

**COURT OF APPEAL**  
**Leading Cases 2004/2005**

**ANTI-SOCIAL BEHAVIOUR ORDERS**

Where an order is sought without notice to the other side it ought not to be granted without good reason. The court gave guidance on the granting of without notice anti-social behaviour injunctions and powers of arrest attached to them.

[\(Moat Housing Group – South Ltd v Carl Harris & Susan Colette Hartless \[2005\] EWCA Civ 287\)](#)

**ASYLUM and IMMIGRATION**

Guidance was given as to what may amount to an error of law which would be material and would include: perversity, inadequacy of reasons, or failure to apply a relevant country guidance decision.

Jurisdiction arises only where an error of law is raised in the grounds of appeal, although the Court of Appeal may intervene to set aside a decision where there has been a failure to consider an obvious point of Convention jurisprudence which would have availed an applicant. Once an error of law is identified fresh evidence may then be admitted.

[\(R \(Iran\) & Ors v Secretary of State for the Home Department \[2005\] EWCA Civ 982\)](#)

The Court should not exercise its powers of judicial review in cases where there was a right to statutory review of a decision of the Immigration and Asylum Tribunal to refuse permission to appeal to itself from a decision of the adjudicator under S.101 (2) of the Immigration and Asylum Act 2002.

[\(R \(on the application of M & G\) v IAT & Anr \[2004\] EWCA Civ 1731\)](#)

The IAT, when deciding an appeal from a decision of the Adjudicator under the Immigration and Asylum Act 1999 should not take a preferred view of the facts to that of the adjudicator without first identifying some error on the part of the adjudicator. The court also considered the criteria for consideration of whether someone was a member of a particular social group under the Refugee Convention 1951.

[\(P & M v SSHD \[2004\] EWCA Civ 1640\)](#)

In appeals from the adjudicator to the Tribunal under S. 101(1) of the Immigration & Asylum Act 2002, the grounds of appeal should identify clearly the points of law on which it is alleged that the adjudicator has erred. The Tribunal would be wrong to conclude that once it had granted permission to appeal on a point of law, it had power to review the findings of fact.

[\(B v SSHD \[2005\] EWCA Civ 61\)](#)

Supremacy would now be given to the original judge's decision on the facts so that it would be important to identify what facts were before him.

[\(Mlauzi v SSHD \[2005\] EWCA Civ 128\)](#)

The Tribunal could only consider at the substantive hearing matters raised in the actual or amended grounds of appeal.

[\(Miftari v SSHD \[2005\] EWCA Civ 481\)](#)

The Court considered the proper approach to be taken by the adjudicator in considering whether the decision of the Secretary of State to remove or to refuse leave to enter is a disproportionate interference with a person's rights under Article 8 of the European Convention on Human Rights. It held that in considering a claim under Article 8 where there is no right to remain or enter under the Rules then the

role of the adjudicator is to consider for himself whether a truly exceptional case has been made out such that the requirement of proportionality requires a departure from the Rules.

**[\(Huang, Abu-Qulbain and Kashmiri v SSHD \[2005\] EWCA Civ 105\)](#)**

The Court held that administrative delay in the making of the original decision is a relevant but not a determinative factor in assessing proportionality for the purposes of Article 8 of the Convention.

**[\(Strbac v SSHD \[2005\] EWCA Civ 84\)](#)**

The Court would be slow to interfere with decisions of the Tribunal in relation to matters within its special expertise and competence. Such matters include the evaluation of evidence and matters of proportionality.

**[\(Akaeke v SSHD \[2005\] EWCA Civ 947\)](#)**

The failure by the Secretary of State to follow his own policy is unfair and can amount to an abuse of power requiring the intervention of the Court.

**[\(Rashid v SSHD \[2005\] EWCA Civ 744\)](#)**

## **CONTRACT**

The proper law of contract determines the enforceability of an exclusive jurisdiction clause (subject to competing treaty obligations) and, in the case of English Courts applying English law, anti-suit injunctive relief would follow attempts to commence litigation in another jurisdiction, even where those proceedings have been commenced first.

**[\(O.T. Africa Line Ltd v Magic Sportswear Corporation & Ors. \[2005\] EWCA Civ 710\)](#)**

## **COSTS**

It was permissible for any conditional fee arrangement to include a two stage success fee and the reasonableness of the success fee had to be assessed as at the time the agreement was entered into.

**[\(Atack v Lee \[2004\] EWCA Civ 1712\)](#)**.

The court had no power to direct that a success fee was recoverable under a conditional fee agreement at different rates for different periods of the proceedings.

