

COURT OF APPEAL: SOME LEADING CASES IN 2003-2004

Grouped by subject-matter

ANTI-TERRORISM LEGISLATION

Suspicious circumstances were insufficient to justify the certification of M as a suspected international terrorist when all other circumstances were taken into account. ([M v Secretary of State for the Home Department](#) [2004] EWCA Civ 324)

The Court of Appeal has no jurisdiction to hear an appeal by the Home Secretary against the decision of the Special Immigration Appeals Commission to release a terrorist suspect on bail pending his appeal. ([G v Secretary of State for the Home Department](#) [2004] EWCA Civ 265)

The Secretary of State was entitled to rely on evidence which might have been obtained by torture, so long as neither he nor any agent of his was implicated in the torture, when determining whether to detain a suspected foreign terrorist under the 2001 anti-terrorism legislation. ([A & Ors, C and D v Secretary of State for the Home Department](#) [2004] EWCA Civ 1123)

ASYLUM

Measures (s.73 of the Immigration & Asylum Act 1993) intended to prevent asylum seekers from abusing the appeal system entitled the Secretary of State to certify that what the Appellant sought to say in his new appeal could have been dealt with and disposed of at the original hearing and that the fresh appeal was a deportation delaying tactic. ([R \(Balamurali\) v Secretary of State for the Home Department](#) [2003] EWCA Civ 1806)

A mistake of fact giving rise to unfairness was a separate head of challenge in an appeal to the Court of Appeal on a point of law if certain criteria were satisfied. The Court of Appeal could admit relevant new evidence on established principles, which could be applied sensibly in exceptional cases where justice required. ([E & R v Secretary of State for the Home Department](#) [2004] EWCA Civ 49)

When considering whether to grant refugee status to a person who feared persecution if returned because he had evaded military service, the test to be applied to the nature of the war or conflict to which objection was taken was whether the military service to which he was called involved acts with which he could be associated which were contrary to basic rules of human conduct as defined by international law. ([Krotov v Secretary of State for the Home Department](#) [2004] EWCA Civ 69)

The lodging of a Notice of Appeal in the Court of Appeal in an immigration or asylum case when the refusal of a High Court Judge to grant permission to apply for judicial review was under challenge did not give rise to an automatic stay of the deportation process. ([R \(Pharis\) v Secretary of State for the Home Department](#) [2004] EWCA Civ 654)

In an asylum appeal the question whether a sufficient link existed between family members as to give rise to the protection of ECHR Article 8 was a question of fact. **Advic v United Kingdom** (1995) 20 EHRR CD 125 did not support a finding that the protection of Article 8 could never be engaged when the family life which was sought to be relied on was that between adult siblings living together. ([R \(Senthuran\) v Secretary of State for the Home Department](#) [2004] EWCA Civ 950)

Asylum seekers who did not claim asylum as soon as reasonably practicable after their arrival in the United Kingdom were not entitled to state support unless they could show

that they were verging on destitution, had no access to any other source of support and that state support was necessary to prevent their being subjected to inhuman or degrading treatment in contravention of their human rights. ([R \(Limbuella\) v Secretary of State for the Home Department](#) [2004] EWCA Civ 540)

CIVIL RESTRAINT ORDERS

A High Court Judge has power to make a general civil restraint order restraining a litigant's activities in the High Court and the County Courts, and on an appeal from the High Court the Court of Appeal has power to make such an order, which will also embrace his activities in the Court of Appeal. The court added that it was essential for the administration of justice that court staff should be protected from persistent and unsubstantiated allegations of an offensive nature. ([Mahajan v Department of Constitutional Affairs](#) [2004] EWCA Civ 946)

COMMONS REGISTRATION

The Commons Commissioners have no jurisdiction under the Commons Registration Act 1965 to decide whether the register should be amended under Section 13 of the 1965 Act to register land as a village green: only a registration authority has power to amend the register. ([R \(Whitney\) v Commons Commissioners](#) [2004] EWCA Civ 951)

COMPETITION

The Office of Fair Trading was required (under s.33 of the Enterprise Act 2002) to make a reference to the Competition Commission if it believed that it was or might be the case that the merger might be expected to result in a substantial lessening of competition. The relevant belief was that the merger might be expected to result in a substantial lessening of competition and not that the Commission might in due course decide that it might be expected to have that result. ([IBA Healthcare Limited v Office of Fair Trading & Ors](#) [2004] EWCA Civ 142)

