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Mr Tom Lewis or Ms Jane Ching, Nottingham Trent University, Burton Street, Nottingham, NG1 4BU. Telephone 0115 9418418. They can also be contacted on the following e-mail addresses: tom.lewis@ntu.ac.uk and jane.ching@ntu.ac.uk. Style notes and further details about the Journal are available on request.

Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm. W. Gaunt & Sons, Inc., Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

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EDITORIAL

The *Nottingham Law Journal* has always striven to provide a forum for contributions from across the gamut of legal endeavour. This issue of the *Journal* follows this tradition with extremely interesting and diverse contributions from different points on the spectrum: the Bench, the Bar and the Academy. In respect of the first of these we are honoured to be able to publish a lecture given at Nottingham Trent University by The Honourable Sir Jack Beatson on the vital and pressing issue of judicial independence in the wake of the Constitutional Reform Act 2005 and other recent developments. In respect of the second we are pleased to publish a lecture given at Lincoln's Inn by Judith-Anne MacKenzie whose insights as a government barrister allow for the disentangling of some of the complexities of the constitutional concept of the "Crown". Finally, from the Academy, we have the inaugural professorial lecture of our very own Adrian Walters, former editor of the *Nottingham Law Journal*, on the (sadly) very topical issue of consumer debt and bankruptcy; and an article by a new member of staff at the Law School, Helen O'Nions, on the (even more sadly) topical issue of the human rights of asylum seekers.

Whilst the source and subject matter of these pieces is diverse, three of them have the linking thread of having been initially delivered as lectures. We are very pleased to be able to be instrumental in allowing these to reach a wider audience than, in some cases, they might otherwise have reached, an audience that they richly deserve.

TOM LEWIS

ARTICLES

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: PRESSURES AND OPPORTUNITIES

THE HON SIR JACK BEATSON FBA

Lecture given at Nottingham Trent University on 16 April 2008. This lecture has also been published in the September 2008 issue of the journal of the Judicial Commission of New South Wales, *The Judicial Review* (2008) 9(1) TJR 1.

A quiet constitutional upheaval has been occurring in this country since 1998. That year saw the enactment of the Human Rights Act and the devolution legislation for Scotland, Northern Ireland and to a lesser degree, Wales. These developments have led to new interest in the judiciary. Today, however, I am primarily concerned with events since June 2003 when the government announced the abolition of the office of Lord Chancellor, bringing to an end a position in which a senior member of the Cabinet was also a judge, Head of the Judiciary, and Speaker of the House of Lords. The government also announced the replacement of the Judicial Committee of the House of Lords by a United Kingdom Supreme Court. These events led to the Constitutional Reform Act 2005 (hereafter “CRA”) and to the Lord Chief Justice becoming Head of the Judiciary of England and Wales.

The 2003 changes and the new responsibilities given to the Lord Chief Justice necessitated a certain amount of re-examination of the relationship between the judiciary and the two stronger branches of the state – the executive and the legislature. Moreover, in the atmosphere of reform and change, branded as “modernisation”, not all have always remembered the long accepted rules and understandings about what judges can appropriately say and do outside their courts. Others have asked whether the rules and understandings remain justified in modern conditions. The “pressures” to which my title refers arise because of the view of some that judges should be more engaged with the public, the government and the legislature than they have been in the past. The “opportunities” arise from the need to develop constitutionally appropriate rules for such engagement. But before turning to these I must say something about the constitutional importance of the rule of law and the independence of the judiciary.

The Senior Law Lord, Lord Bingham, described the rule of law in the following words: “. . . all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.¹ He recognised that this statement of general principle cannot be applied without exception or qualification, and

¹ “The Rule of Law” (2007) *Cambridge Law Journal* 67, 69.

referred to the fact that there are some proceedings in which justice can only be done if they are not in public.

The primary duty of the judiciary to uphold the rule of law is well understood. So is the precondition for the ability to do it, namely the independence of each judge. The vital importance of this independence follows from the judiciary's core responsibility. It is the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens and between citizens and the state or state entities in accordance with the prevailing rules of statute and case law.

Those last words are important. The "rule of law" must be distinguished from the "rule of judges". The judges are not free to do what they wish. They are subject to the laws as enacted by parliament. It is well understood by judges that matters such as the formulation of policy at national and local level, and the regulation of the economy are for government not judges. The independence of the judiciary is thus, as Sir Igor Judge has observed, not a privilege of the judges themselves.² It is necessary for the public in a democratic state. It is necessary to ensure that people are able to live securely, and that their liberty is safeguarded and only interfered with when the law permits it. It is necessary for all of us, but perhaps particularly so for those who espouse unpopular causes or upset the powerful.

The need for judges to be impartial limits what they can say outside the courtroom. This brings me to the long-standing rules and understandings about the judiciary. In December 1955 Viscount Kilmuir, then Lord Chancellor, wrote to the Director General of the BBC. He stated that "the importance of keeping the judiciary insulated from the controversies of the day" meant that it was as a general rule, undesirable for judges to take part in wireless or TV broadcasts. His reason was that, "so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism". This reason is not restricted to the broadcasting media and the Kilmuir Rules, as they were known, had a wider application, and were defended by subsequent Lord Chancellors on the ground that they protected impartiality.³

But judges have always had a public side, even during the time of the Kilmuir Rules. One example is Lord Scarman's 1974 Hamlyn lectures calling for the incorporation of the European Convention on Human Rights into our law. Another is the use of judges to chair public inquiries. For example, in 1963 Lord Denning chaired an inquiry into the security implications of a Minister of Defence being involved with a call girl who was also involved with an official at the Soviet embassy.

The Kilmuir rules were abolished by Lord Mackay of Clashfern in November 1987. He saw them as difficult to reconcile with the independence of individual judges. Lord Mackay did not favour a free-for-all. He said that judges

must avoid public statements either on general issues or particular cases which cast any doubt on their complete impartiality, and above all, they should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial.

But his view was that those who are fit to hold judicial office should have the judgment to decide such matters for themselves. Clear understandings as to what it was appropriate for judges to speak about remained. These clear understandings reflect

² Evidence to House of Commons Select Committee on the Constitution, 1 May 2007, answer to Q 379.

³ Eg by Lord Hailsham, see Lord Woolf's RTE/UCD Lecture, 22 October 2003, http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj221003.htm.

general principle. However, the line between what is or is not appropriate can be a fine one, and difficult to maintain. I will return to this difficulty and its consequences.

There is a strong conventional rule (reflected in the House of Commons' *sub judice* rule) that judges do not discuss the merits of individual cases or decisions where cases are pending or ongoing. Judges generally do not do so even where the case has been finally concluded, save possibly as an example of practice when discussing general principles of law.

Judges do not comment on the merits, meaning or likely effect of provisions in any Bill or other prospective legislation, or on the merits of government policy, save in very limited circumstances. To do so could be seen to call into question their impartiality in the event of subsequently being called upon to apply or interpret those provisions in a court case. What are those limited circumstances? One might be where government or a Parliamentary Committee has sought comment from a particular judge when the policy in question affects the administration of justice within the area of judicial responsibility of that judge. The recent meeting of the President of the Family Division with the Lord Chancellor about concerns as to the effect in practice of changes in domestic violence legislation is an example.

But even in such cases, there are dangers. Concerns about the effect of public utterances by judges are not unfounded. Speaking out has risks, particularly if the general atmosphere is more "political", and others put a "spin" on what is said. Judges are professional experts charged with a task of interpretation, in Lord Bingham's words, "auditors of legality", but they have no independent authority to rule on what would best serve the public interest. They lack the democratic credentials to perform such a task, and they lack the resources and processes conducive to good law-making.⁴

Even lectures can lead to difficulties. The Home Office considered that lectures given by Lord Steyn about detention without trial at Guantanamo Bay precluded him sitting in *A v Home Secretary*,⁵ where the compatibility of Part 4 of the Anti-Terrorist Crime and Security Act 2001 empowering the detention without trial of non-citizens suspected of involvement in terrorism was considered by the House of Lords, and he did not do so.

In the case of inquiries, a distinction should be drawn between accident inquiries and inquiries on politically charged issues. The experiences of Lord Scott and Lord Hutton who chaired inquiries in 1996 and 2003 into the sale of arms to Iraq and the death of Dr David Kelly, show the risks when judges chair the second type of inquiry. The appointment of a judge does not depoliticise an inherently political issue. The report is non-binding, unenforceable and not subject to appeal. Those disagreeing with it will seek to discredit its findings by criticising the judge.⁶ If the government or institution has been cleared, the dissenters will describe the judge as an establishment lackey. This happened to Lord Hutton. If the government or the institution is criticised, the judge will be described as naïve and unfamiliar with the reality of government. This happened to Lord Scott.

I have referred to the risks where the judiciary comment on proposals for legislation or the terms of draft Bills. There may be real benefits to the government in obtaining the views of those who are involved in the courts on a daily basis. There may be real

⁴ Bingham, "*The Judges: Active or Passive*", Maccabean Lecture 2005. This was said in the context of when and how judges should develop the non-statutory law in their decisions but it is of relevance in this context too.

⁵ [2004] UKHL 56.

⁶ See generally, Beatson (2005) 121 LQR 221. Lord Morris of Aberavon QC, a former Attorney-General, discussing the Scarman and MacPherson inquiries, said: "[w]hen a judge enters the market place of public affairs outside his court and throws coconuts he is likely to have the coconuts thrown back at him. If one values the standing of the judiciary . . . the less they are used the better it will be": 648 HL Deb Col 883; 21 May 2003.

benefits to the judiciary in sharing their experience so as to avoid an impractical or unworkable piece of legislation. But doing so can also be risky to both government and the judiciary. The risk to the government is precisely that possibility which is the risk to the judiciary.

Say that the government asks the Lord Chief Justice or a Head of Division about the impact of a proposed policy it is considering about the work of the courts. Can the judiciary provide technical assistance? If so, in what circumstances, and can it be in private or must it be in public? Can such assistance ever be given without risking making the judiciary just another “player” in the political/policy process with policy preferences? If there is such a risk, there are obvious implications for the perception that the judiciary is impartial.

The judiciary has always stated that it will not comment on government policy. Its position is that its role in any pre-legislative scrutiny exercise is to comment only on the practicality of the drafting and the workability of policy for the courts. This was reiterated by the Lord Chief Justice in the press conference he held about his *Review of the Administration of Justice in the Courts* published at the end of March.⁷ He was asked about the statement in paragraph 14.6 of the *Review* that “the judiciary is willing, if consulted, to advise on the practical implications for the administration of justice of proposed legislation”. He was asked whether he had advised on the length of pre-charge detention for suspected terrorists. Lord Phillips said that he would advise the government whether there were sufficient judges available to do the scrutinising task contemplated by the proposals for pre-charge detention. He would also advise whether it was necessary to have a High Court Judge or whether one could use an experienced Circuit Judge. However, he would not advise or comment on the broader implications of particular legislation, including this, because that relates to policy. Again, however, it may be hard to recognise where to draw the line between appropriate comment on the practicality of the drafting and workability of a scheme, and inappropriate comment on policy.

For example, consider proposals to introduce a radically different form of procedure in courts, say restricting information given to those charged with criminal offences. One obvious question would be as to the compatibility of the proposals with the right to a fair trial before an independent tribunal enshrined in article 6 of the ECHR. If a judge is asked to comment and indicates that the proposals are or may be contrary to article 6, is that improper comment on government policy or is it something affecting the workability of a policy in the courts? What happens if the legislation subsequently comes before the judge who has commented on this issue? What happens if the judge who has commented is the Lord Chief Justice or the Head of one of the three divisions of the High Court?

This is an area in which thought must be given to whether, in the new constitutional climate, adjustments should be made or a different approach is needed. Once judges provide any comment, the risk arises of them and the government wishing to draw the line in different places. There is also the risk that the public will believe that judges have entered the political arena. Moreover, once judges comment on some matters, it may be understandable that on occasion government ministers find it difficult to appreciate the proper boundaries of judicial comment. A striking example was the frustration of Charles Clarke, the then Home Secretary, at Lord Bingham’s unwillingness to discuss the government’s proposals for control orders after the House of Lords held that the provisions for detaining non-citizens without trial in Part 4 of the

⁷ HC448 (31 March 2008).

Anti-Terrorist Crime and Security Act 2001 were incompatible with the European Convention on Human Rights.

I return to the impact of the changes initiated in 2003 on long-standing understandings of the relationship between the different branches of the state. One of these concerns reactions to adverse decisions. Even before 2003, the number of occasions on which individual judges were criticised by government ministers who had lost cases or where legislation had been interpreted in a way different from that which they wanted had increased. It intensified afterwards.

The consequent tension is an inevitable feature of the relationship between an independent judiciary and the executive. Lord Bingham has said the tension is “entirely proper” because, particularly at times of perceived threats to national security:

governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed.

Notwithstanding this understandable tension, however, the executive, legislative and judicial branches of the state should show appropriate respect for the different positions occupied by the other branches when fulfilling their respective constitutional roles.⁸

The constitutional changes have also been accompanied by an increasing wish by Parliamentary Select Committees to have judges giving evidence on a wide number of topics. Judges were called to do so on 20 occasions in the 18 months from April 2006 (when the Lord Chief Justice became Head of the Judiciary) to December 2007, and on three occasions this year. Overall this is about once a month.

To understand the impact of the changes it is also necessary to consider the process of reform. Reforming an unwritten constitution is an interesting activity. It can be rather like pulling on a loose thread of wool on a pullover. You do not know whether you are going to remove a blemish and tidy things up or whether you are going to end up with no pullover. This is particularly so where the reform is driven by political events and without the benefit of careful study and consultation. These were features of both the 2003 decision to abolish the post of Lord Chancellor and the 2007 decision to create a Ministry of Justice. The first was presented as about increasing the separation of powers. But the immediate motivation was the removal of a powerful Lord Chancellor who was a thorn in the flesh of a more powerful Home Secretary. The second – for which there were a number of good reasons – was undertaken to rid another powerful Home Secretary of part of his empire – prisons – to enable him to concentrate on other parts – immigration and terrorism.

The government made and announced its decisions in 2003 and 2007. It then discovered that major issues of principle had not been considered and remained unresolved. For example, despite the announcement made in June, it found that the office of Lord Chancellor could not be abolished by the fiat of the Prime Minister. The office was referred to in over 300 statutory provisions and an Act of Parliament was required. Most of these provisions related to the courts, but the Lord Chancellor’s roles as Speaker of the House of Lords, visitor to many educational institutions, and his ecclesiastical role also appeared to have been overlooked. The government found that what it had started resulted in an outcome it had not anticipated and led to a destination that was not identified at the outset.

In 2003 the government ended up negotiating with Lord Woolf, then Lord Chief Justice, and a small number of senior judges. The judiciary, led by Lord Woolf who

⁸ See eg. the Commonwealth (Latimer House), *Principles on the Accountability of and the relationship between the Three Branches of Government*, agreed by Commonwealth Law Ministers and Heads of Government in 2003.

postponed his retirement, stepped in to ensure the essential attributes of judicial independence were articulated and preserved. These attributes had, for the 125 years since the great reforms of the late 1800s, generally been well guarded by constitutional culture rather than by constitutional law.

The process after the 2003 announcement involved three stages. The first was an analysis (initiated by the judiciary) of all the responsibilities of the Lord Chancellor to identify which were attributes of his judicial role and which were part of his role as a government minister. The second was the historic Concordat between Lord Woolf and the new Lord Chancellor, Lord Falconer, as to the allocation of the principal responsibilities between the Lord Chancellor and the Lord Chief Justice. The third was the translation of the Concordat into statute form. This was only completed two years later, when, after further significant negotiations during the passage of the Bill, the CRA was enacted in 2005. These three stages produced an outcome with four features unanticipated and perhaps undesired by government at the outset.

The first was the recognition in section 7(1) of the CRA of the Lord Chief Justice as the head of the judiciary. The Bill as originally introduced to Parliament indicated that the government had wanted a less defined and more fragmented outcome. The second was that the responsibilities of the Lord Chancellor identified as attributes of his judicial role were formally transferred to the Lord Chief Justice or his delegates by the CRA or by the Concordat.