**[\(KU v Liverpool City Council \[2005\] EWCA Civ 475\)](#)**.

A professional funder who had funded part of an impecunious Claimant's costs was liable for the successful Defendant's costs up to the value of the funding.

**[\(Arkin v Borchard Lines Ltd \[2005\] EWCA Civ 655\)](#)**.

The Court set out the criteria for making a protective costs orders in

**[\(R \(Corner House Research\) v Secretary of State for Trade and Industry \[2005\] EWCA Civ 192\)](#)**

## **DEFAMATION**

In considering what was the appropriate forum for the trial of a claim for internet libel the court would take into account the fact that the publisher had chosen a global medium, thereby targeting a jurisdiction where the text could be downloaded.

**[\(King v Lewis \[2004\] EWCA Civ 1329\)](#)**.

Where the Defendant had put a short statement before the court maintaining that he could and would justify an alleged libel, it remained the case, even following the

Human Rights Act 1998, that the Claimant would be unable to obtain an interim injunction to restrain publication of an allegedly defamatory statement unless it were plain that the plea of justification was bound to fail. ([Greene v Associated Newspapers Ltd](#) [2004] EWCA Civ 1462).

Where an offer of amends had been accepted, there was bound to be substantial mitigation of damages, since the procedure not only involved an apology but also willingness by the Defendant to pay proper compensation and costs. ([Nail v News Group Newspapers Ltd](#) [2004] EWCA Civ 1708).

The established and irrebuttable presumption in defamation law that the person defamed had suffered damages was not to be abandoned for incompatibility with the freedom of speech provisions in article 10 of the European Convention on Human Rights. Where the defamation proceedings were not serving the legitimate purpose of protecting the Claimant's reputation it was appropriate that those proceedings be stayed as an abuse of the court's process. ([Jameel \(Yousef\) v Dow Jones & Co Inc](#) [2005] EWCA Civ 75).

Where a corporation brought an action in defamation the Freedom of Speech provisions enshrined in the European Convention on Human Rights did not derogate from the common law rule whereby damage was presumed once the libel was proved. There was no requirement to show special damage. ([Jameel \(Mohammed\) v Wall Street Journal Europe sprl \(No.2\)](#) [2005] EWCA Civ 74).

## **EDUCATION**

Where a school's uniform code imposed a particular uniform which did not meet the demands of certain pupils' religion, it would be for the school, as an emanation of the state, to justify any limitation on pupils' freedom under Article 9 of the ECHR created by the code and its enforcement. Governors were entitled, as a matter of law, to set a school uniform code. The court set out the criteria for considering the matter. ([R \(on the application of 'B'\) v Denbigh High School](#) [2005] EWCA Civ 199)

## **ELECTORAL LAW and CONSTITUTIONAL LAW**

In a case involving alleged corrupt practices relating to postal ballots in council wards in Birmingham the court held that the proceedings were civil and quashed the Commissioner's findings in relation to the Appellant because there had not been the semblance of a fair trial where he had allowed court room identification of the Appellant. ([R \(Afzal\) v Election Court and Anr](#) [2005] EWCA Civ 647)

The Appellant unsuccessfully challenged the validity of the Hunting Act through a claim that the Parliament Act 1949 under which it was enacted was itself invalid. ([R \(Jackson and Ors\) v HM Attorney General](#) [2005] EWCA Civ 126. Upheld by the House of Lords [2005] UKHL 56)

## **EMPLOYMENT LAW**

Legislation preventing employees over the age of 65 from applying for compensation payments for unfair dismissal or redundancy did not indirectly discriminate against male employees and was thus not contrary to European law. ([Rutherford v Secretary of State for Trade and Industry](#) [2004] EWCA Civ 1186).

If a "final straw" was to be successfully relied on by an employee as a repudiation of a contract of employment, it had to be the last in a series of acts or incidents which cumulatively amounted to a repudiation of the contract by the employer.

**(Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493).**

When applying the principle of equal pay for work of equal value it was not enough for the Claimant and the comparator to be employed by the same employer, since having a single employer was not necessarily the same as being in the same employment, or having pay and conditions attributed to a single source. The single source was the body responsible for pay and conditions which could restore equality and need not be the overall employer.

**(Robertson v Department for Environment, Food & Rural Affairs [2005] EWCA Civ 138).**

An Employment Tribunal had to conduct a two stage exercise in discrimination cases: first the Complainant had to prove discrimination; second the Respondent had to prove that he did not commit the unlawful act. The second stage would only come into effect if the Complainant had proved the facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent had committed discrimination.

**(Igen Ltd v Wong [2005] EWCA Civ 142).**

In deciding whether an employee worked wholly or mainly outside Great Britain for racial discrimination purposes, the relevant period was not that to which the discrimination complaint related but rather the whole period of employment.

