**THAT WAS (THE OTHER HALF) THE YEAR THAT WAS ...**

**SOME OTHER PUBLIC LAW HIGHLIGHTS OF 2012-2013 (NO. 2)**

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Secrecy : sunshine is the greatest disinfectant[[1]](#footnote-1)

1. At a time when the founder of *Wikileaks*, Julian Assange,is still claiming sanctuary in the Embassy of Ecuador in London, one of its central contributors, Bradley Manning, is on trial in the US for being a traitor, and another, Edward Snowden, remains holed up in Moscow airport, secrecy in public law is particularly topical.

1. There have been a range of cases in the past year continuing to put the role of secrecy in a justice system in the spotlight, if not necessarily the sunlight.

***R(Bancoult) v Secretary of State for Foreign and Commonwealth* *Affairs***[2012] EWHC 2115 (Admin) and [2013] EWHC 1502 (Admin)

1. These two decisions are of direct relevance to the use that can be made of secret material obtained by Wikileaks, even where such material has been widely published. Somewhat unusually, this arose in the latest chapter in the attempts by Chagos Islanders to secure their return to the Chagos Islands.

1. B, the Chair of the Chagos Refugees Group, sought judicial review of the decision of the Secretary of State to create a Marine Protected Area ("MPA") around the British Indian Ocean Territory. This claim was part of a long-standing campaign of the Chagos Islanders to enable their return to the Chagos islands, after removal by the Government between 1965 and 1973 and subsequent continued exclusion.[[2]](#footnote-2)
2. The making of the MPA rendered any commercial fishing in the area unlawful. It would therefore make it more difficult for the Islanders to sustain themselves if they were to succeed in returning to the Islands.

1. One of the grounds of review was an allegation that the decision to make the MPA was made, at least in part, for the improper purpose of seeking to prevent their return. The allegation was based on publication by *The Telegraph* and *The Guardian* of what were said to be confidential and sensitive memoranda sent by the US Embassy in London to the State Department in Washington, as disclosed through Wikileaks. B sought to rely on a cable of 15 May 2009 said to report a meeting between US representatives and Mr Roberts, HM Commissioner for the British Indian Ocean Territory, and Ms Yeadon, a civil servant. The document reported that Mr Roberts had stated that the MPA would, in effect, put paid to the resettlement claims of the former residents.

1. The Judge noted that for understandable reasons, it was not the policy of the Secretary of State to admit or to dispute that documents leaked by Wikileaks were, or were not, genuine. The HM Commissioner and the civil servant had addressed in their witness statement their recollections of the meeting of 12 May 2008 and they had no contemporaneous note or record, but they had not addressed the contents of the alleged cable.

1. B was granted permission to cross-examine Mr Roberts and Ms Yeadon on the basis of the factual dispute as to what was said at the meeting of 12 May 2009, as compared with the Wikileaks document. This was because of the potential relevance as to whether there was an irrelevant and improper motive for the creation of the MPA. The Secretary of State had unsuccessfully resisted the order for cross-examination on the basis that the Court should not further Wikileaks improper purposes.

1. The Judge acknowledged that the Wikileaks documents must have been obtained unlawfully, and in all probability by the commission of a criminal offence under the law of the USA. He understood why it was the policy of HM Government neither to confirm nor to deny the genuineness of leaked documents, save in exceptional circumstances, particularly where, as here, the documents in question were not those produced or received by the UK Government. However, because the documents in question had been leaked and widely published, and no claim had been made to the effect that the documents should not be considered by the Court on the grounds of public interest immunity or the like, and they were before the Court, he considered the Court would have to decide whether or not they were genuine documents. Consequently, he did not see how the claim could be fairly or justly determined without resolving the allegation made by the Claimant, based on the Wikileaks documents, as to what transpired at the meeting of 12 May 2009, and more widely whether at least one of the motives for the creation of the MPA was the desire to prevent resettlement.

1. The substantive hearing of the claim subsequently occurred in April 2013 before Richards LJ and Mitting J: see [2013] EWHC 1502 (Admin) at which cross-examination commenced.

1. However, during the course of that cross-examination the Court revisited the question of the admissibility and use of the cable materials. B asked for a ruling that B could cross-examine with a view to inviting the Court to rely on the key document evidentially, despite the Secretary of State’s policy of NCND. The Court initially indicated that B could do so. However, this was superseded by the Court’s subsequent decision the following day that cross-examination on that basis was not permitted.