The third was a statutory guarantee of “continued” judicial independence in section 3(1) of the CRA. The need for a statutory guarantee showed that culture no longer sufficed to protect judicial independence. Also, while the use of “continued” signified that there was to be nothing new, this was fine. The common law provided a sound basis for judicial independence, particularly when coupled with the statutory recognition in section 1 of the CRA of the rule of law as an existing constitutional principle and its relationship with the independence of the judiciary.⁹ The fourth was the creation of a formal and public channel of communication between the Lord Chief Justice and Parliament. Section 5(1) of the CRA provides that:

The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.

I turn to the announcement in January 2007 that there was to be a Ministry of Justice. The process after that announcement led to the completion of one matter not properly dealt with by the Concordat or the CRA. This concerned responsibility for the administration of the courts. The Ministry of Justice was announced and envisaged by the government as a change in the machinery of government – not as another constitutional change. There was no consultation. The Lord Chief Justice first learned about the proposal from an article in a Sunday newspaper. This was less than a year after the reforms in the CRA came into effect.

The judges had no objection in principle to the creation of the new ministry. But they saw it as a constitutional change. They did so because having an adequate number of courts and an adequate number of judges, both adequately resourced, is a prerequisite for the rule of law. The judiciary had two concerns. The first was that bringing together the political responsibility for prisons and courts under one ministry and one ministerial budget could lead to a conflict of interest which might prejudice judicial impartiality or lead to a perception by the public that it was compromised. The

⁹ See *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin) at [64]; rev'd [2008] UKHL 60.

potential conflict identified was between the resource needs of the courts and those of the prisons. What was the risk to impartiality or the perception that the judiciary was impartial? This was seen to arise because the decisions of the courts in applying the law would have a financial impact upon other parts of the Ministry of Justice's budget. For example, sending people to prison in accordance with legislation would increase the prison population with significant financial consequences. The judiciary considered that steps had to be taken to protect court resources from demands from other parts of the Ministry of Justice.

The second concern arose from the fact that the courts are administered by Her Majesty's Court Service ("HMCS"). In the past HMCS was in effect the creature of the Minister and had no independent existence. A court administration solely responsible to the government minister was tenable when that minister was also a judge and head of the judiciary. Since the Lord Chancellor was neither, this position was considered no longer acceptable. Other models were available. For example, in Ireland where there is a Ministry of Justice, there is an autonomous court administration responsible to the judiciary alone. The Scottish Executive favours a similar arrangement and in January placed a Bill before the Scottish Parliament (the Judiciary and Courts (Scotland) Bill 2008).

In England and Wales, the announcement of the creation of a Ministry of Justice was followed by a year of negotiation. Some of it was brought into the public domain because of evidence given to Parliamentary Committees. On 23 January 2008 the Lord Chief Justice and the Lord Chancellor announced a new partnership regarding the operation of HMCS with effect from the beginning of April. The details of the agreement were published when the Lord Chancellor presented the new HMCS Framework Document to Parliament.¹⁰ The arrangement is not as far reaching as the Irish and Scottish models. But budgets will be set by a transparent process. One of the objectives of HMCS is to support an independent judiciary in the administration of justice. Part 7 of the Framework Agreement provides that all court staff owe a joint duty both to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts. Staff are subject to the direction of the judiciary when they are supporting the judiciary in the conduct of matters for which the judiciary is responsible, such as listing and case management. Most importantly, there will be a Board, chaired by an independent person – neither a judge nor a civil servant – accountable to both the Lord Chief Justice and the Lord Chancellor.

Some functions (such as training) had always been seen as judicial. The consequences of the changes are that other functions where the position was less clear are now clearly judicial. Resources are provided by the Lord Chancellor. The Lord Chief Justice is responsible for deployment of individual judges, the allocation of work within the courts ("listing" of cases), and the well-being, training and guidance of serving (full and part-time) judges. This means that the judiciary is responsible for:

- i An effective judicial system, including the correction of errors;
- ii Training judges in the light of changes in law and practice; and
- iii Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.¹¹

Some functions are shared. These include discipline, the effective and efficient operation of the courts through the Court Service, and the protection of the image of

¹⁰ Cm 7350 (April 2008).

¹¹ "The Accountability of the Judiciary" para 13(d), see <http://www.judiciary.gov.uk/docs/accountability.pdf>.

justice. In the last of these the judiciary is assisted by the Judicial Communications Office, but the Lord Chancellor has a statutory role under section 3(6)(a) of the CRA.

The result of all this is that the judiciary has had to take an institutional position on the matters for which it is responsible. Since 2003 it has been developing governance mechanisms through the Judicial Executive Board (“JEB”) and a revived and reinvigorated Judges’ Council with representatives from all ranks of judges.¹² There is thus an increased awareness of and focus on the judiciary as an institution as opposed to a group of individual judges. As yet there has been less awareness of the effect of the emergence of a judiciary with stronger institutional attributes on the concept of the independence of individual judges. There is much work to be done on this topic; often referred to as the internal independence of the judiciary.¹³

The need for such an institutional position will increase under the rules in the new framework agreement about HMCS. This is because the Lord Chancellor and Lord Chief Justice will jointly see how they can improve the performance and efficiency of the courts, while respecting the principle of the independence of the judiciary. The judiciary will make a contribution to this.

So the question arises as to what can judges do without prejudicing their constitutional independence. Section 11 of the framework agreement draws a distinction between policy about operational guidance to the courts, which will be developed by HMCS’s Board, on which judges sit, and policy and legislative proposals that the Ministry of Justice is developing. The distinction between “policy” and “operational” matters can be difficult to draw at the margin but it is suggested that, provided care is taken, it can provide a satisfactory touchstone in this context. Where policy and legislative proposals have an operational impact on the courts, the agreement provides that HMCS must be consulted. Where such proposals raise significant issues they must be reported to HMCS’s Board. Section 11, however, states that it does “not affect the operation of the convention under which the Government may consult the judiciary on legislative proposals”.

A further consequence of the new arrangements is the question of accountability for matters for which the judiciary is now responsible where in the past government ministers were responsible. Consideration has been given as to how to provide a measure of accountability which is consistent with the principle of judicial independence.

Accountability was once seen as part of a command and control relationship: a person may be “accountable to” another person or institution, which may sack him or her. Today, however, the concept is more fluid and includes a number of practices which explain, justify and open the area in question to public dialogue and scrutiny. A person may be “accountable for” certain matters. The difference is more graphically captured by Professor Vernon Bogdanor’s distinction between “sacrificial” and “explanatory” accountability.¹⁴ The former involves taking the blame for what goes wrong, and forfeiting one’s job if something goes seriously wrong. The latter involves giving an account of stewardship, for instance, in the case of ministers to parliament and to the electorate.

It is often said, particularly by politicians, that our judges are not accountable. What they often mean is that our judges are not elected, as some state judges in the USA

¹² See Lord Justice Thomas, *The position of the judiciaries of the UK in the constitutional changes*, Address to the Scottish Sheriffs’ Association, 8 March 2008.

¹³ Montreal Declaration § 2.03.

¹⁴ Bogdanor, “*Parliament and the Judiciary: The Problem of Accountability*”, (Third Sunningdale Accountability Lecture 2006); Le Sueur, in Andeanas and Fairgrieve (eds) *Independence, Accountability and the Judiciary* (BIICL 2006), 49–50.

are, and that the government cannot fire a judge it does not like, in the way that last year the President of Pakistan fired the Chief Justice and a number of other judges in Pakistan's highest court. But judges are in fact subject to a number of forms of accountability. These are, however, not always understood. Nor are the necessary limits to judicial accountability. Neither individual judges nor the judiciary as a body should be subject to forms of accountability prejudicing their core responsibility as the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens, and between citizens and the state in accordance with the prevailing rules of statutory and common law.

The nature and form of the accountability of the judiciary depends on their responsibilities and conduct. It is generally accepted that, save in accordance with the Act of Settlement 1701, senior judges cannot be held accountable either to Parliament or to the executive in the sacrificial sense, and that they cannot be externally accountable for their decisions in cases heard by them. Such accountability would be incompatible with the principle of the independence of the judiciary.

So how are judges accountable? Save for the House of Lords, individual judges are held to account by higher courts hearing appeals from their decisions. Complaints about their personal conduct are investigated by the Office for Judicial Complaints acting on behalf of the Lord Chancellor and the Lord Chief Justice who are jointly responsible for considering and determining such complaints. You will also be aware of accountability by scrutiny – sometimes harsh scrutiny – by the media. Contempt type powers have given way to the consequences of a more broadly based principle of the freedom of the press.

It is worth dwelling on the depth of accountability by way of appeal. The decisions of appellate courts are fully reasoned, widely available and they do not always pull their punches. So, in rejecting the approach taken by the Court of Appeal to the legality of the Denbigh High School in not allowing a Muslim pupil to wear the jilbab, Lord Bingham said this was an example of a retreat to procedure as a way of avoiding questions which the court must confront, however difficult they are.¹⁵ Lord Hoffmann stated that the Court of Appeal would have failed the examination it had set the school by giving the wrong answer to one of the questions of law.¹⁶ Appellate courts can be less gentle, as the Court of Appeal was when describing a High Court judge's handling of a hearing as "intemperate" and as impugning in the strongest terms the good faith of an application for him not to sit in the case when there was "no shred of evidence to suggest some ulterior or improper motive" behind the application.¹⁷

Another form of accountability over court decisions arises from the fact that, except where the issue is one of EU law, it is open to Parliament to legislate in order to reverse the effect of a single decision or a body of doctrine distilled from a number of cases. Moreover, the duty to give reasons for decisions is a clear example of "explanatory" accountability which assists transparency and scrutiny by the other branches of the state and the public (as well as facilitating appeals).

Some consider that a judge cannot be both independent and externally accountable, and that even "explanatory" accountability is incompatible with, or a danger to, judicial independence. The late Lord Cooke of Thorndon argued that "... [j]udicial

¹⁵ *R (on the application of Begum) v Denbigh HS*, [2006] UKHL 15 at [27]–[31].

¹⁶ *Ibid*, at [66] – [68].

¹⁷ *Howell v Lees Millais* [2007] EWCA Civ 720. See also *Baigent v Random House Ltd* [2007] EWCA Civ 247 at [3] and [121] and *Jameel v Wall St Journal SPRL (No 3)* [2006] UKHL 44, at [56] – [57].

accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised".¹⁸

The judiciary recognised that the changes introduced by the CRA raised issues of accountability. While some of their long-standing practices could be understood as forms of accountability in one or other of the senses of that term, the new situation justified further steps. The first happened during 2005, as part of the preparations for the Lord Chief Justice to become Head of the Judiciary. The Judicial website, a major new website, was created. The aim was to increase public understanding of the role of judges in our democracy by providing information about what we do and our constitutional position. It provides the public with direct access to such information without it being filtered by the media. It gives access to the full text of important judgments and speeches by the Lord Chief Justice and the senior judiciary.

The second step was that, in the spring of 2006, I was asked by the Lord Chief Justice and the JEB to take on the role of Judge in Charge of Parliamentary Relations, with a responsibility which later included advising the Lord Chief Justice and the JEB about how to develop our position on accountability. After work had started on this, the House of Lords Constitution Committee commenced an inquiry into the relationship of the Executive, Judiciary and Parliament. This led us to prioritise our own work. Policy was formed and, in May 2007, the JEB and the Judges' Council approved a paper setting out the principles of accountability and a recommendation that, as part of enhanced explanatory accountability, the Lord Chief Justice should publish a *Review of the Administration of Justice in the Courts*.

In October 2007 (at the same time as the Lord Chief Justice and the JEB responded to the House of Lords Constitution Committee which had reported in July 2007),¹⁹ a document authorised by the JEB was published on the judiciary's website discussing the forms of judicial accountability and their limits.²⁰ What I summarise here is set out in more detail in that document. It is premised on the proposition that some practices can be understood as forms of accountability that are consistent with judicial independence. It is also premised on the proposition that the limits upon accountability are those inherent in the principle of judicial independence. We had earlier published modern guidance to judges asked to give evidence to Parliamentary Committees. That deals with the boundaries of what it may be appropriate for a judge to say when "the High Court of Parliament" asks him or her to give evidence. Its contents reflect the clear understandings and conventional rules about what judges can and cannot say.

I have referred to the Lord Chief Justice's *Review of the Administration of Justice in the Courts* which he sent to the Queen and laid before Parliament pursuant to section 5 of the CRA in March 2008. It is a strategic addition to the annual reports and reviews of the operation of particular jurisdictions, such as the Crown and County Courts, the Court of Appeal and the Commercial Court by judges and HMCS. It deals with the matters that, in the words of section 5 of the CRA, appeared to him to be important to the judiciary and to the administration of justice in England and Wales.

The court reports and the Lord Chief Justice's *Review* are valuable tools for external scrutiny of the system. To furnish information about court process, delays, workloads, training, appeals, complaints, lack of integrity and misconduct and equality issues to Parliament and the public is an appropriate way of explaining, justifying and opening

¹⁸ Robin Cooke, "Empowerment and Accountability: the Quest for Administrative Justice" (1992) 18 *Commonwealth Law Bulletin* 1326.

¹⁹ www.judiciary.gov.uk/docs/const_committee_response.pdf. The Committee's report is *Sixth Report of Session 2006 – 07*, HL 151 (26 July 2007).

²⁰ http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/judicial_independence/acc_jud.htm.

these areas to public examination and scrutiny. It can also identify the boundary between the respective responsibilities of the judiciary (for the business of the courts) and of the Lord Chancellor (for resourcing the courts) and HMCS (for providing court buildings and court staff). To voluntarily offer a form of “explanatory” accountability for the matters that are the responsibility of the judiciary is not inconsistent with the requirements of judicial independence.

What about appearances at committees by judges? The constitutional orthodoxy in the past, when there was less separation of powers than there is now, has been that Parliament, as the High Court of Parliament, has the *power to summon* judges. Whatever the legal position, Parliament generally invites rather than summons judges. It is doing so more frequently. Select Committees can represent an appropriate and helpful forum for the Lord Chief Justice or other senior judges. They can explain or state their views on aspects of the administration of justice that are of general interest and concern and upon which it is appropriate for judges to comment.

I have referred to the increasing number of invitations by Parliamentary Committees to judges to appear before them. The judiciary and the Lord Chief Justice have concerns about this, again because judges who comment on an issue might, at a later date, find that they have to adjudicate on that issue. The difficulties which arise when judges give views on the operation of the law or on proposals for new legislation to which I have referred earlier apply here too. It is difficult for judges to comment on certain topics concerned with the court system without risking prejudicing the public perception of their impartiality. We must also not forget that judges may have to adjudicate on disputes involving Parliament or MPs. The recent appeal from the decision of the Information Commissioner about MPs’ expenses is an example.²¹

These concerns were expressed in the judiciary’s response to the House of Lords Constitution Committee and by the Lord Chief Justice in his *Review*. It is noteworthy that appearances by judges before Parliamentary Committees in other Commonwealth common law countries which share our legal and judicial traditions, but where there has been a greater separation of powers, are much less frequent. In Canada they are almost unknown. It is up to judges not to allow themselves to be lured into dangerous territory, territory which members of the legislature might wish to tempt them into. A request for judicial assistance from the House of Lords Constitution Committee when it was inquiring into relations between the executive, the judiciary and Parliament was appropriate. So was one from the House of Commons Select Committee on Constitutional Affairs when it was inquiring into the creation of the Ministry of Justice. Requests for views on the scope of the Human Rights Act and whether it needs amendment are not appropriate.

I have referred to the fact that a stated aim of the changes introduced by the CRA was to increase the separation of powers in our constitutional arrangements. There has, however, as yet been little consideration of the implications of this on the matters upon which it is appropriate for judges to comment to Parliamentary Committees or the powers of such Committees *vis-à-vis* judges. Do the changes in the 2005 Act and the increasingly partisan nature of matters connected with the administration of justice mean that the boundary of what is constitutionally appropriate and permissible must be revisited? If so, will the constitutional changes mean that the boundary must be redrawn? The increase in the separation of powers and in the partisan nature of debates about the administration of justice tends to suggest that it may not be appropriate for judges to comment on certain matters upon which they have done so in the past. The

²¹ The decision was given on 16 May 2008: *Corporate Officer of the House of Commons v The Information Commissioner & Ors* [2008] EWHC 1084 (Admin).

administrative responsibilities of the Lord Chief Justice under the CRA and role of the judiciary in the administration of the court system within the partnership between the Lord Chief Justice and the Lord Chancellor about the operation of HMCS mean that matters upon which comment by the Lord Chief Justice or his delegates would have been inappropriate in the past, are now appropriate, in part because of the legitimate interest in explanatory accountability for the judiciary's part in the new partnership.