In a case concerned with mobile phone airtime the anti-competitive conduct alleged was not the subject of an agreement between the parties and could not therefore found a claim under Article 81(1) of the EC Treaty. ([Unipart Group Ltd v O2 \(UK\) Ltd & Anr](#) [2004] EWCA Civ 1034)

COSTS/FUNDING

In a non-contentious probate matter a solicitor may charge both in relation to time spent and the value of the estate despite the lack of prior agreement. The Law Society intervened in the appeal, and the court gave guidance to solicitors as to best practice. ([Jemma Trust Company limited v Liptrott & Ors](#) [2003] EWCA Civ 1476)

A Collective Conditional Fee Agreement was not subject to the Conditional Fee Regulations. The Claimant was able to establish the necessary liability on his part to pay for the legal services provided to him and was therefore in a position to recover his costs without infringing the indemnity principle. ([Thornley v Lang](#) [2003] EWCA Civ 1484)

There is a need to control the costs of litigation where the costs eventually claimed significantly exceed those estimated at the allocation stage and no further estimate has been given. Under paragraph 6.4(2) of the Costs Practice Direction, the court assessing costs may take the estimate as a useful yardstick in determining the reasonableness of the costs claimed if it can be shown that a party relied on it or different case management directions would have been given if a more realistic estimate had been supplied. The court approved the practice of costs capping in advance. ([Leigh v Michelin Tyre plc](#) [2003] EWCA Civ 1766)

DATA PROTECTION

Data concerning an individual that was held by the Financial Services Authority on its data register was not necessarily “personal data” within the meaning of section 7 of the Act. “Personal data” meant information that affected the subject’s privacy in his personal, family or professional life. Guidance was also given concerning the rights of a data subject to access manual, as opposed to computerised, documents. ([Durant v FSA](#) [2003] EWCA Civ 1746)

DEFAMATION

In a defamation case, where a Claimant is funded by a Conditional Fee Agreement without “after event” insurance cover the Master should consider referring the matter at the allocation stage to a costs judge to make a costs capping order pursuant to the court’s powers under CPR 3.1(2)(m). Such an order should restrict the Claimant’s prospective costs to a reasonable amount, inclusive of any additional liability. ([King v Telegraph Group Ltd](#) [2004] EWCA Civ 613)

In a defamation case, the words “or had reason to believe that the statement complained of ... was ... false” in section 4(3) of the Defamation Act 1996 were intended to shut out from the amends procedure those who knew that what they were saying was untrue or who had reason to believe (in terms of choosing to ignore information which should have led them to such belief or of shutting their minds to such information) that it was untrue. Mere suspicion was not enough. ([Milne v Express Newspapers](#) [2004] EWCA Civ 664)

DISABILITY DISCRIMINATION

When mentally disabled tenants were responsible for nuisances which might have put their neighbour’s health at risk Part III of the Disability Discrimination Act 1995 required a court to apply a two stage test. Did the landlord hold an opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that someone’s health (including the health of the disabled person) should not be put at risk? And was that opinion objectively justified? Guidance was given as to the meaning of “health” in this context. ([Manchester City Council v Romano and Samari](#) [2004] EWCA Civ 834)

DISCLOSURE OF DOCUMENTS

The public interest in the investigation and prosecution of serious or complex fraud should take precedence over the concern of a court to control the collateral use of documents compulsorily disclosed in the course of civil litigation. In the absence of other factors a court’s discretion under CPR 31.22(1) (b) should be exercised in favour of compliance with a notice issued by the Serious Fraud Office under the Criminal Justice Act 1987. ([Marlwood Commercial Inc v Kozeny](#) [2004] EWCA Civ 798)

EMPLOYMENT LAW

A compensation award made against an employer under the Race Relations Act for injury to feelings and aggravated damages that related to a single direct incident of racial discrimination was neither wrong in principle nor excessive in amount ([British Telecommunications plc v Reid](#) [2003] EWCA Civ 1675).