1. In its subsequent judgment, the Court stated that it would have admitted the documents if the only objection had been the NCND policy; but it went on to consider two other objections which the Court had identified during the hearing. The first was a concern that admitting the material might constitute an offence under section 6 of the Official Secrets Act 1989. The Court ultimately rejected that concern on a proper construction of section 6 and the wide public availability of the material in question.

1. The second was a conclusion that the Court was still prohibited from admitting the documents evidentially because of Articles 24 and/or 27.2 of the Vienna Convention on Diplomatic Relations 1961, as set out and incorporated into English law by the Diplomatic Privileges Act 1964.

1. The Court noted that section 2(1) of the Diplomatic Privileges Act 1964 provided that the articles of the Vienna Convention on Diplomatic Relations, signed at Vienna on 18 April 1961, set out in Schedule 1 to the Act had the force of law in the United Kingdom. Those articles include Articles 24 and 27.2 which provided:

"Article 24 The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 27 … 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions."

1. The Court analysed the proper meaning of these Articles and considered that their effect had been conclusively determined by the speech of Lord Bridge of Harwich in *Shearson Lehman Brothers Inc. v. Maclaine Watson and Co. Ltd* *and* *International Tin Council (Intervener) (No. 2)* [1988] 1 WLR 16. This was in respect of Article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972. It provided that the ITC "shall have the like inviolability of official archives as in accordance with the 1961 Convention Articles is accorded in respect of the official archives of a diplomatic mission".
2. The Court relied on what Lord Bridge had stated at page 27F–G:

"Mr Kentridge presented a forceful argument for the defendants based on the proposition that the only protection which the status of inviolability conferred by Article 24 of the Vienna Convention and Article 7(1) of the Order of 1972 affords is against executive or judicial action by the host state. Hence, it was submitted, even if a document was stolen, or otherwise obtained by improper means, from a diplomatic mission, inviolability could not be relied on to prevent the thief or other violator from putting it in evidence, but the mission would be driven to invoke some other ground of objection to its admissibility. I need not examine this argument at length. I reject it substantially for the reasons given by the Court of Appeal. The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings."

1. The Court concluded this statement of principle provided a complete answer to the evidential use of the Wikileaks document in the proceedings. The document was assumed to be illicitly obtained, where B, at several removes had obtained possession of the document from the "violator". Accordingly, the Court concluded the document could not be used in judicial proceedings. It further decided that the information in the document was the object of the protection conferred by Articles 24 and 27.2, not just the document itself.

1. The Court rejected B’s reliance on the fact that other similar documents, including *Wikileaks-*releaseddocuments, had been relied upon by other Courts. For example: (1) *Rose v. The King* [1947] 3 DLR 618 where the Quebec Court of King's Bench, Appeal Side upheld the admission in a criminal case of documents taken by a witness from the Russian Embassy which evidenced a plot, to which Russian officials were party, against the Canadian State; (2) *Prosecutor v. Charles Ghankay Taylor*, where the Special Court for Sierra Leone held on 27 January 2011 that two US Government cables leaked through Wikileaks and published in the Guardian on 17 December 2010 were in principle admissible to support an application by the defence to reopen their case; (3) *El Masri v. The Former Yugoslav Republic of Macedonia* where the Grand Chamber of the Strasbourg Court handed down a final judgment on 13 December 2012 in which the applicant had submitted US diplomatic cables in support of his application; and (4) *Bank Mellat v. Council of the European Union*, where the Fourth Chamber of the General Court at Luxembourg noted in its judgment of 29 January 2013 the Commission's submission that no account should be taken of leaked diplomatic cables, but the court's only observation was that the fact that some Member States were subject to diplomatic pressure "even if proved" did not imply that such pressure affected the contested measures.
2. The Court rejected reliance on these cases on the basis that the issue of the 1961 Convention had not been raised. The Canadian case had, of course, been decided before the 1961 Convention came into force.

1. Consequently, it appears that the general position is that the Courts will be bound to refuse to admit documents of this type, where they are released by organisation such as Wikileaks following unlawful disclosure, notwithstanding any widespread publication of those documents in the press and elsewhere.