Finally, I return to the point from which I started. In the new constitutional structure, do judges need to be more circumspect in what they say, whether in lectures, to Parliamentary Committees, or in advice and comment to government?

I suggest that careful attention needs to be given to the questions I asked earlier. In summary, how does the judiciary play an appropriate role in the modern state without risking the impartiality that is fundamental to its core responsibility of resolving disputes between citizens and between citizens and the state? The risk is that the judiciary will be seen by others, in particular a media used to painting issues in stark rather than nuanced colours, as having policy preferences. If so the judiciary will be seen as just another "player" in the political and policy-formation processes. I do not have an answer to the question save to say that any role which puts at risk the public perception that the judiciary is impartial, and that it will approach any legal question on which it has to adjudicate impartially and in accordance with the rules of statute and common law, is inappropriate. The pressure on the judiciary is to behave in ways which risk making it just another player in the political process. The opportunity is to fashion a constitutional role that is appropriate in a modern democracy.

**DEMYSTIFYING THE CROWN:
THE GOVERNMENT AND THE PRIVATE SECTOR – POWERS,
CONTRACTS AND CONFUSION**

*JUDITH-ANNE MACKENZIE**

This is the text of a lecture given at Lincoln’s Inn on 23 January 2008 to an audience comprised of barristers in self-employed practice, government lawyers and Crown commercial solicitors.

THE CROWN

It is as well to start by pointing out that there are two meanings of “the Crown” that are in common usage, whether amongst government lawyers in particular, lawyers in general or the population at large. The first meaning relates to the monarch herself, in her constitutional rather than her personal capacity. This covers all the functions of the Crown: executive; legislative; and judicial (at least as things stand at present). The second meaning is narrower and relates solely to the executive functions of the Crown. It is the latter sense of the term with which we are largely concerned when we speak of Crown commercial transactions. Here the norm is for a Secretary of State, with powers to act as the Crown (see the material below on the history of the Secretary of State), to enter into transactions. These transactions are, of course negotiated by civil servants either for or often as the Crown, as we shall see when we come to a discussion of the *Carltona* principles.

The indivisibility of the Crown

The leading case on the personality of the Crown and the relationship between the Crown (in the sense of the monarch) and the Crown (in the sense of the executive or government) is *Town Investments v Department of the Environment*.¹ The case related to an underlease of office premises granted in 1952 to the Minister of Works “for and on behalf of Her Majesty”. In 1972 a fresh lease was granted in similar terms but to the Secretary of State for the Environment. The question was whether or not two orders made under the Counter-inflation (Temporary Provisions) Act 1972 applied to the premises. Due to the wording of that legislation, the main issues were:

- (1) whether the Secretary of State was the tenant or had simply contracted as an agent for the Crown; and
- (2) whether the tenant (whichever was the case) occupied the premises for the purpose of his or her own business.

The landlords argued that the premises were held by the Secretary of State as trustee for the Crown. The Secretary of State’s case was that the tenant of the premises was the Crown and that the premises were occupied by the Crown (even though occupied by the staff of another department of State). The Court of Appeal accepted the argument for the landlords. The House of Lords (Lord Morris of Borth-y-Gest dissenting), however, took the view that the tenant and occupier were quite simply the

* Judith-Anne MacKenzie LL.M. AKC is a barrister working in the Government Legal Service. She is Head of the Road Vehicles, Environment and Fuels Division in the Legal Services Directorate of the Department for Transport. All the views in this lecture are those of the author alone and do not necessarily represent the views of the Crown.

¹ [1978] AC 359.

Crown, at least in the sense of the government (the narrower sense given above). Lord Diplock said:²

Where, as in the instant case we are concerned with the legal nature of the exercise of executive powers of Government, I believe some of the more Athanasian-like features of the debate in your Lordships' House could have been eliminated if instead of speaking of "the Crown" we were to speak of "the government" – a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by "the Crown" in the fictional sense in which that expression is now used in English public law.

Their Lordships re-affirmed the fundamental constitutional doctrine that the Crown is one and indivisible. Lord Simon of Glaisdale said:³

... *prima facie* in public law a minister or a Secretary of State is an aspect or member of the Crown.

Accordingly, if contracting with a Secretary of State you are reasonably safe to assume that you are contracting with the Crown. However, a number of recent cases illustrate that the concept of the indivisibility of the Crown should not be pushed too far in certain circumstances:

Robertson and Ors v Department of Environment, Food and Rural Affairs.⁴

Here male civil servants in DEFRA appealed against dismissal of their equal pay claim. They sought to compare their pay with the pay of female staff in DETR, arguing that all were employed by the same employer: the Crown. The court (relying in part on the fact that pay arrangements have been devolved to departments by transfer of functions orders) said that common employment by the Crown did not fulfil the "single source" test in employment cases. The Crown wins.

R (Nahar) v Secretary of State for Work and Pensions.⁵

Mrs Nahar applied for leave to enter the UK on the basis of her marriage in Bangladesh and also applied for a pension on the basis she was a widow. The Home Office allowed her entry on the basis her marriage was valid but Work and Pensions refused her pension on the basis that it was not. Munby J held that the issue of estoppel did not arise because there was neither identity of parties nor parity of interest between the two Secretaries of State. The Crown wins.

Hinchey v Secretary of State for Work and Pensions.⁶

Here Maureen Hinchey had been overpaid a disability benefit. This happened because although the disability allowance department knew her entitlement had ceased, she had not informed the relevant social security office. The Court of Appeal was prepared to regard notice to one office as sufficient but the House of Lords concluded that the

² at p 381.

³ *Ibid.*

⁴ [2005] EWCA Civ 138.

⁵ [2001] EWHC Admin 1049.

⁶ [2005] UKHL 16.

knowledge of one should not be imputed to the other and the overpayment had to be repaid. The Crown wins.

R v W (John).⁷

Here the Court of Appeal rejected an argument that the CPS could not prosecute a tax fraud in a case in which the Inland Revenue had agreed not to do so. The Crown wins.

*What sort of person is the Crown?*⁸

In the *Town Investments* case Lord Simon said:

... the legal concept which seems to me to best fit the contemporary situation is to consider the Crown as a corporation aggregate headed by the Queen.

He then went on to speak of Secretaries of State as aspects or members of the Crown. However, the other members of their Lordship's house did not adopt this approach.

In *In re M*⁹ Lord Woolf said:

... at least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate.

He did not, however, say which it is.

Certainly modern Secretaries of State are themselves corporations sole, usually created by a Transfer of Functions Order which gives rise to a new office of State. For example the Secretary of State for Transport Order 1976¹⁰ created the Secretary of State for Transport as a corporation sole.

In their *Administrative Law*,¹¹ Wade and Forsyth argue that the propositions of Lords Diplock and Simon in *Town Investments* that suggest the Crown is a corporation aggregate are "radically misconceived".¹² Indeed, it does not appear to fit well with the history of the Secretaries of State, which seems to suggest that they were empowered to act "as" the monarch by means of being given the monarch's seals (which points to an *alter ego* approach).

The best summary of the correct approach to this issue may remain that expressed in the *Duchy of Lancaster* case¹³

The King has in him two bodies, a body natural and a body politic. . . He has not a body natural distinct and divorced by itself from the office and dignity royal, but a body natural and politic together indivisible and these two bodies are incorporated in one person, make one body and not divers.

On this view the Crown is either a corporation sole or has the attributes of such a body. That it may act (to use neutral wording) by means of various Secretaries of State and other officers of State is merely a long-standing practicality arising from the impossibility of one human being making personally all the decisions required to govern a large state. In this, the relationship between the Crown and the Secretaries of State may be a precursor of the relationship now generally recognised in public law

⁷ [1998] 2 Cr App Rep 289.

⁸ I am obliged to Oliver Saunderson for his thoughts on this topic, contained in a paper accompanying a lecture to the Department for Transport lawyers in 2005, to which I have referred while preparing this lecture.

⁹ [1994] 1 AC 377, 424 (HL).

¹⁰ SI 1976/1775.

¹¹ (9th ed, 2004, OUP).

¹² *Ibid*, p 46, footnote 6.

¹³ (1561) 1 Plowd 212.

between Secretaries of State and the civil servants and officials in their individual departments, which are recognised in the “*Carltona* principle”.

Furthermore, in modern government the unity and indivisibility of the Crown is still given expression by (the normal) adherence to the principle of collective Cabinet responsibility: the Crown being one, it cannot speak with different voices. However, I admit that this approach is in stark contrast with some of the reasoning in the authorities mentioned above and would not be welcome to any who consider that constitutional development should not be overly restricted by national history.

THE HISTORY OF THE PRINCIPAL SECRETARIES OF STATE¹⁴

Origins of the office

The office of the King’s Secretary originates during the reign of Henry III (previously the functions having been undertaken by the Lord Chancellor or his staff). Originally the Secretary was a member of the King’s household.

In 1433 two Secretaries of State were appointed, one by delivery of the King’s signet and the other by letters patent. The reason for the second was the need for someone to conduct the King’s business in France. In both cases the appointment implied the power to act as and for the King.

In 1443 an Ordinance (Order in Council) referred to the Secretary of State as having a particular function and by doing so indicates that by this period his role was recognised as being to express the will of the monarch. In 1476 the term “Principal Secretary” was used for both Secretaries of State, in order to distinguish them from holders of other lesser offices (such as clerks), who acted without the independence that had already been taken on by the antecedents of the modern Secretaries of State.

In the reign of Henry VIII the responsibility for use of the signet was confirmed by the Signet and Privy Seal Act 1535.¹⁵ The holder of the royal signet was, of course, able to act as the Crown by use of the signet.

The House of Lords Precedence Act 1539¹⁶ gave the Secretaries of State a place in parliament, although they were commoners.

After the reign of Henry VIII the Secretaries of State seem to have ceased to be members of the Royal Household. For most of the reign of Elizabeth there was one Secretary of State (each of the Cecils in succession) but by the end there were two, Robert Cecil being “Our Principal Secretary of Estate” and the other “one of our Secretaries of Estate”.

There were usually two Secretaries of State thereafter until 1794. Sometimes a third was appointed (for example in relation to Scotland or the colonies).

The functions of the Secretaries of State

Their function was (and in theory still is) to act as the medium of communication between the Crown and subjects, subjects being unable to approach the Crown directly. This was not just their function but their right. One Secretary of State of Henry VIII complained strongly when the Lord Mayor of London approached Wolsey without first approaching the Secretary in order to ascertain the King’s pleasure. The Secretary

¹⁴ The historical element of this brief note is largely based on the material contained in Anson, *The Law and Customs of the Constitution* (2nd Ed, 1907, Clarendon Press), vol II, pp160–169. This portion of this note does not attempt to be a complete summary of all the issues but serves to illustrate the development of the office and its functions.

¹⁵ 27 Hen VIII c11.

¹⁶ 31 Hen VIII c10.

also acted as the medium of communication between the monarch and the Privy Council and its committees (then the medium of government) and in essence spoke there for the Crown, when the monarch did not attend.

Cecil in *The Dignity of a Secretary of Estate with the care and peril thereof* mentions the Secretary of State's freedom to negotiate at his own discretion, at home and abroad, without "authority or warrant (like other servants of princes) in disbursement, conference or commission, but the virtue and word of his sovereign". This underlines the freedom of the Secretary of State to act as the Crown by virtue of his office and without the need for any express conferral of authority or giving of instruction by the monarch.

The key change in the function of the Secretary of State came with the move from government by the Privy Council to government *via* the Cabinet. Here the Secretaries of State gained greater importance. Business previously conducted by the Council passed into the control of the Secretaries of State and they became the exponents of the monarch's pleasure in the different departments of government. Here, as direct influence by the monarch declined, the "collective responsibility" of the Cabinet became the key force in relation to the decisions of Secretaries of State, as did the requirement that Secretaries of State be accountable to Parliament for the conduct of state matters.

By 1858 there were five Secretaries of State and Anson writes:¹⁷

Except in so far as Statute gives powers to one or other of the five Secretaries of State, each is capable of performing any of the functions of the various departments. . . Each and all are primarily the means by which the royal pleasure is communicated, the work of each department is the work of the Crown, acting on the advice of responsible Ministers, and for such action and advice each of these Ministers must answer to Parliament.

THE MODERN POSITION OF THE SECRETARIES OF STATE

Appointment

Secretaries of State are (and have for centuries been) appointed by delivery of their seals (not by letters patent as was sometimes the case in their very early history)

The office of Secretary of State in the legal sense depends on the grant and delivery of the seals. The title of the office is "one of his Majesty's Principal Secretaries of State". By the grant and delivery of the seals, each one of those persons becomes a legal organ to countersign any act of State, and he is placed afterwards in that department of business which his Majesty thinks fit to allot him.¹⁸

This remains the case today. Secretaries of State are not, of course, appointed by the Prime Minister (as one might imagine from press reports) but by Her Majesty the Queen, on the Prime Minister's advice.

They do not take up office until they attend to be issued with their seals. The issue of seals is handled by the Privy Council Office. Any Secretary of State's seals will do and sometimes when a "new" Secretary of State is created he or she will be issued with a spare set or old set of seals until a new set can be created. A Secretary of State ceases to hold office on re-delivering the seals to the Privy Council Office. Note that the system is different for some offices (such as the PM), which are not Secretaries of State and in some cases letters patent are required. However, the PM just "kisses hands" and

¹⁷ *Op cit*, pp 167–168.

¹⁸ 33 Parl Hist 976.

thus is appointed personally by the monarch. The Clerk of the Privy Council is responsible for the slightly complex procedures required to ensure all are correctly appointed to their offices.¹⁹

Position as a corporation sole

Since, in modern times, Secretaries of State have functions in their own right, it is important to know whether they are corporations. Whatever the past position, this matter is normally dealt with by a Transfer of Functions Order (an Order in Council) made under the Ministers of the Crown Act 1975 (c 26) shortly after a new Secretary of State is created (that is, after a new office is created, rather than after each appointment to that office). Thus article 4 of the Secretary of State for Transport Order 1976²⁰ reads as follows:

Style, seal and acts of Secretary of State for Transport

4.–(1) The person who at the coming into operation of this Order is Secretary of State for Transport and his successors shall be, by that name, a corporation sole, within a corporate seal.

(2) The corporate seal of the Secretary of State for Transport shall be authenticated by the signature of a Secretary of State, or of a Secretary to the Department of Transport, or by a person authorised by a Secretary of State to act in that behalf.

(3) The corporate seal of the Secretary of State for Transport shall be officially and judicially noticed, and every document purporting to be an instrument made or issued by the Secretary of State for Transport and to be sealed with that seal authenticated in the manner provided by paragraph (2) above, or to be signed or executed by a Secretary to the Department of Transport or a person authorised as above, shall be received in evidence and be deemed to be so made or issued without further proof, unless the contrary is shown.

(4) A certificate signed by the Secretary of State for Transport that any instrument purporting to be made or issued by him was so made or issued shall be conclusive evidence of the fact.

(5) No stamp duty shall be chargeable on any instrument made by, to or with the Secretary of State for Transport.

Note that the statutory instrument does not create the Secretary of State for Transport – that is done by Her Majesty when she appoints a person to the new office she has created (on the request of the PM). Instead it refers to the person who already is Secretary of State.

In the case of the Secretary of State for Transport, the corporation was not dissolved when the functions of that Secretary of State were transferred

(1) to the Secretary of State for the Environment, Transport and the Regions and that Secretary of State was created a corporation sole,²¹ and

(2) thereafter, to the Secretary of State for Transport, Local Government and the Regions and that Secretary of State was created a corporation sole.²²

¹⁹ For more detail on the procedures relating to appointments and the responsibilities of ministers once appointed, see Brazier, *Ministers of the Crown*, (1997 OUP); and *The Ministerial Code* at http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code/.

