notice and grounds of appeal, and assisting in the obtaining of necessary Court documents. The Consular Directorate in London was also involved in various discussions about the case with *Reprieve* and others. Various diplomatic representations were made by the FCO to the Indonesia and Ministry of Foreign Affairs. On 31 October 2012 the defendant raised the claimant's case with the Foreign Minister of Indonesia. Her Majesty's Ambassador to Indonesia wrote to the Attorney-General of Indonesia on 26 September 2012 raising the claimant's case and made further representations on her part in a meeting with him on 20 December 2012. "

35. It is to *Al-Skeini and others v United Kingdom* (2011) 53 EHRR 18 that we should go for the most recent authoritative interpretation by the Grand Chamber of the ECtHR of "jurisdiction" within the meaning of article 1. In that case, the applicants were relatives of Iraqi citizens who had been killed by British forces in Basra. The court held at para 149 that there was jurisdiction because:

> "the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional circumstances, the court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art 1 of the Convention. "

36. Earlier in its judgment, the court said:

> "131. A state's jurisdictional competence under art.1 is primarily territorial. Jurisdiction is presumed to be exercised normally throughout the state's territory. Conversely, acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of art.1 only in exceptional cases.
>
> 132. To date, the Court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.
>
> (ib)General principles relevant to jurisdiction under article 1 of the Convention: state agent authority and control

> 133. The Court has recognised in its case law that, as an exception to the principle of territoriality, a contracting state's jurisdiction under art.1 may extend to acts of its authorities which produce effects outside its own territory. The statement of principle, as it appears in *Drozd* and the other cases just cited, is very broad: the Court states merely that the contracting party's responsibility "can be involved" in these circumstances. It is necessary to examine the Court's case law to identify the defining principles.
>
> 134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others."

37. The authorities cited in support of this paragraph include *X v Federal Republic of Germany* (1965) Appln No 1611/62, *X v United Kingdom* (1977) Appln No 7547/76 and *WM v Denmark* (1993) 15 EHRR CD 28.

38. Mr O'Neill places particular reliance on the admissibility decision of the Commission in *X v United Kingdom.* This concerned a complaint by a UK national that the UK had breached its obligations under the Convention because the British Consulate in Amman (Jordan) had failed to take sufficient steps to obtain custody of her abducted daughter. The Commission held that the consular authorities had "done all that could reasonably be expected of them". It was not, therefore, necessary for it to address the question of jurisdiction. Nevertheless it did so in these terms:

> "The applicant's complaints are directed mainly against the British consular authorities in Jordan. It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged (cf. Applications No. 1611/62, Yearbook 8, p. 158 (168); Nos 6780/74, 6950/75, Cyprus v Turkey, Decisions and Reports 2, p. 125 (1371)). Therefore, in the present case the Commission is satisfied that even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still "within the jurisdiction" within the meaning of Article 1 of the Convention."

39. It can be seen that the Commission provided two sources for its "constant jurisprudence". The first was *X v Federal Republic of Germany.* This concerned allegations that the German consul in Morocco had solicited the expulsion of the

applicant (a German national) from Morocco in breach of his Convention rights. The Commission dismissed the application as inadmissible on the basis that there was insufficient evidence to substantiate the allegations of German complicity in the expulsion. The decision contains no clear finding that the German Government's "jurisdiction" was engaged, but the Commission did say:

> "*Whereas,* in certain respects the nationals of a contracting state are within its 'jurisdiction' even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention."