***R(Evans) v Her Majesty’s Attorney General and the Information Commissioner***[2013] EWHC 1960 (Admin)

1. The issue of secrecy arose in a rather different context in *Evans*. This concerned the preservation of non-disclosure of communications between the Prince of Wales and Government ministers, where they had been sought under the Freedom of Information Act 2000. The communications had been made prior to the introduction of a new statutory exemption for the Prince of Wales, similar to that which applies to the Queen, as from 19 January 2011.

1. The raised the issue of the validity of the “statutory override” or “veto” vested in Government Ministers and the Attorney General under section 53 of the Freedom of Information Act 2000. This provision enables Government Ministers or the Attorney General to exercise a statutory power of veto of disclosure of information, even where the Tribunal or the Court has otherwise concluded is not exempt from disclosure under the FOIA.

1. As the Lord Chief Justice put it: “The possibility that a minister of the Crown may lawfully override the decision of a superior court of record involves what appears to be a constitutional aberration.”

1. The Court considered that it was an understatement to describe the situation under s.53 of FOIA as unusual. It appeared to be a unique situation and no similar statutory arrangements could be found in this jurisdiction, although the same “override” exists in the freedom of information arrangements in a number of common law countries, including New Zealand, Australia and Canada.

1. In the event, the Divisional Court concluded that this statutory veto did not offend the rule of law, or any wider principle of constitutionality. This was in light of the sovereignty of Parliament to enact such a provision and the fact that it was considered to be not quite “a pernicious "Henry VIII clause"” enabling a minister to override statute, because the power was not unconstrained, otherwise it might had “the same damaging effect on the rule of law.”

1. The apparent saving grace for the provision in terms of constitutionality and the rule of law was the requirement for any such statutory override decision to be laid before Parliament, and for it to be accompanied by reasons which themselves must demonstrate “reasonable grounds” for the exercise of the veto.

1. As a matter of statutory construction, notwithstanding the language of section 53(2) itself which suggested otherwise, the Court concluded that “reasonable grounds” was not a matter of self-certification, but in fact a jurisdictional condition precedent. It was concluded that the reasonable grounds for the certificate must exist; and if reasonable grounds did not exist the certificate would be invalid and of no effect.

1. The Court placed particular reliance on the fact that the exercise of the veto remained subject to judicial scrutiny by way of judicial review. The Court considered that this process was not confined or constrained by “artificial rules”. As the Lord Chief Justice put it:

 “ … unless, before exercising the executive override, the minister has given full weight to the decision of the court, he will not have acted reasonably, and the override will be set aside. Beyond the language of s.53 itself, there are no inhibitions on the court's approach to the problem, and given the delicate constitutional circumstances in which the jurisdiction falls to be exercised, it is clear that the aggrieved applicant is not required to go so far as to demonstrate that the minister's decision is "unreasonable" in the familiar but narrow "Wednesbury" sense. Rather, the principle of constitutionality requires the minister to address the decision of the Upper Tribunal (or whichever court it may be) head on, and explain in clear and unequivocal terms the reasons why, notwithstanding the decision of the court, the executive override has been exercised on public interest grounds. That provides the essential context in which the reasonableness of the grounds for the minister's opinion must be examined. As this close judicial scrutiny is available the legislative provision in s.53(2) provides the necessary safeguard for the constitutionality of the process.”

1. For reasons given by Davis LJ, the Court decided that the decision of the Attorney General in respect of the Prince of Wales’ correspondence had satisfied this critical reasonableness requirement. Davis LJ was of the opinion that in a case of this kind such a certificate, with Statement of Reasons, should receive as much “light of day” as possible. Both the Certificate and Statement of Reasons were appended to the Judgment.

1. The debate on how the Court was to adjudicate on “reasonable grounds” is particularly interesting. Davis LJ regarded the bright-line classification of the issues as either issues of fact or issues of law or issues of mixed fact and law as not helpful. He considered it did not reflect the reality. The thought that it did not involve a dispute based on a challenge to a primary finding of fact or a challenge to a ruling of law, but a difficult exercise in evaluation, ultimately depending on the weight to be accorded to the various competing factors.