²⁰ SI 1976/1775.

²¹ SI 1997/2971.

²² art 3 of SI 2001/2568.

Therefore, although there was a further Transfer Order, it did not need to create the Secretary of State again and we simply got the old seals out of the cupboard.²³

What gender is the Secretary of State?

The simple answer to the question is that the Secretary of State is of the gender of the current holder of the Office. When drafting legislation we therefore refer to the Secretary of State as “her” or “his” and “she” or “he” depending upon the gender of the holder of the office at the time the legislation is made. In the Department for Transport this required a certain amount of last-minute redrafting of statutory instruments when the person holding the office of our Secretary of State changed from Douglas Alexander to Ruth Kelly.

Any subsequent change of gender is, of course, addressed in relation to legislation by section 6 of the Interpretation Act 1978.²⁴

When dealing with a contract this requires either the adoption of the Interpretation Act provision or the recital of similar provisions in the contract. However, provided that it is clear that the contract was intended to be made with the Secretary of State in his or her capacity as such (the corporation) I do not imagine the court would have much trouble in dealing with this minor issue, even in the absence of such a provision.

While I have never met a gender-neutral Secretary of State we will undoubtedly not object to contractual drafting which seeks to be gender neutral but in general “he/she” and “his/her” are best avoided. In future legislation itself is likely to be drafted to avoid gender specific references, where that is possible.

Successors In Title

A more interesting issue is whether it is advantageous to include a “successors in title” provision in a Crown contract, in so far as this is designed to address only changes in Secretary of State. The Crown itself may, of course, wish such a provision to be included to cover any changes to other parties.

As Secretaries of State are corporations sole, a “successor in title” clause is not needed to cover any change in the person who holds that office for the time being. The current Secretary of State is certainly bound by contracts entered into by her predecessor in the same office.

However, machinery of government changes are now relatively frequent and you may therefore have cause to consider whether a “successor in title” clause is needed to address a possible transfer of functions from say a Secretary of State for the Environment, Transport and the Regions to a Secretary of State for Transport, Local Government and the Regions. This does constitute a move from one Secretary of State to a different Secretary of State and thus from one corporation sole to another.

The answer is that a “successor in title” clause is not, in practice, likely to be necessary because the Transfer of Functions Order (TFO) creating the new Secretary of State will also deal with the issue of continuity of rights and obligations. Thus the Secretaries of State for Transport, Local Government and the Regions and for Environment, Food and Rural Affairs Order 2001²⁵ (which dealt with the transfer mentioned above) included the following provisions:

²³ SI 2002/2626.

²⁴ The earlier Act only provided for the male to include the female but not the reverse. This was becoming increasingly unhelpful in a world in which some professions were mainly staffed by women (eg nursing) but also included men and in which female ministers were becoming more usual.

²⁵ SI 2001/2568.

Transfer of certain immovable property

8. All immovable property in the United Kingdom to which the Secretary of State for the Environment, Transport and the Regions is entitled at the coming into force of this Order is hereby transferred to the Secretary of State for Transport, Local Government and the Regions.

Transfer of property, rights and liabilities to Secretary of State for Transport, Local Government and the Regions.

9.–(1) All property, rights and liabilities to which the Secretary of State for the Environment, Transport and the Regions is entitled or subject at the coming into force of this Order are hereby transferred to the Secretary of State for Transport, Local Government and the Regions.

(2) This article does not apply to any property, rights or liabilities which are transferred by article 11 or 13.

However, the occurrence of this result necessarily depends upon the drafting of the TFO in question and thus, personally, I see no reason to object to the inclusion in a contract of a “successor in title” clause that is wide enough to cover a transfer of functions from one Secretary of State to another, as it appears to me that other advisers may require this to protect their clients. I would, however, be interested to know whether any of my colleagues disagree with this view. There is, of course, a valid concern that any unnecessary drafting is (to use the time-honoured phrase of Parliamentary Counsel) inclined to go septic. However, it is understandable if those contracting with the Crown prefer to take a “belt and braces” approach to such matters (even if some of us view a belt as wholly redundant).

Statutory references

For completeness, it is worth noting that Schedule 1 to the Interpretation Act 1978 includes the following definition:

“Secretary of State” means one of Her Majesty’s Principal Secretaries of State.

Normally, all legislation (primary and secondary) is therefore drafted simply in terms of “the Secretary of State” leaving Transfer of Functions Orders to deal with the issue of which Secretary of State should in practice exercise which function.

CARLTONA

The *Carltona* principle is that civil servants and officials may, in many instances, do more than act on behalf of their Secretary of State. Rather, where they are of an appropriate seniority in relation to the issue in question, they may act as the Secretary of State. Accordingly, where *Carltona* applies, the official is the *alter ego* of the Secretary of State and not simply his or her servant or agent.

The principle derives its name from *Carltona Ltd v Commissioners of Works*.²⁶ In that case the Commissioners had power to requisition land, “if it appears to that authority to be necessary or expedient to do so”. The owner of a factory challenged a requisition of his premises on the grounds that the Commissioners had (1) never met and (2) never considered the requisition. In fact the decision had been made by an Assistant Secretary (now equivalent to a Senior Civil Servant PB1) in the Commissioners’ office. The Court of Appeal held that the decision was valid and did

²⁶ [1943] 2 All ER 560.

not constitute an improper delegation or usurpation of authority. Lord Greene MR said:

It cannot be supposed that this regulation meant that in each case the minister in person should direct his mind to the matter. The duties imposed upon Ministers and the powers given to ministers are normally exercised under authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer to Parliament for anything that his officials have done under his authority...²⁷

This is not a delegation by the Secretary of State. In *R v Home Secretary, ex p Oladehinde* Sir John Donaldson said, “The civil servant acts not as the delegate, but as the *alter ego*, of the Secretary of State”.²⁸ Freeland in *The Rule Against Delegation and the Carltona Doctrine in an Agency Context*²⁹ argues that the *alter ego* is a fictional doctrine and that really one should regard powers being conferred on a department rather than on its Secretary of State. This approach, however, conflicts with the legal position, which is that save for specific limited purposes, government departments do not themselves have any personality in law.³⁰

The difficulty that may arise, in practice, is knowing whether a particular official has, for example, sufficient seniority to sign a document (such as a contract). In many departments, such as in the Department for Transport, there therefore exists a document which lists the “signing authority” for various types of document, which specifies who may sign documents according to the office or grade held. The current Department for Transport version is appended and from this you can see that while some documents (notably statutory instruments) must be signed by at least a junior minister, others (including contracts) may be signed by civil servants of various grades. In the case of a department with no such authority in place, you may need to rely on the test as to whether it is “normal practice” in the department for officials at that level to act as Secretary of State. In most cases, a Senior Civil Servant will be able to act in this way, and that person’s grade can be verified by use of the *Civil Service Year Book*.

Note, however, that on some occasions the courts have concluded that *Carltona* does not apply and therefore the Secretary of State must exercise the power in question personally. In 1918, an order to deport an alien was considered to require personal action: *R v Chiswick Police Station Superintendent, ex p Sacksteder*.³¹ However, immigration officers were found to be able to exercise the power in *R v Home Secretary, ex p Oladehinde*.³² Much of the case-law in this area relates to matters of imprisonment and deportations and may be of limited assistance in the commercial context.³³

The *Carltona* doctrine was considered further, post-devolution, in the Scottish case of *Beggs v The Scottish Ministers*,³⁴ a case concerning the opening of prisoners’ mail in

²⁷ At p 563.

²⁸ [1991] 1 AC 254 at 284.

²⁹ [1996] PL 16 at 22.

³⁰ There is a large number of cases in which *Carltona* is discussed. See, for example, *Point of Ayr Collieries Ltd v Lloyd-George*; [1943] 2 All ER 546; *Re Golden Chemical Products Ltd*; [1976] Ch 300; *Woollett v Minister of Agriculture and Fisheries*; [1955] 1 QB 103; *R v Skinner*; [1968] 2 QB 700; *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 and the other cases mentioned below.

³¹ [1918] 1 KB 578 at 585.

³² [1991] 1 AC 254.

³³ See also, for example, *R v Home Secretary, ex p Doody*; [1994] 1 AC 53; *R (Chief Constable of the West Midlands Police) v Birmingham Justices*; [2002] EWHC 1087 (Admin); *Liversidge v Anderson*, [1942] AC 206 at 224.

³⁴ [2007] UKHL 3.

breach of an undertaking given by the Scottish Ministers to the court. The *Beggs* case makes a number of important points on the position of civil servants and ministers. Lord Hope of Craighead noted that civil servants are Crown servants and are not servants of the ministers in whose departments they serve.³⁵ However, ministers are responsible to parliament for acts and failures of civil servants in their departments and cannot delegate this responsibility. In *Beggs* the actions in question were those of civil servants but ministers accepted responsibility for them and were found to be in contempt of court. Their Lordships were of the view that no finding could be made against the prison governor whose failure was the cause of the contempt because he had not personally been made a party and had no opportunity to defend himself in his personal capacity. However, it was accepted that the court had the option, during the proceedings, of requiring a civil servant to appear on behalf of a minister (in reliance on *Carltona*) should this seem appropriate, instead of requiring the minister to attend in person.³⁶

Although interesting in some ways, the *Beggs* case may not assist much in the commercial context. However, the earlier case of *R (on the application of the National Association of Health Stores) v Secretary of State for Health*³⁷ may be of greater interest. This related to the banning of the sale for medicinal purposes of *kava-kava* by means of a Prohibition Order and its exclusion from use in foods by regulations made under the Food Safety Act 1990. The main ground of challenge by NAHS was that the minister who signed the Prohibition Order and the Regulations had not been made aware that the prohibition was opposed by at least one leading pharmacological authority (Professor Ernst). In the Administrative Court Crane J held (*inter alia*) that the knowledge of civil servants as to Professor Ernst's views could be attributed to the signing minister without any requirement that that knowledge be communicated to the minister. On this point on appeal for the Crown, the following sentence in Lord Diplock's speech in *Bushell v Secretary of State for the Environment*³⁸ was relied upon:

The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise.³⁹

However, this approach was robustly rejected by the Court of Appeal. Sedley LJ said this concept was:

... antithetical to good government. It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified, as Crane J qualified it and as Mr Cavanagh now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decision-making authority (to adopt the lexicon used by Lord Griffiths in *Oladehinde* [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.⁴⁰

³⁵ at paragraphs 8 and 9.

³⁶ see paragraph 38.

³⁷ [2005] EWCA Civ 154.

³⁸ [1981] AC 75.

³⁹ See also *R v Secretary of State for Education, ex parte S* [1995] ELR 71; *Best v Secretary of State for the Environment* [1997] EG 39 (CS) and *R (Alconbury Ltd) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295, paras 126 and 127.

⁴⁰ at paragraph 26.

Thus one cannot rely on *Carltona* to treat ministers as entirely one with the civil servants in their departments: the normal Civil Service practice of ensuring that all relevant issues are placed before a decision-making minister remains an important element of decision taking, whatever the nature of the decision.

For completeness it is worth mentioning that the *Carltona* principle is not confined to Ministers but extends to a number of others whose functions are so wide that it is assumed that it must be intended that they should act through others. Indeed there is a recent interesting discussion of this whole area of law in *DPP v Haw*,⁴¹ which related to the demonstration being conducted in Parliament Square and conditions imposed by the Commissioner of Police acting through one of his superintendants.

THE RAM DOCTRINE

The “Ram doctrine” is expressed in a Memorandum of advice given by the then First Parliamentary Counsel, Sir Granville Ram, on 2 November 1945. Although it constitutes legal advice to the Crown, legal professional privilege was waived and it was disclosed in 2003 in response to questions in the House of Lords to Baroness Scotland.⁴²

The Ram opinion was given when the Ministers of the Crown (Transfer of Functions) Bill was being considered. This Bill later became the Ministers of the Crown (Transfer of Functions) Act 1946. The opinion addressed the issue of whether it was necessary for legislation to confer power to add new functions to existing government departments by order. At that time Ministers were considering machinery of government changes following the Second World War.

There is an interesting article on the doctrine by Lord Lester of Herne Hill QC and Dr Matthew Weait (with which the present speaker, unsurprisingly, does not entirely agree).⁴³ (It was Lord Lester who obtained the publication of the Ram doctrine by his persistence in pressing the government to release the 1945 advice).

The essence of the doctrine is that the Crown (and therefore a Secretary of State) has all the powers of a natural person and therefore (unlike a statutory corporation, for example, a local authority) does not need to point to any statutory power or authority for any action he or she may wish to take. Lester and Weait argue (*inter alia*)

It is inappropriate for the executive to seek to base the exercise of ministers’ and civil servants’ powers without parliamentary authority on medieval concepts of the Crown as a corporation sole. Those concepts were appropriate for a feudal landowning monarch but they are wholly outmoded as a basis for the exercise of ministers’ powers within a modern system of government based upon parliamentary democracy and the rule of law.

In his article *Equality, Review and the Crown’s Power to Disburse Funds*,⁴⁴ Professor Paul Craig also adopts the Lester and Weait approach.

⁴¹ [2007] EWHC 1931 (Admin).

⁴² Baroness Scotland’s response may be found at <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030122/text/30122w02.htm> and see also Baroness Scotland’s response to a follow-up question at <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030225/text/30225w01.htm>.

In addition, the doctrine is mentioned in the Treasury Solicitor’s Department memorandum to the Select Committee on Public Administration at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422we09.htm> and in the PAC response (see para 13) http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc_19.cfm.

⁴³ Lord Lester and Matthew Weait, “The Use of Ministerial Powers without Parliamentary Authority: The Ram Doctrine” [2003] PL 415.

⁴⁴ This may be found on the 39 Essex Street website, at http://www.39essex.com/documents/PC_seminar_paper_261006.pdf.

However, my own view is that, while this approach may provide an interesting argument that the law should be changed, with the greatest respect to the learned authors mentioned above, is not an argument that the law is not as it is, in the light of the authorities. The law is as it always has been and will (in the absence of a revolution) remain so, until changed by legislation.

There is little authority on the matter but in *R (on the application of Hooper) v Secretary of State for Work and Pensions*⁴⁵ the House of Lords proceeded on the basis that the Crown did have such a power. This was the case in which several widowers claimed equal treatment with widows, relying on their rights under the Human Rights Act 1998 but their Lordships concluded that the statutory scheme provided clear evidence that the intention of Parliament was to discriminate between widows and widowers and that the Secretary of State therefore could not pay widowers' benefits that conflicted with the statutory scheme. In relation to the common law powers of the Secretary of State, Lord Brown of Eaton-Under-Heywood said:

Given Parliament's unambiguous intention in the matter it would seem to me an obvious abuse of power for the Secretary of State to have introduced a scheme to make matching extra-statutory payments to widowers. Whatever his general common law power to make such payments, he could not lawfully exercise it inconsistently with Parliament's clearly expressed will. The extra-statutory criminal injuries compensation scheme, for example, would not have been lawful had Parliament just rejected a Bill promoted to enact it – consider the analogous situation in *R v Secretary of State for the Home Dept, ex p Fire Brigades Union* [1995] 2 AC 513, in particular Lord Nicholls's analysis (at pp 575–576).⁴⁶

Displaced by legislation

That the rule is subject to this *caveat*, was made clear by Sir Granville Ram himself. That is that the Secretary of State may not exercise a power where he is precluded, either expressly or impliedly, from doing so by statute. This, is course, precisely the reverse of the rule for statutory or other corporations (such as local authorities and Companies Act companies). However, in those cases the limitations of the *ultra vires* rule have in modern times largely been abrogated by legislative reform and clever drafting.

Express exclusions of power are rare. An example may be found in section 6(1) of the Human Rights Act 1998:

6.–(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The more usual issue is whether the doctrine has impliedly been displaced by the conferral of specific powers on the Secretary of State that appear to cover the same ground.

In the *Pergau Dam* case (*R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*),⁴⁷ the Overseas Development and Co-operation Act 1980, section 1(1) (now repealed) specified the purposes for which the Secretary of State might provide aid for the benefit of other countries. Those purposes were developmental or welfare purposes. The Secretary of State agreed aid for the dam mainly on commercial and political grounds but also said that there was a developmental objective. The court found that there was no developmental purpose

⁴⁵ [2005] UKHL 29, [2005] 1 WLR 1718.

