FOREWORD (PUBLIC LAW)

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The most important recent decision of the UK Supreme Court in the realm of public law is surely its rejection of the application for judicial review of the decision to refuse leave to the applicant to enter the UK in order to participate in her appeal against the order which deprives her of UK citizenship: *R (Begum) v Secretary of State for the Home Department*.[1] As always, the judgment of Lord Reed appears carefully measured. The Home Secretary's decision had been based on asserted concerns that the effect of Ms. Begum's return to the UK would be to endanger national security; and clearly the court had to afford respect to them. But, unless they were a trump card, how much respect? The court concluded that her application should be stayed until she could participate effectively in the appeal without endangering national security. It conceded that this solution was imperfect in that the deprivation of her citizenship (which has generated widespread public controversy) would therefore remain in force, incapable of challenge for a period upon which the court clearly felt unable to set a date even for review. The question is whether this undeniably unattractive result should have affected the amount of respect which fell to be paid to the asserted concerns. My experience is that the judges of the Supreme Court strive to their utmost to prevent their personal predilections from playing a part in the evaluative exercises required of them. But do they always succeed? Can we imagine, for example, that Lord Kerr, whose recent death is so widely

[1] [2021] UKSC 7, [2021] 2 WLR 556.

mourned, would have associated himself with the court's evaluation?

A different but linked question is whether we should expect judges entirely to exclude consideration of the political and social consequences of deciding a case in one way rather than in another. It is prompted by the hard-hitting article by John Yap and Nicholas Jin in this edition on the Court of Appeal's rejection of the challenge to the validity of the regulations by which in March 2020 the Government introduced into England the severe lockdown measures designed to combat the Covid-19 pandemic: *R (Dolan) v Secretary of State for Health*.[2] John and Nicholas charge the court with excessive deference to executive decisions made in time of emergency. In fact the regulations had been repealed during the hearing at first instance but by no means all of the political and social consequences of any decision to declare them invalid had then evaporated.

I am reminded of my own participation in an appeal to the Supreme Court which had potentially substantial political and social consequences: *Moohan v The Lord Advocate*.[3] The appeal, heard on 24 July 2014, challenged the lawfulness of legislation which precluded all convicted prisoners in Scotland from voting in the referendum on Scottish independence fixed to take place only eight weeks later. It was doubtful whether, were the legislation to be held unlawful, the necessary remedial measures could be brought into effect within that time. At an early stage, therefore, the profound consequences of upholding the appeal troubled me. Nevertheless, by the end of the hearing, I had become convinced that the blanket exclusion of all the prisoners from the franchise breached the human rights of at any rate some

[2] [2020] EWCA Civ 1605, [2021] 1 WLR 2326.
[3] [2014] UKSC 67, [2015] AC 901.

of them. It soon transpired, however, that a majority of my colleagues proposed to dismiss the appeal and that my judgment would be one of dissent. I confess that at that point my concern at what I considered to be the unlawful exclusion of prisoners from the franchise was tempered by relief that, by my judgment, I would not be contributing to substantial political and social upheaval; and my question to you undergraduates is whether these sentiments of mine were professionally inappropriate.

In her nicely provocative article Petra Stojnic touches on another subject of acute current relevance—the subjection of UK armed forces to obligations to uphold the human rights of those with whom they are in armed conflict abroad. Her focus is the decision of the Strasbourg court in *Al-Skeini v UK*.[4] Then in an era of expansive disposition, the court held that the UK breached the rights of non-detained Iraqi civilians whom its forces shot in the course of a military operation; for, although the UK did not control that territory, it assumed responsibility for the maintenance of security there, with the result that the civilians were held to fall within its jurisdiction for Convention purposes. The burden of Petra's article is that the court in *Al-Skeini* did not go far enough and that, if the UK caused what would, in the event of jurisdiction, be a breach of the Convention, then jurisdiction should depend on an assessment of the scope of its responsibility on the facts of each case. She might have been wise to refer to, if only to disagree with, our extensive review of *Al-Skeini* in *Mohammed v Secretary of State for Defence*;[5] but the real questions—apt for answers in next year's edition?—are whether Petra's solution would be appropriate as a pan-European jurisdictional criterion or whether it is practicable either to expect soldiers in the heat of armed conflict so to confine their activities as to

[4] [2011] 7 WLUK 207, (2011) 53 EHRR 18.
[5] [2017] UKSC 2, [2017] AC 821.

respect the human rights of those ranged against them or indeed to expect courts to be able satisfactorily to judge whether soldiers in that situation had infringed those rights.

In her article Caragh Deery considers the decision of the Court of Appeal in *R (McConnell and YY) v Registrar General for England and Wales*,[6] which addressed yet a third subject of extreme topicality. Shortly after he had secured recognition as transgender, Mr McConnell became pregnant and gave birth to YY. In the proceedings he unsuccessfully challenged his description as YY's 'mother' in the Register of Births. The court held that the Registrar was required to reflect the biological reality of the birth, which was that Mr McConnell was the mother and therefore that, notwithstanding his legal status as male, he could not instead be recorded as the father. Caragh's examination of the case is well-balanced and attuned to the surrounding sensitivities; and while, in the end, she endorses the decision as in accordance with the present law, she calls for discussion whether, without forfeiting biological accuracy, other descriptions of parenthood might be devised which would better serve our differing modern identities.

Then we find the article by Sze Hian Ng on the effect of the decision of the Luxembourg court in *Slovak Republic v Achmea BV*.[7] A bilateral investment treaty between Holland and Slovakia provided for disputes to be resolved by an arbitral tribunal; and the court held the provision to be unlawful because the tribunal would be interpreting EU law while lying outside the network of judicial bodies solely authorised to interpret it under EU treaties. The question is whether the effect of the decision prohibits access by EU members to arbitral tribunals established under the important Energy Charter Treaty, to which there are many other

[6] [2020] EWCA Civ 559, [2021] Fam 77.
[7] [2018] 4 WLR 87.

contracting parties worldwide. Sze Hian's answer is 'perhaps not'. I hope that he becomes an advocate for he has a rare forensic skill: he makes a dry subject sound interesting.

It remains only to refer to two complementary articles on the need to control the use of algorithms in automated decision-making by public authorities. The authors recognise the benefits of such systems in terms of consistency but address the risks that some such decisions will be infected by unlawfulness which will be difficult for the victims to establish. In his article Benjamin Cartwright suggests a suite of controls to operate before the algorithm is set to work, in particular its scrutiny by a specialist body, an Algorithm Commission. In hers Gianna Seglias addresses the particular use of algorithms in the assessment of the risk of a person's future unlawful behaviour in deciding whether to bring a charge or to grant parole. She suggests that a muscular use of the laws against discrimination (the principles of which I always found fiendishly difficult to apply) would help to establish the unlawfulness of the decision in court. These thoughtful articles deserve high-level professional attention.

For the purpose of writing this foreword I have read each of these articles twice. Instead of being a burden, it was a pleasure. For, in different ways, each is excellent. Congratulations!

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