1. The Court also rejected an argument that the power under s.53 of FOIA was not compatible with the Council Directive 2003/4/EC on public access to environmental information, or with Article 47 of the EU Charter of Fundamental Rights. These arguments had been made having regard to the Implementation Guide to the Aarhus Convention and to the recommendations of the Aarhus Convention Compliance Committee (ACCC/C/2008/33) published in 2011 relating to compliance by the United Kingdom with the Aarhus Convention in respect of a licence issued concerning the Port of Tyne. In the course of such recommendations the Committee had queried whether judicial review met the standards required for review by the Aarhus Convention with regard to "substantive legality". The Court rejected concerns of this kind.

*Bank Mellat* v *(No.1)*

1. Questions of secrecy in terms of the use of closed procedures in court proceedings have continued to pose difficult questions, even now for the highest court in the land. Each time it raises the basic tension between the fundamental principles of a fair justice system and the problem of non-disclosure of sensitive material.

1. By way of background, it will be recalled that in *Al Rawi v The Security Service and others* [2011] UKSC 34, the Supreme Court seemingly conclusively rejected any development of the common law to enable use of a “closed material procedure” in the whole, or part, of the trial of a civil claim absent specific legislation permitting such a procedure.

1. In so doing, the Supreme Court recognised that the absence of such a procedure might mean it would still be necessary to strike out a claim such as that which arose in *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 1786. There, a registered police informer sought to recover payment for information and assistance provided to the police. The defendants denied any contractual liability to make such payments or that any information or assistance provided by the plaintiff had led to the arrests or the prosecutions alleged. The Court of Appeal concluded that a fair trial of the issues raised by the pleadings would require the police to disclose, and the court to investigate and adjudicate upon, sensitive information which should in the public interest remain confidential to the police. It therefore struck out the claim.

1. In *Al Rawi* the Supreme Court considered such cases were a rarity, but not ones which justified extending the common law in the way suggested.

1. In *R(Mohammed) v Secretary of State for Defence* [2012] EWHC 3454, Moses LJ revisited the principles established in *Al Rawi* in adopting a “confidentiality ring” procedure. Under this process, information for which PII had been claimed could, as a matter of principle, be provided to the Claimant’s lawyers only and considered *in camera*.

1. In using this procedure, Moses LJ rejected the notion that this practice had been ruled impermissible by the House of Lords in *Somerville v Scottish Ministers* [2007] 1 WLR 2734 or by *Al Rawi*. Moses LJ considered that a confidentiality ring of the type proposed avoided the difficulties identified in those other cases, and it would only be put in place *after* the court had considered the documents in respect of which immunity is claimed. He considered it provided an alternative to a ruling either to uphold or reject the claim, whereas the problem with the procedure adopted in *Somerville* had been that it hadbreached the very protection which was sought by the Executive.

1. Moses LJ considered that if a court ruled in favour of a confidentiality ring, it would be deciding that the public interest demanded not complete immunity but rather it could be protected by a more limited form of confidentiality. He concluded that a confidentiality ring could only exist where the client's legal team consented and was of the view that it would not damage their client's interests. He also considered that in *Al Rawi*, the question as to whether the parties could agree to a closed hearing was not for determination, and no argument was heard, although some of the Justices expressed doubt as to whether consent provided a solution

1. In *AHK and others v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), Ouseley J had to examine this issue again. This was in the context of cases of judicial review of decisions of the Secretary of State to refuse to grant naturalisation as a British Citizen under section 6 of the British Nationality Act 1981. The refusals were on the basis that the persons were not of good character, but where the Secretary of State was not willing to disclose documents upon which she relied in making her decisions because of harm to national security.

1. The Court rejected the ability to adopt a closed material procedure in light of *Al Rawi*. It considered that this was the case even if the consent of the parties were given.

1. The Court considered what the potential outcome of the PII process would be if the claim for PII were upheld. The Court was of the view that if the Secretary of State gave evidence that there were good reasons and a sound and relevant basis for her decision, it would be impossible for the Court to hold that she was wrong in her substantive decision and the claims would fail. The Court concluded that the position was akin to *Carnduff*. Ouseley J disagreed with the principle of using a confidentiality ring for the reasons he had given in a previous SIAC judgment. However, Ouseley J was prepared to contemplate staying the proceedings, pending the outcome of the then pending enactement of the Justice and Security Bill.