⁴⁶ At para 123.

⁴⁷ [1995] 1 WLR 386.

and that the aid was therefore unlawful. The court agreed with the view expressed in Wade's *Administrative Law* that:

... statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.⁴⁸

Although the point was not argued, this case is not in conflict with the Ram doctrine because here, fairly clearly, the power to make overseas grants in aid had been completely delineated in statute. It was common ground that statutory requirements must be met in full.

In the *Hooper* case, mentioned above, their Lordships found it relatively easy to conclude that the benefits legislation contained a complete scheme, which displaced impliedly any common law powers. In *R v Secretary of State for the Home Department, ex parte Fire Brigades Union*⁴⁹ the issue was whether the Home Secretary could introduce a tariff compensation scheme which was different from the statutory scheme for criminal injuries compensation (the statutory provisions having not been commenced). Their Lordships (Lord Keith of Kinkel and Lord Mustill dissenting) concluded that, while the Home Secretary was not obliged to commence the statutory scheme, he was unable to use his common law or prerogative power to introduce a conflicting scheme.⁵⁰

Such issues become very complex where there is not a complete "statutory code" for certain matters (which might provide strong evidence of a parliamentary intention to displace the usual position) but instead a series of specific powers that may or not be related in such a way as to appear to "cover the field" and thus displace the usual powers. It is a truism to say that each such case must be addressed on its own facts but that is indeed the only approach that can be taken when dealing with a patchwork of statutory provisions that do not yet appear to have been completely sewn together into one quilt.

The other caveat – supply

As Ram indicates, the Crown's legal freedom to enter contracts by virtue of the Ram doctrine is in practice qualified by the government's dependence on parliament for supply (that is, its funding).⁵¹ In practical terms, a Secretary of State's freedom to exercise his or her legal powers is subject to parliament's willingness to vote the money required.

This caveat is given its modern form in the 1932 Concordat between the government and parliament.⁵² In essence, this requires that the government does not depend on the Appropriation Act as sole cover for any form of expenditure which is recurrent. Thus, for recurrent expenditure, express financial cover will normally be included in the relevant Act of parliament, often in fairly generic form. A recent example in the typical format may be found in the Pensions Act 2007, section 28:

28.–(1) There is to be paid out of money provided by Parliament—
(a) any expenditure incurred by the Secretary of State by virtue of this Act; and

⁴⁸ (7th ed, 1994, OUP) p 413.

⁴⁹ [1995] 2 AC 513.

⁵⁰ See also *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508 (statute displaces prerogative powers) and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (minister must act within statutory powers and use them for the purpose for which they were granted).

⁵¹ For a crash course in the modern form of supply, see http://www.hm-treasury.gov.uk/media/4/A/pss_aud_supply.pdf.

⁵² See Schedule 2 to the *Government Accounting Manual* at <http://www.government-accounting.gov.uk/>.

(b) any increase attributable to this Act in the sums payable under any other Act out of money so provided.⁵³

Alternatively, the Act may simply mention the provision of a service or carrying out of a function, in which case it will be clear that parliament has intended that the Secretary of State should expend public funds upon that service or function.

However, this is a matter of the rights of parliament (in practice, of the House of Commons) and thus it is at least arguable that the absence of such a provision should not prevent the enforcement of a contract against the government for which it has no proper money provision. The Secretary of State and Permanent Secretary would, however, be answerable to the Public Accounts Committee in such a case and thus government lawyers need to advise on the issue, even if others can in practice ignore the point. To the best of my knowledge the point has never been taken. The position would be more problematic were a challenge to come from a third party (such as a taxpayer) who wished to ensure that public funds were not misapplied.

DEPARTMENTS, AGENCIES, NON-DEPARTMENTAL PUBLIC BODIES

Having established the nature of the Crown, the relationship between the Crown and Secretaries of State, and the power of certain officials to act as the Secretary of State, it becomes necessary to address the additional complexities that have increasingly arisen due to the creation of a wide range of government departments and agencies, non-departmental public bodies and other statutory corporations.

Departments

The first point to watch for is that usually government bodies do not have any separate legal personality.⁵⁴ Most government departments are not statutory corporations and have no legal personality. They are, however, recognised in statute for certain limited purposes. The most important of these is the Crown Proceedings Act 1947, which permits actions to be brought by and against those departments that are on a published list

Parties to proceedings

17. (1) The Minister for the Civil Service shall publish a list specifying the several Government departments which are authorised departments for the purposes of this Act, and the name and address for service of the person who is, or is acting for the purposes of this Act as, the solicitor for each such department, and may from time to time amend or vary the said list.

Any document purporting to be a copy of a list published under this section and purporting to be printed under the superintendence or the authority of His Majesty's Stationery Office shall in any legal proceedings be received as evidence for the purpose of establishing what departments are authorised departments for the purposes of this Act, and what person is, or is acting for the purposes of this Act as, the solicitor for any such department.

(2) Civil proceedings by the Crown may be instituted either by an authorised Government department in its own name, whether that department was or was

⁵³ Money provisions in Bills must be italicised in the House of Commons print of a Bill which starts in the Commons. Collecting the money into one place in this way reduces the amount of the Bill that must be italicised. However, in some Bills, and therefore Acts, the money provisions are dealt with in a more specific form. In Bills starting in the Lords there is no italicisation but there must still be some clear authorisation by Parliament of the expenditure, which may in some cases be by means of a clear obligation or authorisation to provide a service or perform a function.

⁵⁴ See *M v Home Office* [1992] QB 270, [1992] 2 WLR 73, 94 (CA).

not at the commencement of this Act authorised to sue, or by the Attorney General.

(3) Civil proceedings against the Crown shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General.

(4) Where any civil proceedings against the Crown are instituted against the Attorney General, an application may at any stage of the proceedings be made to the court by or on behalf of the Attorney General to have such of the authorised Government departments as may be specified in the application substituted for him as defendant to the proceedings; and where any such proceedings are brought against an authorised Government department, an application may at any stage of the proceedings be made to the Court on behalf of that department to have the Attorney General or such of the authorised Government departments as may be specified in the application substituted for the applicant as the defendant to the proceedings.

Upon any such application the court may if it thinks fit make an order granting the application on such terms as the court thinks just; and on such an order being made the proceedings shall continue as if they had been commenced against the department specified in that behalf in the order, or, as the case may require, against the Attorney General.

(5) No proceedings instituted in accordance with this Part of this Act by or against the Attorney General or an authorised Government department shall abate or be affected by any change in the person holding the office of Attorney General or in the person or body of persons constituting the department.

Agencies

With agencies and other such bodies, the situation is more complex. Many have no separate personality and are simply part of their parent department (which itself has no personality).

Thus the Department for Transport has no personality. Furthermore (to give a few examples), the Driver and Vehicle Licensing Authority (DVLA), Vehicle Certification Agency (VCA) and Vehicle Operating Standards Agency (VOSA) do not have separate legal personality either. They are simply parts of the Department for Transport. In each case these organisations are simply offices or emanations of the Secretary of State for Transport.

Accordingly, in any contract or other transaction with such bodies, the appropriate party will be the Secretary of State and not, for example, Department for Transport or the DVLA. This is true, even though some “bodies” may have their own CEOs, websites, logos and all the paraphernalia of a separate organisation. In some cases they even have “trading fund status”. This however is a matter of government accounting rules and does not indicate any separate personality.

Other bodies may, however, have legal personality. This is because they have either been formed as corporations under the Companies Acts (whether as wholly, or partly, owned Crown companies) or have been created as statutory corporations. A Department for Transport example of a Companies Act company is Cross London Rail Links Ltd, in which the Secretary of State holds shares (as does Transport for London). This is the company that has assisted in taking the Crossrail Bill through Parliament. An example of a recently created statutory corporation is the Office of the

Renewable Fuels Agency, which was created by the Renewable Transport Fuels Obligation Order 2007.⁵⁵ Article 6 of that Order reads

The Administrator

6.–(1) The Office of the Renewable Fuels Agency is established as a body corporate and is appointed as the Administrator pursuant to section 125 of the 2004 Act.

(2) The Schedule (which makes provision about the Administrator) has effect.

Such corporations are, of course, limited to the powers in their constitutions, which in the case of the statutory corporations will be found in the legislation itself.

Accordingly, when dealing with any such organisations, it is best to start by identifying what (if any) personality and powers the body has. If your clients are dealing with departmental policy staff there is sometimes (I speak from past experience) a possibility those policy colleagues may themselves not understand the nature of the body in question and you may need to check further if you are told that a government organisation has legal existence in its own right. On the whole, the simplest approach is often simply to ask for confirmation of the position from the department. This is a matter on which we are likely to be happy to assist.

In *R (on the application of National Association of Health Stores) v Secretary of State for Health*,⁵⁶ Sedley LJ commented:

41. The constitutional status of individual executive agencies is not necessarily an easy question, since, as I have indicated, they can be brought into being under more than one power and since they will have a variety of forms and functions. In *R v Home Secretary, ex parte Sherwin* (DC, 16 February 1996, unreported)⁵⁷ it was accepted that the Benefits Agency was part of the Department of Social Security, having been set up under the prerogative power pursuant to the Prime Minister's statement of 18 February 1988. But the same may not be true of, for example, the FSA. One obvious test will be whether the executive agency possesses legal personality, but this may not be the only question: see Bradley and Ewing *Constitutional and Administrative Law* (13 ed) 291–4, and the Cabinet Office website "*Executive agencies and non-departmental public bodies*". We have not been called upon to decide the point, but its potential difficulty needs to be noted.⁵⁸

The Cabinet Office web-site lists executive agencies⁵⁹ and in each case tells you which Secretary of State is the responsible minister. It also lists government departments and non-ministerial government departments.

Non-departmental public bodies (NDPBs)

NDPBs also come in a wide range of formats. Some are statutory corporations, while others (particularly consultative bodies) may have no corporate status. An annual list of public bodies is published by the Cabinet Office, which may assist if you need to know more about a particular body but the information published does not include the legal status of the body.⁶⁰

⁵⁵ SI 2007/3072. This is a very rare example of a statutory corporation being created by subordinate legislation. The Schedule contains the details of membership of the corporation and other constitutional matters.

⁵⁶ [2005] EWCA Civ 154.

⁵⁷ An error for *R v Secretary of State for Social Security, ex parte Sherwin*, now reported at (1996) 36 BMLR 1.

⁵⁸ *Ibid*, at paragraph 41.

⁵⁹ At http://www.cabinetoffice.gov.uk/ministerial_responsibilities/executive_agencies.aspx.

⁶⁰ For this and other guidance on public bodies, see <http://www.civilservice.gov.uk/about/public/bodies.asp>.

Is it the Crown?

Where you are dealing with a body with corporate personality, you may also need to know whether the body forms part of the Crown. This is particularly the case where you are dealing with a statutory provision that does not bind the Crown. You may well find that the legislation creating the body in question contains an express provision saying that the body is not to be treated as the Crown. For an example of such a provision, see paragraph 16 of Schedule 13 to the Education Act 2005, which says that the Training and Development Agency for Schools is not the Crown

16. The Agency are not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown, and the property of the Agency is not to be regarded as property of, or property held on behalf of, the Crown.

CROWN CONTRACTS

What types of contracts does the Crown make?

Like any other major body, the Crown enters into a wide range of contracts. These are likely to include everything from major property transactions (such as the lease on the Department for Transport's HQ in Marsham Street), through contracts for specialist services (such as contracts for possible technical solutions to road pricing arrangements), to major IT projects (such as the computerisation of all MOT testing and electronic recording of test results). In between are all the ordinary contracts that any large organisation requires, whether for the supply of cleaning services, catering, paper or paper-clips. In government service we have all of these and many more besides.

To illustrate the range of contracts that departments are likely to be involved in, the following (entirely non-comprehensive) list may serve to illustrate the range:

- (1) leases or freehold acquisitions or disposals of real property (not just office buildings but in the case of the Department for Transport including a range of properties across the UK used for testing vehicles);
- (2) provision of IT services for a department's in-house needs;
- (3) provision of IT services to enable a department to provide on-line services to the public (*eg* Vehicle Excise Duty payment on-line, MOT test computerisation and Transport Direct);
- (4) provision of commercial legal advice;
- (5) provision of economic and financial advice (*eg* contracts with merchant banks);
- (6) provision of other technical and/or specialist advice or research;
- (7) provision of public services (such as provision of search and rescue helicopters and crew to the Marine and Coastguard Agency);
- (8) provision of catering and cleaning and other facilities management services;
- (9) provision of stationery, books, equipment etc.;
- (10) printing not handled in-house or by OPSI.

In addition to such contracts, a department may handle a number of transactions that, while not simply contractual, are commercial in nature and give rise to similar considerations both for those advising the Crown and those advising other parties. Examples of these include:

- (1) the provision of major grants, where the grant conditions may be as complex as, and resemble, commercial contracts;
- (2) statutory franchise arrangements, such as those relating to rail franchising;
- (3) outsourcing or (in the past) privatisation arrangements under statutory powers, sometimes using statutory transfer scheme powers which enable transfers of more that would be permitted by normal contractual arrangements.

Fettering discretion – contracts and letters of comfort

Frequently during transactions, non-Government parties will seek assurances as to future events (such as relating to possible future changes of policy) in the form of terms in a contract or by way of “letters of comfort”. Such terms and letters, while common between commercial organisations give rise to particular difficulties in the government context, particularly those arising from the basic principle of administrative law that a Secretary of State cannot fetter his or her discretion.

The “fettters” rule

It is a fundamental obligation of a Secretary of State (or, indeed, any other public authority) to preserve her freedom to exercise her discretion as she sees fit at the appropriate time. However, she is also free to contract. The difficulty arises when she is asked to contract, or even give an assurance, as to how she will exercise any discretionary power in the future.

To give just one recent example, in one draft contract the other party sought to include a term that the Secretary of State for Transport would use her best endeavours to ensure that a particular treaty was not amended in a particular way. This was a proposal that was doubly offensive:

- (1) it purported to bind the Secretary of State as to how she would make a future decision, at a point at which she was not in a position to have all the information relevant to that decision; and
- (2) making treaties is a matter of the prerogative and not therefore a matter as to which the Crown would ever be likely to wish to give a binding commitment.

The offending clause was removed from the draft when our position on this was made clear.

It will suffice to illustrate this basic point about fettering discretion with only two cases (the case-law on the subject is extensive).⁶¹ In *Stringer v Minister of Housing*⁶² an agreement between a planning authority and Manchester University to discourage development near Jodrell Bank was held to be without legal effect. In *Rederiaktiebolaget Amphitrite v R*⁶³ a Swedish shipping company obtained an undertaking from the UK government that its neutral ships would not be detained if they entered British

⁶¹ See, for example:

- (1) *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, undertaking not to use power to build not possible;
- (2) *Birkdale District Electric Supply Company Ltd v Southport Corporation* [1926] AC 355, electricity company was able to contract not to raise prices above those of neighbouring company; *Ransom & Luck Ltd v Surbiton BC* [1949] Ch 180, contract not to revoke planning permission; *Triggs v Staines UDC* [1969] 1 Ch 10, agreements that designation as a sports ground would cease unless UDC purchased land by certain date not valid;
- (3) *Cory (William) & Son Ltd v London Corporation* [1951] 2 KB 476, Corporation could change byelaws even if this increased loss under a refuse contract (no implied term);
- (4) *Commissioners of Crown Lands v Page* [1960] 2 QB 274, despite covenant for quiet enjoyment, the Crown could requisition land it had leased; the grant of an easement by the Crown or a public body often gives rise to complex considerations – see *British Transport Commission v Westmorland CC* [1958] AC 126 and cases discussed therein.

⁶² [1970] 1 WLR 1281, [1971] 1 All ER 65.

⁶³ [1921] 3 KB 500.

ports carrying certain cargoes. Such a ship was detained and it was held that the company could not enforce the undertaking because the Crown was unable to make a contract that limited its power of executive future action. Note, therefore, that the fetter will have no benefit; it is simply invalid.