**(Saggar v Ministry of Defence [2005] EWCA Civ 413).**

An Employment Tribunal had jurisdiction to determine unfair dismissal claims brought by international airline pilots employed by Hong Kong companies since their contracts of employment required them to be based in England.

**(Crofts v Cathay Pacific Airways Ltd [2005] EWCA Civ 599).**

## **FAMILY LAW**

When determining financial provision that would achieve a fair result and avoid discrimination in short marriage cases, the court concluded that judges had to apply the factors in the Matrimonial Causes Act 1973 s.25(2) to the facts of each individual case. Proposed outcomes were to be tested against the yardstick of equality. **(Miller v Miller [2005] EWCA Civ 984)**

In considering the provisions of Brussels II (EC Reg No 1347/2000, OJ 2000 No L160/19) in divorce proceedings, the court held that procedural matters are best determined in the jurisdiction of the procedure and that it was essential that divorce proceedings were found to be initiated by the first manifest step if the Brussels II Regulation was to achieve its objectives.

**(B.C v A.C. [2005] EWCA Civ 68; Chorley v Chorley (2005) Times, 18 January, CA)**

Three separate appellant fathers appealed against orders refusing or limiting the assistance of a McKenzie friend in family proceedings in which they sought contact and residence with their children. Such a request could not be refused without compelling reasons, even where the proceedings related to a child and were being heard in private. The presumption in favour of a litigant in person being allowed the assistance of a McKenzie friend was a strong one and a proposed McKenzie friend should not be excluded from the courtroom or chambers whilst the application for their assistance is being made. **(Re O (Children): Re W-R (A Child): Re W (Children) [2005] EWCA Civ 759)**

## **INSOLVENCY**

The differential treatment in bankruptcy of the contractual pension rights of the self-employed and the pension rights of those employees who are members of an occupational pension scheme set up by way of trust (providing for forfeiture of rights on bankruptcy) was not a difference of treatment based on discrimination on the ground of status.

[\(Malcolm v Benedict Mackenzie \(a firm\) \[2004\] EWCA Civ 1748\)](#).

## **JURISDICTION**

A foreign state enjoyed personal immunity from suit in the courts of the United Kingdom but could not claim a blanket subject matter immunity in respect of acts of torture alleged to have been committed by state officials. In determining whether any individual claim ought to proceed against the state official, the court should consider and balance all relevant factors.

[\(Jones v Ministry of the Interior of the Kingdom of Saudi Arabia \[2004\] EWCA Civ 1394\)](#).

The principle of non-justiciability, whereby the agreements of foreign states may not be considered judicially, does not prevent the English court considering an arbitrator's jurisdiction where foreign States have intentionally conferred rights intended to be enforceable domestically on and by private persons.

[\(Occidental Exploration & Production Company v The Republic of Ecuador \[2005\] EWCA Civ 1116\)](#)

The court has restricted jurisdiction, under s.44(3) of the Arbitration Act 1996, to make an interim mandatory order only where necessary for the purpose of preserving evidence or assets, rather than at the discretion of the court.

[\(Cetelem S.A v Roust Holdings Limited \[2005\] EWCA Civ 618\)](#)

## **MEDICAL LAW**

The "best interests" test used by Doctors to assess the treatment to be provided to a patient was an objective test, and would be of most use when applied to a patient who was not competent to make his own decision. Although patients had the right to refuse treatment, the right to autonomy and self-determination did not mean that patients could demand a particular course of treatment regardless of the nature of that treatment, especially when the doctors felt it was contrary to the patient's clinical needs.

[\(R \(Burke\) v General Medical Council and Anr \[2005\] EWCA Civ 1003\)](#)

## **PERSONAL INJURY**

Where a Claimant was assisted by a clinical case manager, the case manager owed his duties to his patient alone and not to both his patient and the Court. If the clinical case manager considered that it was in his client's interests that he should attend a conference with legal advisers at which legal advice was being sought, then the privilege was not the case manager's to waive: nor would the court have any power to direct such waiver.

[\(Wright v Sullivan \[2005\] EWCA Civ 656\)](#)

Following the decision of the House of Lords in the cases of Barber v Somerset County Council and Hatton v Sutherland the Court gave further appellate guidance in the area of work place stress. The Court hoped that parties would in future consider mediation in these types of cases

[\(Hartman v South Essex Mental Health & Community Care NHS Trust & Ors \[2005\] EWCA Civ 06\)](#)

In cases concerning disputes as to who should bear the costs of an injured Claimant's future care and accommodation, where all or part of that care may be provided by the local authority, the Court held that the general approach should be to consider the Claimant's reasonable needs and what the local authority is likely to provide and then see if the local authority provision is likely to fall short of such needs. The Court confirmed that in principle "top up" awards by the compensator may be awarded in appropriate cases but stressed the importance of placing cogent evidence before the court as to how differing regimes would operate.