1. The issue of closed procedures has now arisen again in the recent decision of the Supreme Court in *Bank Mellat.* The case resulted in two significant judgment, but the first deals with the closed procedure issue: *Bank Mellat v Her Majesty’s Treasury (No.1)* [2013] UKSC 38

1. Under the Counter-Terrorism Act 2008, the Treasury had made the Financial Restrictions (Iran) Order 2009 (“the 2009 Order”), which Parliament subsequently approved. The 2009 Order effectively shut down the United Kingdom operations of Bank Mellat and its subsidiary. Section 63 of the 2008 Act gave any party affected by such an order the right to apply to the High Court to set it aside. The Bank made such an application and the Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives.

1. In the High Court, Mitting J accepted the Government’s case that justice required that the evidence in question be put before the court and that it had to be dealt with by a closed material procedure. The hearing before him was partly in open court and partly at a closed hearing. Mitting J handed down an open judgment, in which he dismissed the Bank’s application, and a shorter closed judgment, which was seen by the Treasury, but not by the Bank, and was not publicly available. In the Court of Appeal, the appeal was heard largely by way of an open hearing, but there was a short closed hearing to consider the closed judgment of Mitting J. The Court of Appeal dismissed the Bank’s appeal in an open judgment, and while it referred in general terms to the closed material in that open judgment, the Court of Appeal found it unnecessary to give a closed judgment.

1. The Supreme Court decided (i) by a majority of six (Lord Neuberger, Lady Hale, Lord Clarke, Lord Dyson and Lord Sumption) to three (Lord Hope, Lord Kerr and Lord Reed dissenting), that it was possible for the Supreme Court to adopt a closed material procedure on an appeal, and (ii) by a majority of five to four (Lord Hope, Lord Kerr, Lord Dyson, and Lord Reed dissenting), that it was appropriate to adopt a closed material procedure on the appeal.

1. Lord Neuberger gave the judgment of the majority on both those issues. The majority decided that section 40(2) of the Constitutional Reform Act 2005 giving the right of appeal to the Supreme Court against any judgment of the Court of Appeal must extend to a judgment which was wholly or partially closed.

1. It is clear that the majority view was reached in light of the unattractiveness of the alternative courses of action if no such procedure were accepted. Where a closed material procedure had been adopted at first instance and in the Court of Appeal, for the Supreme Court to entertain an appeal without considering the closed material it was considered would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal, or in the sense of being seen fairly to determine the appeal

1. The minority considered that Parliament had not conferred the power to conduct such a procedure on the Supreme Court (as opposed to the High Court, the Court of Session and the Court of Appeal) and such a procedure would be contrary to the fundamental principle of the common law right to a fair trial.

1. Despite accepting the principle of such a procedure, strong warnings were given as to the invocation of the closed material procedure at the appellate level. The Supreme Court stated that it had voiced strong suspicions at the time that nothing in Mitting J’s closed judgment would have any effect on the outcome of the appeal, but the bare majority had decided to grant the Treasury’s request to hold a closed material procedure. This was because they could not be sure, without seeing the closed judgment and listening to submissions on it, whether the closed judgment would have any effect on the outcome of the appeal. There seemed to be a real risk of justice not being seen to be done to the Treasury if the Supreme Court did not proceed to hold a closed hearing. However, afterholding a closed hearing, they concluded that there had been no point in the Supreme Court seeing the closed judgment, because there was nothing in it which could have affected the Supreme Court’s reasoning.

1. Lord Neuberger drew seven conclusions from the experience, summarised as follows:
2. if there is an open and closed judgment, the open judgment should identify every conclusion reached in whole or in part in light of points made or evidence in the closed judgment and the judge states what has been done;
3. as much should be said in the open judgment about the closed material relied on in the closed judgment as possible;
4. on appeal against an open and closed judgment, an appellate court should, of course, only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal and the advocate should considered very carefully whether to make such a request;
5. if the appellate court decides that it should look at closed material, careful consideration should be given by the advocates, and indeed by the court, to the question whether it would nonetheless be possible to avoid a closed substantive hearing;
6. if the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing;
7. if there is a closed hearing, the lawyers representing the party who is relying on the closed material, as well as that party itself, should ensure that, well in advance of the hearing of the appeal, (i) the excluded party is given as much information as possible about any closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible as to the nature of the passages relied on in such closed documents and the arguments which will be advanced in relation thereto;
8. the appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material.
9. Much of the debate about the ability to conduct closed material procedures at the first stage of litigation has now been rendered academic in light of Parliamentary intervention in the form of Justice and Security Act 2013. This enables closed material procedures to be carried out in civil litigation.