Legitimate expectation

This is not the place to undertake a detailed examination of the law relating to legitimate expectation, substantive or otherwise. However, I mention the principle, in case what appears above seems balanced too much in favour of the Crown. Where the principle applies, the effect will be, to some extent, to make the Crown adhere to its statements as to future action. Note, however, that even where the situation has given rise to a legitimate expectation it is normally possible to remove that expectation and in some cases the position may change rapidly, where that is appropriate: *R v Secretary of State for Health, ex parte US Tobacco International Inc* (the “oral snuff” case).⁶⁴

POWER TO CONTRACT

That, nonetheless, the Crown may be bound by contract is clear. The leading case on the matter is *The Bankers’ case*,⁶⁵ which related to a bank loan taken out by the impecunious King Charles II, at the time of the restoration of the monarchy, by means of letters patent that charged repayment against the hereditary revenues of the Crown. The loan and interest on it was not repaid by either King Charles II or his brother King James II and in due course the bankers in question sought to enforce the agreement against King William and Queen Mary shortly after their accession to the throne. The bankers won their case. This established that, subject to specific procedural rules, the Crown was bound by its own contractual obligations.

You may also take comfort from *Commissioners of Crown Lands v Page*, in which Devlin LJ said that it would be wrong to suggest that any public body could, “. . . escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good”.⁶⁶

However, very few cases involving Crown contracts ever reach the courts. This is largely because the Crown tends to honour its contracts and pay invoices promptly. Certainly regulation 3 of the Public Contracts Regulations 2006⁶⁷ expressly mentions Ministers of the Crown and government departments as possible contracting authorities.

Of course, it might be suggested that making a contract is in itself a fetter upon a discretion. However, if one looks carefully at the authorities, one can discern a distinction between a current decision to exercise a power in a particular way (such as making a valid contract) and a promise to exercise in a particular way at some point in the future (an unenforceable fetter). Thus making a contract for the design and installation of software is likely to be a valid exercise of power. However, if the IT supplier asks for an undertaking that the legislation applicable to that software will not be amended during the currency of the contract, that undertaking cannot be given – this is a fetter.

⁶⁴ [1992] QB 353.

⁶⁵ (1695) Skin 601.

⁶⁶ [1960] 2 QB 274 at 293.

⁶⁷ SI 2006/5.

LIMITATIONS ON CONFIDENTIALITY

Those dealing with commercial contracts will be accustomed to including confidentiality clauses in such contracts. This is entirely understandable because such clauses will normally be designed to protect the commercial confidentiality of all parties to the agreement. However, when contracting with the Crown, you will find that the situation is more complex, due to a number of factors. In essence these are:

- (1) the obligations imposed by the Freedom of Information Act 2000;
- (2) obligations imposed by other statutory requirements to disclose information (notably those arising in relation to environmental information);
- (3) the requirement that certain transactions be reported to Parliament.

Taken together, these requirements produce the result that a Secretary of State can rarely, if ever, enter into an unqualified confidentiality clause in a contract.

Freedom of Information

I do not intend here to rehearse the entire position on freedom of information. Rather I propose to illustrate the issues by reference to one factor that often arises in this context. It is that it is often assumed by those contracting with the Crown that, by describing certain provisions in a contract as commercially sensitive and/or confidential, the other party can ensure that those details, at least, will not be disclosed, due to the exemptions in sections 41 and 43 of the Freedom of Information Act 2000 (FoI Act). However, even here there are limitations.

Section 41 only applies where disclosure would constitute an actionable breach of confidence. However, where this is the case, the exemption is absolute (section 2(3)(g)).

Section 43 covers:

- (a) trade secrets; and
- (b) information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person.

Note that this provision turns not on whether the parties say that something is a trade secret or that its disclosure would, or would be likely to, prejudice commercial interests but whether it is *in fact* such a secret or its disclosure would prejudice or be likely to prejudice commercial interests. Importantly, the passage of time may mean that information that could properly be regarded as exempt under section 43 ceases to be exempt some time later. The Secretary of State may consult your client in such a case but must reserve the right to reach her own conclusions on the matter.

Furthermore, section 43 does not provide an absolute exemption and the decision as to whether it should be disclosed or withheld will turn on the results of the public interest test balancing exercise conducted by the department for the Secretary of State.

As a consequence, lawyers acting for the Crown will normally require the insertion into any contract of provisions that expressly recognise the FoI obligations of the Secretary of State and his or her department.

Environmental Information

Similar considerations apply in relation to information caught by the Environmental Information Regulations 2004.⁶⁸ Once again, I will not go into the detail of those Regulations but it should be noted, if you are not familiar with the requirements, that

⁶⁸ SI 2004/3391.

the provisions, while similar to those in the FoI Act are far from being identical and notably the exemptions differ.

Where the information being sought is within the (very wide) definition of “environmental information” the Regulations rather than the FoI Act will apply (see section 39 of the FoI Act). Once again, the Secretary of State is likely to require his or her position in relation to disclosure under the Environmental Information Regulations 2004 to be recognised in a contract, should any terms as to confidentiality be sought.

Requirements to notify parliament

As we have seen the Crown is in essence free to contract, due its common law powers, unless these have been excluded by statute. However, the fact that the Crown is dependent upon parliament for its financial supply has implications for the confidentiality (or otherwise) of contracts.

The most obvious restriction is that a Secretary of State will be obliged to report contingent liabilities to parliament. While payments under a straightforward contract will not fall into this category (but see the “Ram doctrine” material above for points on the need for statutory cover for recurrent expenditure), any guarantee or other contingent liability will be caught (subject to some limits in relation to small transactions).⁶⁹

To summarise, these are all obligations that the Crown cannot agree to waive and may need discussion ahead of time with departmental lawyers if they give rise to significant problems for those for whom you are acting.

In conclusion

I hope that what I have said today will be of assistance to those assisting, or dealing with, the Crown. Good luck with all your future transactions.

⁶⁹ For more information on Government Accounting requirements, see <http://www.government-accounting.gov.uk>.

EXPOSING FLAWS IN THE DETENTION OF ASYLUM SEEKERS: A CRITIQUE OF *SAADI*

HELEN O'NIONS*

INTRODUCTION

The Grand Chamber of the European Court of Human Rights has recently determined that the short-term detention of asylum applicants for administrative purposes does not constitute a violation of the right to liberty provided by the European Convention on Human Rights (ECHR), article 5(1). The Court held that whilst such detention should not be arbitrary there is no inherent requirement of “necessity”.¹ Thus the routine detention of asylum seekers has been endorsed by the ECtHR.

This article will critically examine legal, social, financial and practical aspects of administrative detention. It will argue that the fundamental human right to seek and enjoy asylum, provided in article 14 of the Universal Declaration of Human Rights, has been considerably undermined. Further, that the separation of lack of arbitrariness and proportionality from necessity leads to a false dichotomy which results in detention in the absence of any individualised assessment of propriety or need.

Broadly speaking, the social consequence of detaining asylum seekers is twofold. On a societal level it fuels the perception that asylum applicants are “bogus” and illegitimate. Their incarceration on arrival might be viewed as an extension to the penal estate. Patricia Tuitt has argued that the law, including international refugee law, has constructed the refugee in a negative manner.² Refugees and asylum seekers are presented in a confrontational paradigm which is both threatening and divisive. This is nowhere more apparent than when they are confined to detention centres solely on the basis of administrative convenience.

The decision of the ECtHR unquestioningly accepts this flawed approach by conflating illegal entrants with asylum seekers and in so doing it erodes the starting point of article 5(1) namely, the right of all persons to liberty, as well as the international right to seek and enjoy asylum provided in Universal Declaration of Human Rights, article 14.

Concern for human rights should also lead us to consider the social effect of routine detention on vulnerable, individual asylum applicants who may have experienced trauma and torture prior to arrival in the UK. Whilst the short-term nature of detention may minimise the detrimental health effects it can in no way ameliorate them completely. There is ample evidence to suggest that even brief periods of detention can have extremely damaging health consequences, particularly where there is uncertainty as to the reason and possible length of detention.

One of the central justifications for increasingly restrictive Western asylum policies has been the financial cost of the asylum process and the increasing burden on the welfare state. Yet, the cost of administrative detention, as seen in the Oakington reception centre (the weekly cost in 2002 was calculated to be £1620 per person),³ is far greater than the cost of alternatives such as open accommodation centres or monitoring and reporting systems.

* Dr Helen O'Nions is a Senior Lecturer in Law at Nottingham Trent University, UK.

¹ *Saadi v UK* App 13229/03, judgment of 29 January 2008.

² Tuitt, P, *False Images: the Law's Construction of the Refugee* (Pluto Press, 1996).

³ HC Debate 25 October 2001, Col 333W.

A key justification for administrative detention is centred on efficiency, such that an adverse decision can be quickly followed up by removal. There is an implicit assumption at Oakington that most detainees do not have genuine cases. Even where applicants are rejected (Oakington has an initial refusal rate of 100%) many go on to appeal the decision and may be afforded refugee status at a later stage (as in the *Saadi* case where three refugees had their initial application for asylum rejected). Those that are unsuccessful are, in fact, rarely removed speedily from the UK.

Administrative detention adopts a lowest common denominator approach: the asylum applicant is considered to be an illegal immigrant until he or she is able to present enough evidence to prove otherwise. As recognised by the dissenting judgments in *Saadi*, the decision of the Grand Chamber fails to distinguish asylum applicants from other immigrants. This undermines international legal standards for the protection of refugees.

THE SAADI STORY

Dr Saadi was an Iraqi Kurd who lived in the autonomous region in Northern Iraq. He arrived at Heathrow on 30 December 2000 and immediately claimed asylum. He was later detained for seven days at Oakington reception centre.

There is, of course, nothing unusual about detaining asylum applicants; particularly where there is a risk of absconding or where the power is used pursuant to removal. Indeed, as of 27 December 2007, the Home Office was detaining 1455 asylum applicants.⁴ The particular factor in this case which makes it controversial and requires scrutiny is the uncontested fact that the applicant had been given temporary admission and was thus able to reside at a location of his choice on three separate occasions prior to being detained at Oakington. During this time he had complied with all Home Office instructions concerning reporting and documentation.

This detention followed a change in Home Office policy announced by the immigration minister Barbara Roche on 16 March 2000 to enable persons to be detained at Oakington for a seven day period if: “it appears that their applications can be decided quickly, including those which may be certified as manifestly unfounded”.⁵

On 2 January 2001 Saadi was detained at Oakington but was not told of the reason for his detention until 5 January. His claim was refused on 8 January and he was subsequently released having lodged a notice of appeal. Some two years later, Saadi was officially accorded refugee status and was granted asylum in the UK.

Saadi, along with three other Iraqi Kurd applicants, challenged the legality of the detention under domestic law and under ECHR, article 5, contending that there had been an unlawful deprivation of liberty.

Article 5 (1) provides:

Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . .

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

⁴ Immigration and Nationality Directorate, *Quarterly Statistics*, 31 December 2007.

⁵ Barbara Roche MP, written answer to a parliamentary question, 16 March 2000.

It is clear from the facts that Saadi's detention did not fall within the second limb of article 5(1)f as he was not detained pursuant to removal.⁶ Therefore the key question was whether his detention was to prevent an "unauthorised entry".

At first instance, Collins J ruled that whilst the detention was lawful under domestic law, it was unlawful under article 5(1)f, as there was no risk of the applicant absconding and it could not be said that the detention was needed "to prevent his effecting an unauthorised entry". Furthermore, he held that the detention was disproportionate as it was not "reasonably necessary" to its stated purpose, namely the speedy examination of the asylum claim.⁷

On appeal the Court of Appeal⁸ and House of Lords ruled that detention was lawful under domestic law and under article 5.⁹ The House of Lords reasoned that detention did not have to be necessary to prevent absconding or actions against the public good and further, that all entry was unauthorised until it was expressly authorised by the Home Office. Therefore, providing the action of detention was proportionate, the detention fell within the exceptions listed in ECHR, article 5(1)f.¹⁰

The House of Lords placed great emphasis on the ability of a state to control its own borders within the limits conferred by statute and international obligations. Lord Slynn emphasised that the article 5(1)f power is to "prevent" unauthorised entry and that until the state specifically authorised entry, the entry must be seen as unauthorised. The state thus has power to detain until the entry is formally authorised.¹¹ There is therefore no need to show that the individual was seeking to evade immigration control. Lord Slynn's approach can be contrasted with that of Collins J, who reasoned that if the applicant had done all that he reasonably could to report to the authorities and did not present a risk of misbehaviour, he could in no way be regarded as effecting unauthorised entry.¹²

Lord Slynn rejected the implication of necessity in the second limb of article 5(1)f and reasoned that both limbs required the same approach:

If necessity for detention is to be shown, it is more appropriate to require it for someone who has been lawfully here and who is then arrested and detained with a view to deportation because of his conduct here than for someone who has recently landed and who has never been lawfully here under authorised entry.¹³

The House of Lords declined to consider the application of the non-discrimination provision in article 14. However, they did find a breach of article 5(2) – which requires that everyone arrested be informed promptly of the reasons for his or her arrest – as Dr Saadi was not informed of the reason for his detention for a period of 76 hours.

The Decision of the European Court of Human Rights

On 11 July 2006 the ECtHR upheld the decision of the House of Lords by a narrow majority. In referring to the "states' 'undeniable right to control aliens' entry into and residence in their country"¹⁴, the Court concluded that until a potential immigrant has

⁶ *Chahal v UK*, (1996) 23 EHRR 413 is the key case of the second limb of art 5(1)f.

⁷ *Saadi v UK*, App 13229/03, ECtHR Strasbourg, 11 July 2006, para 12.

⁸ [2001] EWCA Civ 1512, [2002] 1 WLR 356, [2001] 4 All ER 961.

⁹ *R (on the application of Saadi) v SSHD*, [2002] UKHL 41; [2002] 1 WLR 3131, [2002] 4 All ER 785.

¹⁰ *Ibid*.

¹¹ *Ibid* at 3142. For commentary on *Saadi* see Berkowitz, Nathalia "Article 5, detention of asylum seekers" (2006) 3 IANL 223–225 at 20; "Immigration and asylum: detention of asylum seeker for speedy processing of application" (2006) 6 EHRLR 742–745.

¹² [2001] EWCA Civ 1512, [2002] 1 WLR 356, [2001] 4 All ER 961, para 29.

¹³ *R (on the application of Saadi) v SSHD* [2002] UKHL 41; [2002] 1 WLR 3131 at 3143.

¹⁴ *supra* n7 para 40 citing *Amuur v France*, App No 19776/92, of 25 June 1996, para 41.

been officially granted leave to remain, he or she had not effected a lawful entry. He or she could thus be detained under article 5(1)f as detention would be aimed at preventing unlawful entry.

This cautious approach, with its inherent deference to state sovereignty,¹⁵ led the Court to reason that decisions to detain persons of uncertain immigration status (including asylum seekers) should confer a broader discretion than detention under other exceptions in article 5(1).¹⁶ Necessity was not specifically required prior to a decision to detain:

All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum and that it should not otherwise be arbitrary, for example on account of its length.¹⁷

The Grand Chamber upheld the Chamber's decision on 28 January 2008. Again, there was an attempt to separate notions of necessity from a lack of arbitrariness and proportionality:

To avoid being branded as arbitrary . . . such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate . . . and the length of the detention should not exceed that reasonably required for the purpose pursued.¹⁸

This was the first opportunity for the highest authority of the ECtHR to review the meaning of unauthorised entry in the light of article 5(1)f. The outcome legitimises reasonably brief periods of detention for administrative convenience providing it cannot be seen to be arbitrary. The Grand Chamber's explicit endorsement of one of the most contentious aspects of increasingly restrictive European immigration policy demands further examination.

THE LEGALITY OF DETENTION

The ECtHR's decision requires two essential elements to be present for a lawful decision to detain an asylum seeker. Firstly, the detention should not be arbitrary and secondly, it should be proportionate to the legitimate aim pursued by the state: namely the prevention of unauthorised entry. These requirements are uncontroversial; being clearly grounded in both international refugee and human rights law. The United Nations High Commissioner on Refugees' *Guidelines On Detention Of Asylum Seekers* state that freedom from arbitrary detention is a "fundamental human right".¹⁹ The International Covenant on Civil and Political Rights, article 9, provides, *inter alia*, that no-one shall be subject to arbitrary arrest or detention and the Human Rights Committee's General Comment No 8, *On the Right to Liberty and Security of Persons* demonstrates that immigration control is specifically encompassed by this right.²⁰

¹⁵ Cornelisse, Galina "Human rights for immigration detainees in Strasbourg: limited sovereignty or a limited discourse?" (2004) 6 EJML 93–110 at 105.