40. The second source was the Commission's decision in *Cyprus v Turkey* (1975) 2 DR 125. In that case, Turkish troops had occupied parts of Northern Cyprus. The commission concluded that:

> "It remains to be examined whether Turkey's responsibility under the Convention is otherwise engaged because persons or property in Cyprus have in the course of her military action come under her actual authority and responsibility at the material times. In this respect it is not contested by the respondent Government that Turkish armed forces have entered the island of Cyprus, operating solely under the direction of the Turkish Government and under established rules governing the structure and command of these armed forces are authorised agents of Turkey and that they bring any other persons or property in Cyprus "within the jurisdiction" of Turkey, in the sense of Art. 1 of the Convention, to the extent that they exercise control over such persons or property. Therefore, insofar as these armed forces, by their acts or omissions, affect such persons' rights or freedoms under the Convention, the responsibility of Turkey is engaged."

41. The facts in *WM v Denmark* were that the applicant and others entered the premises of the Danish Embassy in East Berlin and requested the Embassy officials to intervene to apply for permits so that the group could leave East Germany. The officials conducted negotiations with the East German authorities on behalf of the applicant to that end. The Danish Ambassador subsequently asked the East German police to enter the premises and remove the group, and the applicant left the embassy with the East German police when asked to do so. The Commission regarded the applicant as prima facie falling within the jurisdiction of Denmark on the grounds that the acts of the ambassador within the embassy amounted to an exercise of authority over the group. But he had been deprived of his liberty by the East German authorities, and not the Danish authorities. It followed that his subsequent treatment did not engage the responsibility of Denmark and his claim was held to be manifestly unfounded.

42. The effect of *WM v Denmark* was considered by the Court of Appeal in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643 at paras 64 to 66. This was a case where the applicants had been given shelter at the British Consulate in Melbourne, Australia. Their request for

asylum from the UK was refused. The applicants brought a claim for judicial review of the refusal of asylum on the grounds that it violated their rights under article 3 of the Convention. This court distinguished *WM v Denmark* on the grounds that the embassy officials had negotiated with the East German authorities and might therefore be said to have assumed some responsibility or exercised some authority in respect of the applicant. There was no directly comparable element in the instant case. The court considered whether there was a material distinction between the two cases in that, without assumption of responsibility by the consular authorities for the protection of the applicants, there was nothing in the instant case to bring them within the jurisdiction of the UK for the purposes of article 1. Nevertheless, the court did not decide the application on that basis. In making that decision, the court bore in mind that in the instant case (i) the applicants were told that while they were in the consulate, they would be kept safe; and (ii) they were given some protection by being brought from the reception area into the office area of the embassy. For these reasons, the court was content to assume (without deciding) that, while they were in the consulate, the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of article 1.

43. How should this jurisprudence be viewed? In my opinion, *Cyprus v Turkey* does not assist in the present context. It is true that it is a case about state agent authority and control, but it did not concern diplomatic and consular agents, although at para 8 of its decision the Commission made reference to *X v Germany* and the position of state agents (including diplomatic and consular agents) "to the extent that they exercise authority over such persons or property". As Mr Chamberlain says, *Cyprus v Turkey* should be viewed as based on an orthodox reading of the term "jurisdiction". The Turkish soldiers brought those in the areas they were occupying (who were not Turkish nationals) within the "jurisdiction" of Turkey for the purposes of article 1 of the Convention because people in those areas were, as the ECtHR later put it in *Al-Skeini*, under the "control and authority" of the Turkish soldiers and, therefore, the Turkish Government.

44. What emerges from the other decisions concerning the activities of diplomatic and consular agents is that these activities *may* so affect an individual as to bring the individual within the jurisdiction for the purpose of article 1. A motif that runs through the cases is that it is a condition of the engagement of article 1 that the acts or omissions of which complaint is made come within the scope of an exercise of control and authority by the state in question. That is the governing principle in relation to diplomatic and consular activities. The jurisprudence provides only limited assistance on the question of how this principle should be applied on the facts of a particular case. It is important to note the cautious way in which the principle has been expressed. In *X v Germany*, the Commission said "in certain respects" the nationals of a contracting state are within its jurisdiction even when abroad; and diplomatic and consular representatives perform "certain duties" which may "in certain circumstances" make the country of origin liable under the Convention. This decision contains no statement of how these circumstances may be identified. The facts of the case are far removed from those of the present case.