1. However, it seems likely that the approach of the Supreme Court in the *Bank Mellat (No.1)* as to the general reluctance at the appellate level of resorting to a closed material procedure will continue to apply under the new legislative provisions.

Fair Procedures

1. The *Bank Mellat* decision is not only significant for its consideration of the closed material procedure. The second long judgment relates to the substantive appeal as to whether or not the Order in question was validly made: *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39.

1. Bank Mellat sought to set aside the Treasury’s direction under Schedule 7 of the Counter-Terrorism Act 2008 requiring all persons operating in the financial sector not to have any commercial dealings with Bank Mellat.

1. The 2008 Act itself only laid down three safeguards: (1) the direction must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect thereafter; (2) the direction must be proportionate having regard to the risk to the national interest presented by, in this case, nuclear proliferation; and (3) any person affected by the direction may apply to the High Court to set it aside.
2. However, the majority of the Supreme Court concluded that the order should be set aside on procedural grounds because the Treasury had failed to give the Bank the opportunity to make representations before making the direction. Despite the absence of any express statutory right to such an opportunity, the Supreme Court concluded that such an opportunity was required at common law. The Supreme Court also allowed the appeal on substantive grounds to the effect that the Order was not justified under the Act.

1. The decision of the Supreme Court is a continuing example of what appears to be an increasingly common practice of larger panels sitting on cases, with decisions passed by relative narrow majorities. In this case, the appeal was allowed on the procedural ground by a majority of 6 to 3 ((Lords Hope, Reed and Carnwath dissenting); and on the substantive grounds by a majority of 5 to 4 (Lords Neuberger, Hope, Dyson and Reed dissenting).

1. Lord Sumption’s majority judgment on procedural grounds is of particular wider interest in relation to the analysis of the common law requirements of the duties of fairness, in circumstances where coercive action is taken peremptorily by the State pursuant to statutory powers.

1. He concluded that a common law duty of prior consultation depended on the particular circumstances in which each direction was made, but that unless a statute expressly or impliedly excludes a duty of consultation, or in the particular case consultation would be impractical or frustrate the object of the direction, fairness required that a person specifically targeted by it should have an opportunity to make representations.

1. Because the direction had serious effects on Bank Mellat’s business, came into force immediately and took effect for up to 28 days pending Parliamentary approval, and there were no significant practical difficulties about consultation, the Bank should have been consulted. He also concluded that the duty of fairness was not excluded by (1) the statutory right under the Act of recourse to the courts after the direction; or (2) the fact that the order was subordinate legislation.

1. He identified that the statutory right substantially reproduced the rights which a person affected would have anyway on judicial review. It therefore should not limit other procedural rights. It was also inadequate where the effects of an order were immediate. This analysis was not affected by the fact that the direction was made by statutory instrument.

**The Spectrum of Colours of the Common Law and the Right to Access to Justice**

1. The combination of a challenge advanced under the common law and, alternatively, under the HRA 1998, also formed the focus of a somewhat different complaint in *R(Children’s Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34.

1. On appeal from a decision of Foskett J, CRAE and the EHRC sought to argue that the fundamental right of access to justice required the Secretary of State to provide, or facilitate, the provision of information to stated categories of children as to the illegal use of restraint techniques on them when they had been detained in Secure Training Centres (STCs) in the United Kingdom. It was argued that the common law, or the ECHR, required the Secretary of State to take steps which would enable the trainees to discover the wrong, and thereby realise the legal rights which they possess in consequence.

1. The contention was that the right of an individual to an effective access to justice made it a small step to conclude that there was an obligation on the part of the Secretary of State to inform those potentially affected by the unlawful use of force during the relevant period that they may have been so affected.
2. Although the Claimants disavowed any floodgates effect, the Court of Appeal was concerned with the potential effect of any such duty. As Laws LJ stated:

“… the submission entails a particular (and striking) view of the scope of the common law's insistence on access to justice. It means that at least in some circumstances a potential defendant to a civil suit must declare himself as such. If there is any force in such a proposition, we cannot in my judgment presume that it is uniquely applicable in this case.