¹⁶ *supra* n7, at para 44.

¹⁷ *Ibid.*

¹⁸ *supra* n1, para 74.

¹⁹ UNHCR, *Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers* (UNHCR, February 1999) para 1.

²⁰ HRC, General Comment No 8, *Right to Liberty and Security of Persons* (Art 9) 30 June 1982, para 1.

Arbitrary detention would encompass decisions which are unreasonable, unjust, delayed and unpredictable.²¹ The UNHCR Executive Committee consider that, *inter alia* “[a]rbitrary detention of asylum-seekers and refugees occurs when they are detained for insufficient reason, without adequate analysis of their individual circumstances. . .”²²

The test for proportionality requires the decision maker to balance the state’s interests in maintaining immigration control and preventing unauthorised entry with the potential risk to the individual’s human rights. Considerations including the conditions and duration of the detention will constitute essential aspects of this assessment.

Whilst detention for deterrent purposes is specifically ruled out in international law, one British refugee organisation (Bail for Immigration Detainees) provided the following submission to the United Nations Working Group on arbitrary detention in September 2002:

From our experience of detention and bail procedures BID is forced to conclude that detention is employed in the UK as a deterrent to those seeking asylum. Furthermore, the lack of procedural safeguards leads to widespread arbitrary detention. This submission offers recommendations to end this unlawful practice.²³

Another principle found in international refugee law is the requirement that detention should be “necessary”. The United Nations High Commission for Refugees’ commentary suggests that restrictions on movement should only occur when necessary and then should be afforded a narrow interpretation²⁴. The Geneva Convention on the Status of Refugees 1951, article 31(2), requires that restrictions should:

- i Be prescribed by law.
- ii Be necessary.
- iii Not be discriminatory.
- iv Be applied only until status is regularised or until the person obtains admission elsewhere.²⁵

The Executive Committee’s *Conclusion on Detention of Refugees and Asylum Seekers* in 1986²⁶ emphasised the need for necessity to be related to one of the legitimate aims stated; these aims have now been updated by the 1999 Guidelines which describe detention as “inherently undesirable”.²⁷ The introduction to the guidelines emphasises the need for necessity in all cases. Furthermore, the guidelines establish the general principle that asylum seekers should not be detained.²⁸ If detention is required it must

²¹ Commission on Human Rights, *On right to be free from arbitrary arrest, detention and exile*, UN Doc E/CN.4/826/Rev.1, paras 23–30.

²² Executive Committee of the High Commissioner’s programme Standing Committee, *Detention of asylum-seekers and refugees: the framework, the problem and recommended practice*, EC/49/SC/CRP.13, 4 June 1999, para 25.

²³ Bail for Immigration Detainees (BID), *Submission to the UN Working group on arbitrary detention*, September 2002, Executive summary.

²⁴ Landgren, Karin, “Comments on the UNHCR position on detention of refugees and asylum seekers” in Hughes and Liebaut (eds) *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (Kluwer, 1998) pp141–160 at 146.

²⁵ Field and Edwards, *Alternatives to detention of asylum seekers and refugees*, UNHCR Legal and Protection Policy Research Series, POLAS/2006/03, April 2006, Appendix 1, Australia para 74.

²⁶ Ex Com Conclusion 44 (XXXVII) 1986 A/AC.96/688.

²⁷ UNHCR, *Revised Guidelines on applicable criteria and standards for the detention of asylum seekers* (UNHCR, 1999) para 1.

²⁸ *Ibid.*, Guideline 2.

be prescribed by law and should only be applied following consideration of all the alternatives.²⁹ They are contained in guideline 3:

- i. To ascertain identity.
- ii. To determine the elements on which the claim is based, but not for the duration of the decision-making process or indefinitely.
- iii. In cases of bad faith where the asylum seeker has destroyed travel documents or has used fraudulent documents intentionally to mislead the state authorities.
- iv. To protect national security or public safety.

Whilst the second exception might be interpreted to provide justification for short-term, administrative detention, it is clear from the accompanying paragraph that it is only envisaged for a temporary period for the purpose of a preliminary interview. Furthermore:

... it would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

The United Nations High Commission for Refugees considers that detention outside these exceptions is contrary to accepted legal norms. But there remains ambiguity in the UN soft-law and consequently there is differing academic opinion as to precisely what the law requires. Dan Wilsher concludes that the guidelines allow detention in order to determine the elements on which the claim is based and that such detention is justifiable *per se* if for a prescribed period.³⁰

In 2007 the UN Working Group again suggested that necessity was required in order to avoid arbitrary detention “whilst administrative detention of immigrants and asylum seekers is not prohibited *a priori* by international human rights law, it can amount to arbitrary detention if it is not necessary in all circumstances of the case”.³¹

Yet it remains unclear how necessity is to be assessed. James Hathaway contends that short-term detention for administrative purposes whilst not specifically covered by the guidelines, can be adjudged to be necessary. He supports the House of Lords’ approach which adopted a flexible interpretation of necessity:

On balance, this seems a fair construction of the notion of “necessary” contrasts, very much in line with the intention of the drafters to afford host states time to complete a basic enquiry into the identity and circumstances of unauthorised asylum-seekers before releasing them into the community.³²

Other commentators such as Grahl-Madsen argue that detention can be employed in order to ascertain identity and to assist the investigation but that it is limited by the requirement of necessity.³³ He specifically rules out the legitimacy of detention for administrative convenience.³⁴

Whether or not detention for administrative convenience is justified by necessity remains a debated point. Yet we cannot ignore the numerous statements from the UN

²⁹ *Ibid*, Guideline 4: The possible alternatives include regularly reporting and monitoring mechanisms, provision of a surety or guarantor, release on bail and open accommodation centres.

³⁰ Wilsher, Dan, “Detention of asylum seekers and refugees an international human rights law” in Shah, P (ed) *The Challenge of Asylum to Legal Systems* (Cavendish, 2005) pp145–168 at 159.

³¹ A/HRC/7/4, 10 January 2008.

³² Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) at 433.

³³ Grahl-Madsen, Atle, *The Status of Refugees in International Law* (Sijthoff Leiden, 1972) at 148.

³⁴ *Ibid*, at 150.

Working Group that detention is a last resort option that should only be deployed after a consideration of alternatives:

the detention of refugees and asylum-seekers is an exceptional measures and should only be applied in the individual case, where it has been determined by the appropriate authority to be necessary in the light of the circumstances of the case and on the basis of criteria established by law in line with international refugee and human rights law. As such, it should not be applied unlawfully and arbitrarily and only where it is necessary for the reasons outlined in Ex Comm 44 in particular for the protection of national security and public order. . .³⁵

Necessity is also a common thread in the international human rights discourse on detention. The Human Rights Committee have explicitly linked necessity to the assessment of arbitrariness: “. . . remand in custody could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”.³⁶

This is particularly the case when the applicant has a specific vulnerability, such as a psychiatric illness, as confirmed by the Human Rights Committee in *C v Australia*.³⁷

Whilst a deprivation of liberty is covered by article 9 of the International Covenant on Civil and Political Rights, article 12 of the Covenant is also relevant as it addresses more general restrictions on movement. Whilst one could argue that the article 9 rights should be afforded greater priority in the hierarchy of human rights protection, it is interesting to note that article 12 specifically requires that any restriction on movement be “necessary”. Although it only protects freedom of movement of those lawfully within the state’s territory, this has been defined by the Human Rights Committee in such as way as to include asylum applicants.³⁸ Article 12 (3) establishes that restrictions on freedom of movement must be provided by law and be necessary to protect national security, public order, health or morals or rights and freedoms of others. A restriction is therefore necessary when its severity and intensity are proportional to one of the purposes listed in this article and when it is related to one of these purposes.³⁹

Such a calculation can only be made using an individualised assessment of need, as recognised by Collins J. A key consideration should be whether the potential of unauthorised entry could be prevented by less intrusive means.⁴⁰

Thus the Grand Chamber’s reluctance to require specific necessity in the decision to detain does not sit comfortably with international human rights or refugee law. It also seem at odds with the Council of Europe’s own recent Recommendation (Rec (2003) 5) which states:

3. The aim of detention is not to penalise asylum seekers. Measures of detention of asylum seekers may be resorted to only in the following situations:
– when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity

³⁵ In relation to art 31(2), the expert round table organised by the UNHCR in Geneva 8–9 November 2001 confirmed para 11b in Feller, Türk and Nicholson, *Refugee Protection in International Law* (UNHCR, 2003) at 256.

³⁶ *A v Australia*, Communication No 560/1993, CCPR/C/59/D/560/1993.

³⁷ Communication No 900/1999, CCPR/C/76/D/900/1999.

³⁸ *Celep v Sweden*, Communication No 456/1991, CCPR/C/51/D/456/1991.

³⁹ Nowak, M, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Engel Verlag, Kehl am Rhein, 1993) at 211; Goodwin-Gill “Article 31 of the 1951 Convention relating to the status of refugees: non-penalization, detention and protection” pp185–258 in Feller, Türk and Nicholson *supra* n35 at 223.

⁴⁰ *R (On the application of Saadi and others) v SSHD*, [2001] EWHC Admin 670, Collins J at para 34.

documents or used fraudulent documents in order to mislead the authorities of the host state;

- when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained;
- when a decision needs to be taken on their right to enter the territory of the state concerned, or
- when protection of national security and public order so requires

Furthermore, “Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case”.⁴¹

A second controversial aspect in terms of the legal interpretation of article 5(1)f concerns the definition of unauthorised entry and specifically the reasoning that all entry is unauthorised until it is expressly authorised by the Home Office.

This interpretation does not sit comfortably with the approach taken by the Human Rights Committee on freedom of movement provided under International Covenant on Civil and Political Rights, article 12. In *Celepli v Sweden*, the Human Rights Committee held that an illegal entrant whose status had been regularised was lawfully within the state for the purpose of article 12.⁴² It could therefore be inferred that an asylum applicant with temporary admission is lawfully present under article 12.⁴³

Collins J’s approach to the question of unauthorised entry seems to be more in keeping with the spirit of the Universal Declaration on Human Rights, article 14 and the UN Convention on the Status of Refugees, article 31(1). Whilst the former provides a right to seek and enjoy asylum, the latter prohibits penalties applied purely on the basis of unauthorised entry. Whilst the balance of academic opinion seems to suggest that short-term detention will not constitute a penalty under article 31,⁴⁴ it surely undermines the spirit of article 31 if an individual is detained having complied with all the reporting and monitoring criteria of the host state in the absence of a specific, individualised assessment. According to Collins J:

Once it is accepted that an applicant has made a proper application for asylum and there is no risk that he will abscond or otherwise misbehave, it is impossible to see how it could reasonably be said that he needs to be detained to prevent his effecting an unauthorised entry.⁴⁵

The Rationale for Detention

Collins J was in no doubt that the real reason for the detention was not to effect removal or prevent unauthorised entry, rather it was to speed up the determination process in suitable cases.⁴⁶ This is evidenced by Home Office statements, policy documents and the Home Office’s operational enforcement manual.⁴⁷ Such rationale was not foreseen by article 5(1)f and therefore, according to Collins J, the detention must be unlawful.

It is not contested that Saadi attempted full compliance with Home Office instructions. He was not an illegal entrant. However the Grand Chamber’s approach

⁴¹ On Measures Of Detention Of Asylum Seekers.

⁴² *Celepli v Sweden*, HRC Case 456/1991.

⁴³ Ophelia Field, *supra* n25 at para 34.

⁴⁴ Giakoumopoulos, Christos, “Detention of asylum seekers in the light of Art 5 of the ECHR” in Hughes and Liebaut, *supra* n24 pp161–182 at 165.

⁴⁵ *supra* n40 at para 29.

⁴⁶ *Ibid*, paras 35, 36 and 45.

⁴⁷ Chapter 38. This rationale was also provided by Ian Martin, Oakington Project Manager, quoted in *Saadi v SSHD*, [2002] UKHL 41, [2002] 1 WLR 3131 at 3137.

echoes that of the House of Lords by making a clear distinction between unlawful and unauthorised entry. Whilst Saadi may have lawfully attempted entry, he had no express permission to enter or remain and therefore his attempted entry was unauthorised. Yet the Grand Chamber, like Collins J, accepted that the true justification for detention at Oakington was not directed at preventing unauthorised entry but was rather intended to speed up the asylum process. This specific justification is not included in the article 5(1)f exceptions. The Convention is of course a “living instrument” which has enabled a proactive court to adopt a creative, teleological approach to the rights therein. However in *Saadi* the ECtHR used their creative interpretation to a different end. By expanding on the limitations to the fundamental right to liberty in article 5(1)f they effectively undermine the text. The first limb of the exception in article 5(1)f now includes the speedy processing of asylum claims in addition to the stated ground of preventing unauthorised entry.

Furthermore, as a direct consequence of this interpretation, any person without express leave to enter or remain in the UK could now be detained as their presence is similarly “unauthorised” under article 5(1)f.

Much of this difference in interpretation hinges on the extent of the state’s margin of appreciation (in the regional human rights context) or judicial deference (in the domestic context). Collins J was keen to stress that the exceptions to article 5(1) should be narrowly construed.⁴⁸ However this emphasis was lost in the senior courts and the ECtHR who preferred to emphasise territorial integrity, in particular the state’s right to protect and control its borders. Thus policy considerations play a large part in the final decision and article 5(1)f is afforded a more expansive interpretation than the other exceptions in article 5(1).⁴⁹

The ECtHR’s failure to adopt a narrow interpretation to article 5(1)f is unfortunate as it opens up the possibility for further expansion and diversification of the European detention estate. As the borders of the European Union become more tightly controlled the possibility of seeking and enjoying asylum in Europe becomes ever more illusive. European asylum policy has already adopted a lowest common denominator approach which focuses on burden sharing and shifting rather than on providing sanctuary for those most in need.⁵⁰ A common asylum policy is one area which commands general support among the member states. It has been used to unify the Union by emphasising the elevated status of the European club through frontier strengthening policies such as interdiction and territorial contraction.⁵¹

Immigration and asylum are seen as threats to European stability despite the evidence that the numbers of asylum applicants have been steadily decreasing. In May 2007, the Home Office announced the lowest rise in the number of asylum applications for 14 years⁵². This pattern had been repeated across Europe.⁵³ Whilst some may argue this decline can be attributed to more restrictive policies, there has been no evidence

⁴⁸ *supra* n40, para 25.

⁴⁹ For example, see *Litwa v Poland*, App No 26629/95, (2001) 33 EHRR 53, on art 5(1)e which specifically required necessity.

⁵⁰ See, for example, EU Directive On The Reception Of Asylum Seekers, 2003/9/EC of 27 January 2003. For analysis see ECRI, *The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation?*, AD3/11/2005/EXT/SH.

⁵¹ Gibney, Matthew, *Beyond the bounds of responsibility: western states and measures to prevent the arrival of refugees*, Global Migration Perspectives, No 22, (Global Commission on International Migration, January 2005) at 6.

⁵² Home Office, “Asylum applications continue to fall”, press release, 22 May 2007.

⁵³ UNHCR, “Asylum applications in industrialized countries continue to plummet” 2006 <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=450fed422>.

advanced to support this contention.⁵⁴ The more obvious factor, borne out by the fall in applications following the stabilisation of the Balkans and the recent increase in applications from Iraq, is the degree and location of ethnic conflicts.⁵⁵

The Non-discrimination Argument

Dr Saadi also alleged a breach of the non-discrimination provision in ECHR, article 14, on account of the list of specific nationalities who were susceptible to detention at Oakington. It seems unfortunate that the House of Lords and the ECtHR declined to examine this issue as it is central to the decision to detain at Oakington. Detention is all too often based on a general assessment of the credibility of applicants from a particular region without adequate consideration of the particular claimant's case. Indeed this is a key element of the "clearly unfounded" category of applicants who find themselves fast-tracked for removal. It has also become a key element of EU policy under the new Procedures Directive.⁵⁶ Under the Race Relations Act 1976, section 19D as inserted by Race Relations (Amendment) Act 2000, section 1, it is possible for an immigration officer to use nationality criteria in order to subject persons to more rigorous examination; to impose conditions on entry and to detain. In the Prague airport case the House of Lords found that the routine questioning and examination of Roma passengers attempting to travel to the United Kingdom amounted to unlawful discrimination under domestic law.⁵⁷ Yet their Lordships acknowledged that had the Home Office sought to rely on a ministerial authorisation under section 19D, they would have been unlikely to find any violation. Inevitably distinctions between national and non-nationals are an essential part of immigration control. However, article 14 is surely engaged when, as in the present case, such distinctions over the right to liberty are based on little more than generalised nationality assessments.