The effective date of termination of employment within Section 97 of the Employment Rights Act 1996 could not be fixed by agreement but was to be objectively determined for the purpose of deciding whether a claim in the Employment Tribunal was lodged in time. ([Fitzgerald v University of Kent & Canterbury](#) [2004] EWCA Civ 143)

An employee who was victimised but dismissed fairly was entitled only to damages for injured feelings and not for loss of earnings. ([Lisk-Carew v Birmingham City Council & Sharp](#) [2004] EWCA Civ 565)

Details of a caution were not disclosed to an employer who subsequently dismissed the employee when they came to light. ECHR Article 8 did not apply and Article 14 did not operate independently of Convention rights. ([X v Y](#) [2004] EWCA Civ 662)

In determining the employment status of someone working under a contract of services for an employment bureau on a long term basis an Employment Tribunal should consider the possibility of an implied employment contract between worker and client ([Dacas v Brook St Bureau \(UK\) Ltd](#) [2004] EWCA Civ 217).

The purpose of a protective award is to provide a sanction for the breach by an employer of its consulting obligations rather than to compensate employees for loss suffered as a result of the breach. ([Susie Radin Ltd v GMB & Ors](#) [2004] EWCA Civ 180).

There was no requirement upon the transfer of an undertaking that the part transferred should have existed as a discrete and identifiable stable economic entity before the transfer. ([Fairhurst Ward Abbotts Ltd v Botes Building Limited](#) [2004] EWCA Civ 83)

An employer should have disclosed its new policy on retirement in the course of a claim for unfair and wrongful dismissal and discrimination. ([Scott v Inland Revenue Commissioners](#) [2004] EWCA Civ 400)

An Employment Tribunal had no jurisdiction to hear a claim for unfair dismissal when the employee in question worked for an English company in the Ascension Islands. ([Lawson v Serco Ltd](#) [2004] EWCA Civ 12)

An employee who held a unique position could still have a normal retiring age within the meaning of the Employment Right Act 1996. ([Wall v British Compressed Air Society](#) [2003] EWCA Civ 1762)

Regular overtime was not to be taken into account when calculating holiday pay which was based on contractual hours. ([Bamsey & Ors v Albon Engineering & Manufacturing plc](#) [2004] EWCA Civ 359)

An application for admission as a pupil barrister was not an application for membership of a trade organisation. ([Higham \(1 Pump Court Chambers\) v Horton](#) [2004] EWCA Civ 941)

When assessing damages to compensate a victim of unlawful race discrimination the appropriate test to be applied was the establishment of a causal link between the act of discrimination and the injury alleged. ([Essa v Laing Ltd](#) [2004] EWCA Civ 02)

FAMILY LAW

The court identified the principles which should govern the award of periodical payments during joint lives or until re-marriage in a case where the payers net income significantly exceeds what both parties need in order to meet their outgoings at the standard of living found to be appropriate. The parties have a mutual obligation to achieve financial independence. This meant that the opportunity and responsibility to invest should be shared. The court had a statutory duty to consider the possibility of a future clean break in cases where it was not immediately practicable. ([McFarlane v McFarlane and Parlour v Parlour](#) [2004] EWCA Civ 872)

A former partner was entitled pursuant to the Human Fertilisation Act 1990 to withdraw his consent to the use of embryos fertilised by his sperm which were created and stored at a

clinic following IVF treatment. The Claimant who had suffered ovarian cancer and was unable to bear a child which was genetically hers if access to the embryos was denied, was therefore not entitled to the grant of an injunction requiring him to restore his consent. ([Evans v Amicus Healthcare Limited & Ors](#) [2004] EWCA Civ 727)

INSOLVENCY

The court allowed an appeal against a decision of the Vice-Chancellor who had held, that the decision of Slade J in *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep. 142 should not be followed and that the charge over present and future book debts was capable of being a floating charge. The court held that Slade J could properly have held the debenture to be a fixed charge because of the requirements that i) the book debts could not have been disposed of prior to collection and ii) that, on collection, the proceeds should be paid to the bank itself. The Court suggested that this appeal demonstrated the desirability of "structured personal property security legislation" as is found in other common law jurisdictions. ([National Westminster Bank plc v Spectrum Plus](#) [2004] EWCA Civ 670)

INSURANCE

When railway companies sought recovery in respect of business interruption losses following the Hatfield rail disaster their insurers relied on a general exclusion of damage for wear and tear. It was held that wear and tear was a proximate cause of the loss. ([Midland Mainline Limited & Ors v Eagle Star Insurance Company Limited](#) [2004] EWCA Civ 1042)