But stated as baldly as I have stated it, the proposition cannot be right. In the first place, it could not apply to a potential defendant who is not an emanation of the State. The burden of the cases shows that the courts will not allow the State to impede the individual's right of access to justice; but there is no learning which remotely suggests that a non-State party, in any circumstances, might owe a duty to seek out or notify another of a claim which that other might have against him. Apart from anything else, the imposition of such a duty on a private litigant would be repugnant to the common law's adversarial system of justice; and if it were expressed as a duty owed in *private* law, it would be alien to every other such duty: not vouched by agreement, nor by the neighbour principle, nor the avoidance of harm to person, property or reputation. It would be like a colour not known on the spectrum.”

“…If there were a positive duty upon the State to provide a potential claimant with the legal elements of his case, that would be as discordant with the common law's adversarial system of justice as if it were suggested that a non-State party might owe such a duty. More: unless this positive duty were owed universally, it would be to provide selected beneficiaries with a distinct advantage over other potential litigants who may one way or another lack the information required to mount a claim, but to whom, nevertheless, the duty was not owed. Such a state of affairs would be inimical to a signal feature of access to justice: that it should be even-handed. But plainly the duty could not be owed universally – to every potential litigant ignorant of his rights. That would not merely be to strike a discord with the common law's adversarial system of justice. It would be to abolish it. Equally, the duty could not in reason be owed in this single case only; if by judicial *diktat* we held that it was, that would simply be eccentric. And there is no principled basis upon which to identify a class of beneficiaries beyond these trainees but short of all potential litigants, so that the duty's reach is neither unique nor universal but somewhere in between. For these reasons the case for such a positive duty is in the end arbitrary.”

1. The Court of Appeal went on to reject a similar argument made under the ECHR, whether advanced under Article 6, or under the procedural rights contained in Articles 3 or 8.
2. Laws LJ went on to observe that the Court of Appeal was bound by the *Ullah* principle, but he included a request, with deference to the House of Lords and Supreme Court, that the principle ought to be revisited:

“There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases. It is a high priority that the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence. If the road to such a goal is clear, so much the better.”

**Alvi and Munir revisited: New London College Ltd & West London Vocational Training**

1. In two combined cases, the Supreme Court has had to give detailed consideration to the difference between rules required to be laid before Parliament under the Immigration Act 1971 and guidance which is not required to be exposed to that procedure.

1. In *R (New London College Ltd) v Secretary of State for the Home Department and R (West London Vocational Training College) v Secretary of State for the Home Department* [2013] UKSC 51, challenges were made regarding decisions on the system for licensing educational institutions to sponsor students from outside the European Economic Area under Tier 4 of the current points-based system of immigration control.

1. Tier 4 dealt with the grant of leave to enter or remain in the United Kingdom to migrants to the UK from outside the European Economic Area for the purpose of study. The essential requirement of the Tier 4 scheme was that the migrant should have been sponsored by an educational institution holding a sponsor’s licence. That requirement was laid down in Part 6A of the Immigration Rules, which dealt with the requirements to be satisfied by migrants applying for leave to enter or remain for the purpose of study. The criteria for licensing sponsors and the duties of sponsors once licensed were not prescribed in the Immigration Rules, but only in the Tier 4 Sponsor Guidance issued by the Secretary of State.

1. Section 3(2) of the Immigration Act 1971 provides that the Secretary of State shall lay before Parliament rules as to the practice to be followed in regulating the entry and stay in the UK of persons required under the Act to have leave to enter. Part 6A of the Immigration Rules was laid before Parliament under section 3(2) of the Act, but the Sponsor Guidance was not.

1. The Supreme Court unanimously dismissed the appeals by the two colleges. Lord Sumption gave the lead judgment, concluding that the criteria for sponsor licensing contained in the Sponsor Guidance were properly to be described as rules, but they were not required to be laid before Parliament under section 3(2) of the Act. This was because that requirement related only to rules regulating the grant of leave to enter or remain in the UK which had to be satisfied by the migrant. The Guidance was directed only to the licensing of sponsoring institutions.

1. Lord Sumption concluded that it could not have been Parliament’s intention that the Secretary of State should be limited to those methods of immigration control which required no other administrative measures apart from the grant or refusal of leave to enter or remain in the UK.