45. In *X v United Kingdom*, the Commission said that the authorised agents of a state, including diplomatic or consular agents, bring other persons within the jurisdiction of that state "to the extent that they exercise authority over such persons or property".

This is the formulation adopted in *Al-Skeini*: the acts of diplomatic and consular agents "may amount to an exercise of jurisdiction when these agents exert authority and control over others". In other words, the mere involvement by these agents is not sufficient. What they do must amount to the exercise of authority and control. Whether this threshold is met is a fact-sensitive question. It is however, clear that the Commission was of the opinion that, on the facts of *X v United Kingdom*, the British consul had exercised authority over the applicant so that the alleged failure of the consular authorities to do all in their power to help the applicant occurred within the jurisdiction. Although the Commission did not explain why it reached this decision in *X v United Kingdom*, there is an obvious and fundamental distinction between that case and the present case. The applicant in that case was a free woman. She was not under the control of the Jordanian authorities. The Commission held on the particular facts of that case that the applicant was sufficiently subject to the control and authority of the consular officials to engage the jurisdiction of the Convention. In the present case, the appellant is totally under the control of the Indonesian authorities.

46. The facts in *WM v Denmark* were also far removed from those in the present case. The applicant had entered the Danish embassy. That of itself raised a prima facie case that what happened there involved an exercise of control and authority by the Danish officials. The fact that they conducted negotiations with the East German authorities must be viewed in that context. But they did not merely conduct negotiations with those authorities; they also asked them to enter the embassy and remove the applicant.

47. Mr O'Neill submits that the consular activity summarised at para 34 above was sufficient to amount to an exercise of authority and control of the appellant by the consular agents in this case. I do not agree. The mere provision of assistance by consular officials is not enough to engage the article 1 jurisdiction. Whether the involvement amounts to the exercise of control and authority sufficient to engage the jurisdiction is a question of fact and degree. But in circumstances where the individual is completely under the control of and detained by the foreign state, it is difficult to see how the necessary degree of authority and control can be exercised by diplomatic and consular agents who do no more than provide the kind of assistance that was provided to the appellant in the present case. The point was put well by Gloster J at para 40 of her judgment in these terms:

> "In my judgment it is manifestly clear on the facts of this case, that, at all relevant times, from the moment she was arrested, throughout the time she was in custody, throughout the trial process, and after her conviction when held in prison, the claimant was and remains under the authority and control of the Indonesian state and relevant criminal authorities. The mere fact that the consular officials provided her with advice and support, and that the FCO engaged in diplomatic representations, cannot be regarded as any kind of exertion of authority or control by agents of the United Kingdom so as to engage its responsibilities under the Convention."

48. I agree with this. In these circumstances, I do not find it necessary to decide whether, if the appellant was within the jurisdiction of the UK for the purposes of article 1,

there has been a breach of the Convention by the United Kingdom on the facts of this case.

The domestic law issue

49. I have summarised the current policy that was applied in the appellant's case at paras 6 and 7 above. In short, there is no funding for legal advice or representation for British nationals facing *any* criminal proceedings abroad. It is a blanket policy. It admits of no exceptions even in death penalty cases.