JURISDICTION

In granting the first successful application under the courts' jurisdiction as set out in *Taylor v Lawrence* [2002] EWCA Civ 90 to re-open a matter on the grounds of new evidence, the court again emphasised the exceptional nature of this jurisdiction. ([Couwenbergh v Valkova](#) [2004] EWCA Civ 676)

LANDS TRIBUNAL

Statutory power given to a local authority to undertake work on a public highway did not relieve it of the duty not to harm the occupiers of property adjoining that highway. ([Ocean Leisure Ltd v Westminster City Council](#) [2004] EWCA Civ 970)

MEDICAL LAW

Knowledge of prejudicial publicity need not be fatal to the fairness of a hearing by the General Medical Council's Professional Conduct Committee, but its effect had to be considered in the context of the proceedings as a whole, including the impact of the legal advice available. ([R \(Mahfouz\) v General Medical Council](#) [2004] EWCA Civ 233)

MISFEASANCE IN PUBLIC OFFICE

A serving prisoner was entitled to receive nominal damages after a judge had held that all the other ingredients of the tort of misfeasance in public office were satisfied when three prison officers opened his correspondence with solicitors and/or a court in the knowledge that this was forbidden by prison rules. The cause of action was complete when a Claimant established that special damage had resulted from the wrong or that an important constitutional right (such as the right of access to a court) had been infringed. The case was remitted to the lower court to determine whether an award of exemplary damages was appropriate. The minimum figure of £5,000 suggested in relation to another class of case was not an appropriate guide in this type of case when an award of exemplary damages against an individual prison officer was under consideration. ([Watkins v Secretary of State for the Home Department](#) [2004] EWCA Civ 966)

PERSONAL INJURY

Guidance was given to lower courts as to how to exercise their discretion on an award of costs when it was said that one party had unreasonably refused to agree to mediation. ([Halsey v Milton Keynes General Hospital](#) [2004] EWCA Civ 576)

Two issues have been resolved which arose out of the House of Lords judgment in *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32. An employer is not entitled to an apportionment of liability to reflect the extent of overall exposure for which he is responsible, and an employee is not liable to suffer a deduction in his award where he had had periods of both employment and self employment involving exposure to asbestos dust. ([Barker v Saint Gobain Pipelines Plc](#) [2004] EWCA Civ 545)

Following the House of Lords judgment in *Tomlinson v Congleton Borough Council & Ors* [2004] 1 AC 46 a young man injured whilst diving into water was held not to be entitled to recover damages under the Occupiers Liability Act. ([Rhind v Astbury Water Park Ltd & Ors](#) [2004] EWCA Civ 756)

Questions relating to an occupier's liability to others for the actions of independent contractors and/or their agents have been considered by the Court on two occasions. ([Bottomley v Todmorden Cricket Club](#) [2003] EWCA Civ 1575 and [T Naylor \[trading as Mainstreet\] v Payling](#) [2004] EWCA Civ 560)

A challenge to the discount rate fixed pursuant to the Damages Act 1996 for the purpose of calculating damages for future loss in personal injury claims was rejected in three linked cases. ([Cooke, Sheppard and Page](#) [2003] EWCA Civ 1370)

Guidance was given in relation to claims arising out of illness suffered whilst on package holidays abroad. The Court upheld small awards for gratuitous care given on return home and suggested that a guideline tariff for such claims in gastroenteritis cases might usefully be agreed. ([Giambrone & Ors v Sunworld Holidays Ltd](#) [2004] EWCA Civ 158)

Company group accident insurance payments should be deducted from an employee's damages following a workplace accident. The "insurance" and "benevolence" exceptions did not apply. ([Gaca v Pirelli General PLC & Ors](#) [2004] EWCA Civ 373)

An application by a Defendant to reduce a payment into court within the period for acceptance and before it is accepted does not automatically stay or suspend the time for acceptance until after the application is heard. A Defendant should give notice to the claimant of his application and if the Claimant then gives notice of acceptance within the permitted 21 days, the court will take this into account when deciding whether or not to grant the Defendant's application. ([Flynn v Scougall](#) [2004] EWCA Civ 873)