**[\(Sowden v Lodge and Crookdake v Drury \[2004\] EWCA Civ 1370\)](#)**

It was held that the council, who were providing care for a third party injured as a result of the hospital's admitted negligence, could not recover the care costs from the hospital as no duty of care arose

**[\(Islington Borough Council v University College Hospital NHS Trust \[2005\] EWCA Civ 596\)](#)**

The Court considered the conduct of cases involving the issues of educational negligence and made general observations about the size of the appropriate awards and case management directions

**[\(D.N \(by his father and litigation friend R.N\) v London Borough of Greenwich\) \[2004\] EWCA Civ 1659\)](#)**

## **PRACTICE and PROCEDURE**

Where a Part 36 Offer is expressed in clear and unambiguous terms, is open for acceptance for at least 21 days and in substance accords with a "Calderbank" offer, is genuine and not a sham and where the defendant is clearly good for the money the offer should usually be treated as having the same effect as a Part 36 Payment-In. **[\(The Trustees of Stokes Pensions Fund v Western Power Distribution \(South West\) Plc \[2005\] EWCA Civ 854\)](#)**

The decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 was approved and applied. The importance of legal representatives being fully aware of and acknowledging the value of Alternative Dispute Resolution was reemphasised. A small building dispute was of a type which clearly exemplified the type of case that cried out for Alternative Dispute Resolution. The reasonableness of parties' actions in refusing mediation must be assessed by reference to the state of practice at the time. Courts can take account of an unreasonable refusal to mediate made before the issue of proceedings.

**[\(Burchell v Bullard & Others \[2005\] EWCA Civ 358\)](#)**

Guidance was given on the appropriate test of a grant of permission to appeal where there was a second appeal. The court analysed the provision of Section 55 of the Access to Justice Act 1999 and in particular the meaning of the phrases "an important point of principle or practice" and "some other compelling reason".

**[\(Uphill v BRB \(Residuary\) Limited\) \[2005\] EWCA Civ 60\)](#)**

The court had power to limit the length of cross-examination under CPR 32.1(3). The test was how long it was necessary to last in the interests of justice.

**[\(Three Rivers District Council & Ors v Bank of England \[2005\] EWCA Civ 889\)](#)**

## **PROCEEDS OF CRIME**

The court held that Section 308(9) of the Proceeds of Crime Act 2002 operated to prevent double recovery but not double litigation in a situation where an earlier confiscation order made under the Criminal Justice Act 1988 had been quashed.

**[\(Director of the Assets Recovery Agency v Singh \[2005\] EWCA Civ 580\)](#)**

## **TAX LAW & VAT**

Although a non-profit making body which was exempt from VAT could remain exempt if it systematically achieved surpluses which were then used to fund its activities, it did not follow that an organisation which had no power to make distributions to its members was automatically “non-profit making”. Whether an organisation was non-profit making would depend, as the European Court of Justice held in *Kennemer* (C-174/00, [2002] ECR I-3293) on the aim which it pursued.

**(*Messenger Leisure Developments Ltd v Commissioners of Customs & Excise* [2005] EWCA Civ 648)**

Section 555(2) of the Income and Corporation Taxes Act 1988 did not have extra-territorial effect. There was a general presumption against extra-territoriality, particularly where the legislation imposed a charge to tax or a liability to collect or account to tax.

**(*Agassi v Robinson (HM Inspector of Taxes)* [2004] EWCA Civ 1518)**

## **TORT**

In publishing photographs of a wedding, a magazine had breached the couple’s rights of confidentiality but had not breached the confidence between them and another magazine.

**(*Michael Douglas & Ors. v Hello Limited & Ors* [2005] EWCA Civ 595)**

## **TRADE UNIONS**

The Respondent Committee had refused to entertain an appeal for recognition for collective bargaining by the Union in respect of sports journalists at a particular publication on the grounds that a collective agreement was already in force. The Court of Appeal held that an agreement would be “in force” when it was binding on the parties to it, even if there were doubts as to the agreement’s future viability. The right of union recognition did not fall within the rights guaranteed under Article 11 of the European Convention on Human Rights and the failure to recognise one union over another was not one which disclosed a discretion under Article 14.

**(*R (National Union of Journalists) v Central Arbitration Committee and Anr* [2005] EWCA Civ 315)**