50. The rationale for this policy is explained by Ms Proudlove. In summary, she says that any policy of paying legal expenses in individual cases would encounter serious practical difficulties. First, how could the Secretary of State rationally stop at death penalty cases? What about other cases where there is a risk of the imposition of penalties which, if carried out in a Contracting State, would violate article 3 of the Convention (for example 40 years' imprisonment in appallingly degrading conditions)? Secondly, why limit payment for representation on appeal? Would it not be more rational to seek to ensure that the sentence is not imposed in the first place, by funding representation at the trial? But this would open up the possible exposure to open-ended financial liability of legal fees at trial. Thirdly, if the Secretary of State were required to fund legal representation, it is difficult to see how it could do so without itself having some assurance about the adequacy of the local lawyer. It would impose a considerable burden on consular officials if they had to establish a scheme in each jurisdiction to validate or assess the competency of local lawyers. Fourthly, there would have to be some system for assessing a British national's ability to pay. In principle, the Secretary of State could establish an assessment scheme similar to that which operates in our legal aid system. But what would be the relevant limits in each jurisdiction? They would have to be sensitive to the average legal fees in each country. What about the question whether an individual's entitlement to financial assistance should be affected by whether he or she has access to funds from family, friends or donations from other sources, such as charitable organisations? The Government might legitimately expect those who have access to such funds to use them before seeking Government assistance. But how could a test be devised for assessing whether an individual has access to such funds? Finally, there is the question of how the Secretary of State could be expected to assess the reasonableness of the fees charged by the local lawyer in the circumstances of the particular case. In England and Wales, there is an established procedure by which parties in receipt of legal aid submit a proposed plan of the work involved, which is then evaluated by the Legal Services Commission. But this is all in the context of a legal system which is understood by the officials who control the funding. These officials are in a position to say whether, in their view, a particular step is justified in the particular proceedings. How would the Secretary of State (or his consular officials) perform that function in the context of a foreign legal system in which they are not expert?

51. It is not the Secretary of State's case that it would be impossible in principle to find a workable answer to these questions or that a scheme providing answers to these questions could not lawfully be set up without legislation. But such a scheme would involve a considerable commitment of resources.

52. Nevertheless, Mr O'Neill submits that the policy is unlawful as a matter of domestic law. He emphasises the fact that the Secretary of State's policy is to work to ensure that EU minimum standards are met in countries which retain the death penalty and to use all "appropriate influence to prevent the execution of any British national". He submits that the blanket rule that the Secretary of State will not fund legal representation in any death penalty case abroad is unlawful because it prevents him from taking into account the death penalty policy in individual cases. In the present case, the blanket rule prevented him from taking into account the fact that a modest sum of money would satisfy the aims and purposes of the policy and there was no good reason in the appellant's case for not providing funding.

53. It is clearly established that a public body may not unlawfully fetter the exercise of a discretionary statutory power: see, for example, *British Oxygen Co Ltd v Board of Trade* [1971] AC 610. But where a policy is made in the exercise of prerogative or common law powers (rather than a statutory discretion), there is no rule of law which requires the decision-maker to consider the facts of every case with a view to deciding whether, exceptionally, to depart from the policy in a particular case. This is because "it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be": *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at para 191.

54. In the present case, as in *Elias* (see para 192), the Secretary of State has decided that it is necessary to formulate "bright line" criteria for determining who is entitled to receive payments from public funds. The "bright line" in the present case is the rule that the Government does not pay legal expenses of British nationals involved in any criminal proceedings abroad. I accept the submission of Mr Chamberlain that there is no requirement as a matter of law to consider whether an exception should be made to the policy in the circumstances of an individual case. As in *Elias,* there is no objection in principle to the idea of a policy without exceptions. That is why I understand Mr O'Neill to accept that the only question for the court is whether the decision to have a blanket policy not to fund legal representation in criminal proceedings abroad is rational.

55. Mr O'Neill's submissions as to why the policy is irrational in relation to death penalty cases can be summarised as follows. First, it does not take account of or further the stated goal of using all appropriate influence to prevent the execution of any British national. This goal recognises that death penalty cases are in a category of their own for the obvious reason that death is irremediable. Secondly, it is undermined by the fact that some funding was available under the policy that was in force for approximately ten years before the current policy came into force in 2007. Thirdly, although the practical problems identified by Ms Proudlove may apply in some cases, they do not apply in all cases and they certainly do not apply in the case of the appellant. As Mr O'Neill puts it in his skeleton argument, the fact that it will be difficult to judge whether funding ought to be granted in case A is not a rational ground for refusing to grant funding in case B when it is clear that it ought to be granted in case B. In other words, the Secretary of State's reason for having a blanket rule that does not permit of exceptions in extreme clear cases does not withstand rational analysis.