POLICE SEARCH POWERS

The United Kingdom was faced with a real possibility of terrorist incidents, so that a statutory power (sections 44-50 of the Terrorism Act 2000) of random stop and search which was subject to significant safeguards was not as a matter of principle an unacceptable intrusion into the human rights of those searched. It was however important that where the police were given such exceptional powers they should be prepared to demonstrate that they were using them with appropriate circumspection. ([R \(Gillan\) v Commissioner of Police of the Metropolis](#) [2004] EWCA Civ 1067)

PRISONERS

When the Independent Assessor calculated the awards for loss of earnings to be made to prisoners whose murder convictions were quashed on appeal he was entitled to set off

against that award sums representing saved living expenses. ([The Independent Assessor v O'Brien & Ors](#) [2004] EWCA Civ 1035)

The Home Secretary's power to reject a Parole Board recommendation for release on licence of prisoners serving determinate sentences of 15 years or more did not contravene the prisoners' human rights despite the fact he had no such power in respect of other prisoners. ([R \(Clift\) v Secretary of State for the Home Department](#) [2004] EWCA Civ 514)

The fixed tariffs of young persons serving life sentences for murder must be kept under review so as to determine whether their individual circumstances justify their release before the completion of the tariff. ([R \(Smith\) and R \(Dudson\) v Secretary of State for the Home Department](#) [2004] EWCA Civ 99)

PRIVILEGE

It was not possible to conclude that litigation against an English tobacco company was reasonably in prospect when it sought advice from its solicitor, so that litigation privilege was not available as a means of resisting a letter of request from a US court that he be examined in connection with pending US proceedings. So far as legal advice privilege was concerned, it was not clear that the overwhelming majority of questions could be successfully resisted on this ground, and it was in the public interest that the requesting court should have all relevant material available to it when it decided the case. ([United States of America v Philip Morris Inc & Ors](#) [2004] EWCA Civ 330)

RESTITUTION

A purchaser had been unjustly enriched when auctioneers mistakenly included a valuable personal number plate in a car auction. Although the "free acceptance" and "reprehensible seeking out" basis for an enrichment claim could not necessarily be made out, the purchaser had received an incontrovertible benefit for which he knew he had not bargained and should therefore reimburse the value of the number plate. ([Coys of Kensington Holdings Ltd v McDonald](#) [2004] EWCA Civ 47)

Subrogation for the most part operates on equity so as to reverse unjust enrichment, and is not precluded just because a creditor has accepted part payment. When, therefore, a lender was unable to register its mortgage due to opposition from a first chargee, it was entitled to be subrogated to the rights of a first lender whose loan had been paid off by the Defendant using money the Claimant later had lent, even though the Claimant had compromised the security by accepting a percentage payment from the Defendant's ex-wife in possession. ([Cheltenham & Gloucester plc v Appleyard & Anr](#) [2004] EWCA Civ 291)

SOLICITORS

The fair trial provisions of ECHR Article 6.1 were not engaged when a domestic tribunal of the Law Society held a disciplinary hearing in private: neither a reprimand nor the imposition of a fine on a solicitor for misconduct involved his civil rights and obligations. ([R \(Thompson\) v Law Society](#) [2004] EWCA Civ 167)

TAX/VAT

The Inland Revenue was not debarred from reopening an assessment under the self-assessment scheme more than 12 months after it became final where the Inspector had merely an awareness or an inference of insufficiency ([Langham \(HMIT\) v Veltema](#) [2004] EWCA Civ 193)

TORT/LIMITATION

Chagos islanders alleged that they had been unlawfully evicted from Diego Garcia in connection with its use as a US military base and claimed damages for unlawful eviction, misfeasance in public office and deceit against HM Government, together with declaratory relief. Although they had signed forms of renunciation in relation to future claims when they had shared in a previous settlement, they claimed that the compensation was inadequate. A 3 judge court discussed their application for permission to appeal against an order striking out their claim. Even if they were not defeated by the renunciation the claims were statute barred.

([Chagos Islanders v The Attorney General & Anr](#) [2004] EWCA Civ 997)

UNDUE INFLUENCE

Where a mortgage was executed by a wife to replace an earlier mortgage which she had executed as security for her husband's business debts and which was voidable for undue influence, the second mortgage was also voidable if the lender bank in both cases was the same. It was fixed with constructive notice of the comparable invalidity of the second mortgage. ([Yorkshire Bank Plc v Tinsley](#) [2004] EWCA Civ 816)