1. It was noted that the submissions made by the respective colleges might have been self-defeating in any event, if successful, because if the system in question were not valid then the complaints about withdrawal of their licences would be somewhat academic.

**Statutory Construction: *Cusack v London Borough of Harrow***

1. As the college cases illustrate, statutory construction is “bread and butter” for most public lawyers, but it is not often straightforward.

1. The decision of the Supreme Court in *Cusack (Respondent) v London Borough of Harrow (Appellant*) [2013] UKSC 40 is not of particular widespread interest because of the particular statutory provisions in issue in that case: parallel powers for a highway authority erect barriers preventing a property owner accessing a public highway. Its particular interest lies in the endorsement of appropriate use of the canons of statutory construction.

1. Mr Cusack was a solicitor who has practised from a property on a main road in Harrow. Harrow London Borough Council, the relevant highway authority, informed Mr Cusack that the movement of vehicles across the footpath in front of his property to a parking area was a danger to pedestrians and other motorists. Mr Cusack was told that the council intended to erect barriers in front of his property and several neighbouring properties in order to prevent cars driving over the footpath.

1. Mr Cusack began proceedings seeking an injunction restraining the council from erecting the barriers. A county court judge refused to grant the injunction, holding that the council had power to erect the barriers under section 80 of the Highways Act 1980. The Court of Appeal held that section 80 was not applicable because the council had power to erect the barriers under section 66(2) of the 1980 Act, but which would require payment of compensation.

1. The Supreme Court unanimously allowed the council’s appeal. Lord Carnwath gave the leading judgment, concluding that there was no general right to compensation when action is taken to restrict a property owner’s right of access to an adjoining highway. Where the authority had two potential powers available to it, it was entitled to use that power which did not provide payment for compensation.

1. Lord Neuberger gave a concurring speech. He also addressed the role of the canons of statutory construction, and the valuable role they had to play as guidelines embodying logic or commonsense. Thus he stated:

“57. It was suggested on behalf of the council that this case represented an opportunity for this court to "make it clear that canons of construction should have a limited role to play in the interpretation" of statutes (and indeed contracts). In my view, canons of construction have a valuable part to play in interpretation, provided that they are treated as guidelines rather than railway lines, as servants rather than masters. If invoked properly, they represent a very good example of the value of precedent.

58. Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents: that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.

59. Thus, there are some rules of general application – eg that a statute cannot be interpreted by reference to what was said about it in Parliament (unless the requirements laid down in *Pepper v Hart* [[1993] AC 593](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1992/3.html) are satisfied), or that prior negotiations or subsequent actions cannot be taken into account when construing a contract. In addition, particularly in a system which accords as much importance to precedence as the common law, considerable help can often be gained from considering the approach and techniques devised or adopted by other judges when considering questions of interpretation. Even though such approaches and techniques cannot amount to rules, they not only assist lawyers and judges who are subsequently faced with interpretation issues, but they also ensure a degree of consistency of approach to such issues.

60. Hence the so-called canons of construction, some of which are of relatively general application, such as the so-called golden rule (that words are prima facie to be given their ordinary meaning), and some of which may assist in dealing with a more specific problem, such as that enunciated by Sir John Romilly in *Pretty v Solly*. With few, if any, exceptions, the canons embody logic or common sense, but that is scarcely a reason for discarding them: on the contrary. Of course there will be many cases, where different canons will point to different answers, but that does not call their value into question. Provided that it is remembered that the canons exist to illuminate and help, but not to constrain or inhibit, they remain of real value.”

 **Postscript**

1. There is a myriad of other public law cases of interest, both in specialist areas and more generally. The ones chosen are necessarily only a very small subjective selection.
1. “Sunlight is said to be the best of disinfectants”: Justice Louis D Brandeis in ‘What Publicity Can Do’ *Harper’s Weekly*  (1913) [↑](#footnote-ref-1)
2. See *Chagos Islanders v the Attorney General* [[2004] EWCA Civ 997](http://www.bailii.org/ew/cases/EWCA/Civ/2004/997.html), *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [[2008] UKHL 61](http://www.bailii.org/uk/cases/UKHL/2008/61.html) [[2009] AC 453](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2008/61.html) and *Chagos Islanders v the United Kingdom* [[2009] ECHR 410](http://www.bailii.org/eu/cases/ECHR/2009/410.html) [↑](#footnote-ref-2)