56. I would reject these submissions for the reasons given by Mr Chamberlain. As regards the first point, it is true that the Secretary of State promotes the goals set out in the Strategy (including using all appropriate influence to prevent the execution of British nationals) by taking the various steps to which I have referred at para 7 above. But the fact that the Government adopts a policy of opposing X and of using all appropriate influence to prevent X does not mean that it must do everything that it could in principle do to lower the risk of X, regardless of how impractical that may be. A decision not to take a particular measure does not signal a departure from the policy. It is challengeable only if the decision is irrational, viewed in the light of the objectives underlying the policy. The practical problems referred to at para 50 above are sufficient to demonstrate that the policy is not irrational.

57. As for the second point, it is true that the previous policy did contemplate the giving of financial assistance in the form of loans to fund the provision of legal representation in death penalty cases. But as I have already said, there is no record of any case in which such funds were in fact made available under the previous policy. In these circumstances, I do not see how it can be said that it was irrational to make explicit in the later policy the way in which the earlier policy was applied in practice.

58. I accept that the practical problems do not all apply in the present case. Mr Chamberlain relies on the response given by Ms Proudlove at paras 97 et seq of her first witness statement in support of the rationality of the Secretary of State's decision not to treat the appellant's case as exceptional. She says that if funding for legal representation were provided in the present case, it would have to be provided in other cases because there "were a number of analogous death penalty cases" both in Indonesia and other countries. She deals with the two features of the case which are relied on by Mr O'Neill as showing that the appellant's case is exceptional. The first is that the sums involved in the present case are very small in comparison with the interest at stake. Ms Proudlove says that this is not a basis for departing from the policy. It can always be said that any sum is small when compared with the risk of an individual being subjected to the death penalty. In any event, it is not fair to discriminate against those whose legal representation is more costly and provide funding only to those who require more modest funding. The second feature of the appellant's case which is said to be exceptional is that she has no alternative means of funding her representation. Ms Proudlove says that that the Secretary of State is not in a position to investigate the financial means of a national to whom it is providing consular assistance. In any event, the financial circumstances of the appellant are not exceptional in that many British nationals who have faced or are facing the death penalty abroad are in an analogous (or worse) situation.

59. Some may regard these responses to Mr O'Neill's points as harsh and inhumane. But the question is whether they are so jejune that they show that the policy is irrational. The test of irrationality presents a stiff hurdle for the appellant to surmount. A timely reminder of the nature of the hurdle was recently given by Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 at para 14:

> "Rationality is a familiar concept in public law..... Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would

> have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

60. As the Secretary of State concedes, it would be possible to produce a policy under which funds for legal representation were made available to British nationals in certain defined circumstances. The practical problems identified by the Secretary of State are not insurmountable. But the question is not whether the Secretary of State could produce a different policy which many would regard as fairer and more reasonable and humane than the present policy. It is whether the policy that he has produced is irrational. I am in no doubt that the policy is not irrational. It is based on reasoning which is coherent and which is neither arbitrary nor perverse.

Overall conclusion

61. One is bound to have great sympathy for the appellant. She is seeking to challenge a decision which, if not overturned by the Supreme Court of Indonesia, will mean that she will be executed (unless she is pardoned). The death penalty is (in my view) rightly regarded by the Government as immoral and unacceptable. The appellant has argued that the Secretary of State's policy of not providing funding for legal representation to any British national who faces criminal proceedings abroad (even in death penalty cases) is unlawful. For the reasons that I have endeavoured to explain, I consider that the Divisional Court was right to conclude that it is not. These are my reasons for the decision to dismiss this appeal.

Lord Justice Elias:

62. I agree.

Lord Justice Patten:

63. I also agree.