SOCIAL CONSEQUENCES

The Impact of Detention on Public Perception

Broadly speaking, the social consequence of detaining asylum seekers is twofold. On a societal level it fuels the perception that asylum applicants are "bogus" and illegitimate. Their incarceration on arrival might be viewed as an extension to the penal estate. Patricia Tuitt argues that the law's construction of refugees and asylum seekers is predominately negative. She highlights both the narrow legal definition provided under the Geneva Convention which tends to exclude refugee women and children and the focus on deterrence in Western refugee policy.⁵⁸

Contemporary political and public debate on asylum is characterised by a number of common misconceptions which begin with the terminology and often end with the view that asylum seekers are undeserving or criminals.⁵⁹ A YouGov survey for *The Sun* newspaper in 2003 revealed that 82% of those questioned thought the government's

⁵⁴ Zetter, Griffiths, Feretti and Pearl, *An assessment of the impact of asylum policies in Europe 1990–2000*, (Home Office Research Study, July 2003).

⁵⁵ David Charter, "Britain is favourite destination for asylum seekers in the EU", *The Times Online*, 9 October 2007.

⁵⁶ Council Directive 2005/85/EC of 1 December 2005, *On minimum standards of procedures in member states for granting and withdrawing refugee status*; Costello, Cathryn "The asylum procedures directive and the proliferation of safe country practice: deterrence, deflection and the dismantling of international protection" (2005) 7 EJML 35–69 at 35.

⁵⁷ *R (ex p Roma Rights Centre et al) v Immigration Officer at Prague Airport and Another* [2004] UKHL 55.

⁵⁸ *supra* n2.

⁵⁹ see for example: *Daily Mail*, "The good life on asylum alley" 6 October 1998; "Suburbia's little Somalia" 12 January 1999; "Brutal Crimes of the asylum seekers" 30 November 1998.

immigration policies were “not tough enough”. 80% expressed agreement with the statement that “the problem of asylum is out of control”.⁶⁰ Newspapers rarely distinguish between asylum applicants and migrants or between asylum applicants and illegal entrants, indeed the Press Complaints Commission has issued guidance on the avoidance of the term “illegal asylum seeker”. The guidance states that the term is both inaccurate and emotive as there is a “danger of generating an atmosphere of fear and hostility that is not borne out by the facts”, yet several newspapers continued to use the term following publication of the guidance.⁶¹

Stanley Cohen observes that the disproportionate response to asylum seekers in the UK is symptomatic of a moral panic, a central element of which is the “hopeless blurring” of the distinction between immigrants, asylum seekers and refugees.⁶² Theresa Hayter similarly notes that refugees are “lumped together with ‘illegal immigrants’ as people whose presence is unwelcome”.⁶³

Research by the Article 19 Project at the University of Cardiff over a 12-week period in 2002 found 51 different labels used by the media to define asylum applicants including “asylum cheat” and “illegal refugee”.⁶⁴ They also identified the effects of this reporting on the asylum applicants themselves:

Asylum seekers and refugees feel alienated, ashamed and sometimes threatened as a result of the overwhelmingly negative media coverage of asylum. Many of the interviewees reported direct experience of prejudice, abuse or aggression from neighbour and service providers which they then attributed to the way the media informs public opinion.⁶⁵

Analysis of the media response to the murder of a Kurdish asylum seeker in Glasgow is illuminating in this respect. Rather than attempting to counteract misperceptions, the typical media response was to fuel ethnic tension by labelling the attack as racially motivated and depicting the local community as unable to cope with the dispersed asylum seekers.⁶⁶ According to Carolyn Coole, media coverage “helped to create a climate of opinion in which readers were invited to view the incomers as a threat”.⁶⁷ A similar response was observed by Ralph Grillo in his analysis of the public reaction to plans to use a hotel for the dispersal of asylum seekers in Saltdean.⁶⁸

Rosemary Sales links the perception to social exclusion policies which draw new boundaries between the “deserving” and “undeserving” in society.⁶⁹ As asylum applicants are denied the right to work they are immediately cast as “undeserving”. She notes that the government’s objective of facilitating the integration of refugees⁷⁰ is compromised by the punitive regime asylum applicants are subjected to on arrival.⁷¹ In particular the use of detention for asylum seekers “enhances the perception that there

⁶⁰ SkyNews, 18 August 2003.

⁶¹ Sarah Hall, “Newspaper flouting ruling on asylum seekers”, *The Guardian Online* 31 December 2004.

⁶² Cohen, Stanley, *Folk devils and moral panics: the creation of Mods and Rockers* (Routledge, 2002) at pxxviii.

⁶³ Hayter, Theresa, *Open Borders* (Pluto Press, 2000) at 64.

⁶⁴ Article 19 Project, “What’s the story? Results of research into media coverage of refugees and asylum seekers in the UK” (University of Cardiff, 2003).

⁶⁵ *Ibid.*, at para 6.

⁶⁶ Coole, Carolyn, “A warm welcome? Scottish and UK media reporting of an asylum seeker murder” (2002) 24(6) *Media, Culture and Society* 839–849.

⁶⁷ *Ibid.*, at 850.

⁶⁸ Grillo, Ralph, “‘Saltdean can’t cope’ protests against asylum-seekers in an English seaside suburb” (2005) 28(2) *Ethnic and Racial Studies* 235–260.

⁶⁹ Sales, Rosemary, “Welfare for asylum seekers in Britain” (2002) 22 *Critical Social Policy* 456–477 at 459.

⁷⁰ Home Office, *Consultation paper on the integration of recognised refugees in the UK* (Home Office, 1999).

⁷¹ *supra* n69 at 474.

is something amiss with that group of people. It contributes to animosity towards asylum seekers as a whole".⁷²

Politicians have not attempted to challenge these negative perceptions and in some cases have actively encouraged them. Whilst attempting to avoid right-wing, inflammatory language, the left has often fallen into the trap of linking an effective (read "harsh") immigration regime with the maintenance of good race relations. This association is of course easier and more simplistic than addressing the root causes of racism in British society. Steve Cohen observes the unfortunate and highly damaging rhetoric of politicians who link asylum seeking with criminality.⁷³ He quotes a Home Office spokesperson reported in *The Guardian*:

If mainstream parties don't have robust but fair policies on immigration, asylum and crime, the beneficiaries will be the far right. The left may not like the idea of detention centres, but it is better than putting asylum applicants in luxury tower blocks when local people feel they cannot get decent accommodation.⁷⁴

The public perception of asylum seekers as Outsiders or "societal 'question marks'" has not been sufficiently addressed by political theory either.⁷⁵ The state-centric approach of international law has legitimised distinctions between individuals and enabled the exclusion of those that appear to challenge the existing social, cultural and ethnic balance of the state. Michael Walzer argues that democratic liberalism requires borders to be maintained in order that the political and cultural community within be protected.⁷⁶ This maintenance might require new, undocumented arrivals to be detained with a view to further investigation or removal. But what is it that Walzer's community needs to be protected from? One could perhaps point to the challenges posed to local services by large groups of migrant workers or the wider threat to our political life from international terrorists but it seems less obvious that there is any real threat generated by the arrival of a few thousand people each year seeking sanctuary from persecution. Indeed, the admission of such people should enhance the community within by advancing compassion and an international conception of justice. Richard Rorty's rejection of philosophical foundationalism in favour of a more pragmatic realism is applied to the refugee situation by Owen Parker and James Brassett who advocate sentimental education as a solution to the negative media portrayal of asylum applicants. Challenging the media tendency to demonise asylum seekers and the liberalist tendency to "empty" asylum applicants of their diverse experiences in order to categorise and define the legitimate refugee, they call for educators and the media to publicly air the real life stories of those seeking protection.⁷⁷ Yet, when the BBC offered a day of programming aimed at getting people to understand more of the asylum process, politicians were vocal in their disapproval, suggesting that it compromised Home Office decision-making.⁷⁸

Parker and Brassett's views echo those of Tuitt who sees the legal definition of the refugee as part of the problem. Its emphasis on the genuine, Convention refugee serves

⁷² Landgren, Karin, "Comments on the UNHCR position on detention of refugees and asylum seekers" in Hughes and Liebau (eds) *Detention of Asylum seekers in Europe: Analysis and Perspectives* (Kluwer, 1998) at 159.

⁷³ Cohen, Steve, *No One is Illegal* (Trentham Books, 2003) at 45.

⁷⁴ *The Guardian*, 23 April 2002.

⁷⁵ Parker, Owen and Brassett, James, "Contingent borders, ambiguous ethics: migrants in (international) political theory" (2005) 49 *International Studies Quarterly* 233-253 at 236.

⁷⁶ Walzer, Michael, *Spheres of Justice* (Basic Books, 1983) at 39.

⁷⁷ *supra* n75 at 250.

⁷⁸ "Minister criticises BBC over asylum shows", *The Independent*, 24 July 2003.

to exclude those whose stories do not fit this narrowly constructed definition.⁷⁹ Thus we are informed by the Immigration and Nationality Directorate's latest figures that 70% of asylum applications were refused (including those granted exceptional or humanitarian status).⁸⁰ This number has fluctuated dramatically from a refusal rate of around 50% in 1984 to 90% in 1994.⁸¹ This rate also varies dramatically between countries, as Hayter recognises: “[i]n general, the process of applying for asylum is fraught with arbitrariness and bitter injustice”.⁸²

Increasingly a generalised approach to safety is adopted, whereby states which generate a high number of asylum applicants may be paradoxically categorised as giving rise to no serious risk of persecution. The applicants from those states find that they are labelled as “clearly unfounded” and are more likely to be placed in detention pending removal. Their individual stories are marginalised as they do not fit the narrow legalistic definition. Thus while the asylum determination process inevitably rejects those who have illegitimate claims for safety it also rejects those who do not fit the 1951 Geneva Convention criteria and those who are unable to articulate their cases clearly and consistently.⁸³ Applicants may be from the wrong country; may have experienced the wrong type of persecution or their experiences may have left them presenting an account deemed to be inconsistent. The label “failed asylum seeker”, while convenient for politicians and the media, cannot represent the diverse experiences of this group of applicants.

Welch and Shuster view the detention of asylum seekers as a “state-ritual” which responds to misplaced public anxieties:

That penal ceremony has become a media theatre on whose stage politicians proclaim their intentions to clamp-down on so-called bogus asylum seekers fraudulently in search of welfare, benefits, education, health-care, housing and jobs.⁸⁴

There is a public perception that many asylum seekers are criminals. Politicians rarely counteract this perception for fear of being ridiculed by the popular press, the opposition and their constituents. The provision of alternatives to detention such as open centres and reporting mechanisms would have helped challenge such misconceptions but the routine use of detention can only fuel a perception of criminality.

Human rights law has also failed to address this problem. In fact the decision of the Grand Chamber appears to make the problem worse as it lumps migrants and asylum seekers together, prompting criticism from the UNHCR.⁸⁵ The dissenting opinions of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä recognise the impropriety of assimilating asylum seekers with other migrants and emphasise the need to maintain a clear distinction between these two categories of entrants. Asylum applicants seek entry in order to exercise a lawful right to seek and enjoy asylum and therefore should not properly be regarded as trying to enter illegitimately:

Properly construed, Article 5(1)f should confer robust protection against detention for asylum seekers. The sub-paragraph stipulated a purpose, the effecting of an unauthorised entry, which detention must prevent. Asylum seekers had to be distinguished from general classes of illegal entrant or those facing deportation, and in order to detain asylum seekers

⁷⁹ Tuitt, *Race, Law and Resistance* (Glasshouse Press, 2004) at 67.

⁸⁰ Immigration and Nationality Directorate, *Asylum Statistics*, 4th Quarter 2007.

⁸¹ *supra* n63 at 66.

⁸² *Ibid.*, at 66.

⁸³ This may include people fleeing civil war and women who have been victims of sexual violence.

⁸⁴ Welch, M and Schuster, L., “Detention of asylum seekers in the UK and USA: deciphering noisy and quiet constructions” (2005) 7 *Punishment and Society* 397–417.

⁸⁵ *supra* n1 at para 54.

... there had to be something more than the mere absence of a decision on the claim; the detention had to be necessary, in the sense that less intrusive measures would not suffice, and proportionate to the aim pursued.⁸⁶

Any attempt to view asylum as part of immigration law is legally and morally questionable. The legal tradition of refugee law is international in nature whereas immigration law belongs solely to the state. There is no counterpart of the international right to seek asylum in the immigration context.

Morally speaking, a distinction can and should be maintained. Nathwani points to the criminal law concept of necessity to differentiate between the position of ordinary migrants and those seeking refuge.⁸⁷ Nathwani's justification for this separation emphasises the lack of choice for asylum seekers when seeking refuge which is "so strong that no other course of action could be reasonably expected from the individual".⁸⁸

The Impact of Detention on Vulnerable Asylum Seekers

It is also necessary to consider the social effect of routine detention on vulnerable, individual asylum applicants who may have experienced trauma and torture prior to arrival in the UK. Research on the mental health effects of detention tends to focus on those confined for longer periods.⁸⁹ Yet, whilst short-term detention may minimise the detrimental health effects, it can in no way ameliorate them. There is evidence to suggest that even brief periods of detention can have extremely damaging health consequences. This will be particularly apparent where the applicant has been subjected to cruel and degrading treatment or torture during a previous incarceration.

Victims of torture are, in principle, not subjected to detention at Oakington. Yet, it is unclear how such a complex decision can be made without the presence of trained medical staff. Research suggests that mental health problems can undermine the applicant's credibility as immigration staff and adjudicators misinterpret the applicant's confusion as dishonesty.⁹⁰ Furthermore, there is a common pattern of non-disclosure amongst people who have been victims of torture. Thus there can be no guarantee that victims of torture will not be detained, especially in the absence of thorough medical examination prior to any decision to detain.

Although Oakington no longer accommodates women and families, there have been cases where vulnerable children have been detained. In 2005, the Home Office conceded that a 15 year old Afghan boy had been unlawfully detained.⁹¹ The High Court awarded £11,000 compensation for the 12 day period of unlawful detention which resulted from a dispute concerning the child's age. A recent Amnesty International

⁸⁶ *Ibid.*

⁸⁷ Nathwani, Niraj, *Rethinking Refugee Law* (Kluwer International, 2003).

⁸⁸ *Ibid.*, at 30.

⁸⁹ Sultan, A and O'Sullivan, K, "Psychological disturbances in asylum seekers held in long term detention: A participant-observer account" (2001) 175 *Medical Journal of Australia* 593-596; Thompson, P; McGorry, D; Silove, D and Steel, Z, "Maribyrnong Detention Centre Tamil survey" in Silove, D and Steel, Z (eds) *The mental health and well-being of on-shore asylum seekers in Australia* (Psychiatry Research and Teaching Unit, Sydney Australia, 1998) pp 27-31.

⁹⁰ Steel, Z, Frommer, N and Silove, D, "Part 1 - the mental health impacts of migration: the law and its effects. Failing to understand: refugee determination and the traumatized applicant" (2004) 27 (6) *International Journal of Law and Psychiatry* 511-528. Asylum Aid, *Still No Reason at All* (1999) critically examines the reasons given for refusals and the importance attached to inconsistent trivial details when rejecting applicants; Shah, Prakash, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish, 2000) at 191.

⁹¹ BBC News, "Asylum seekers 'held unlawfully'", 25 May 2005.

report similarly reported on a case where a torture victim had been detained with her daughter at Oakington for ten days.⁹²

FINANCIAL ASPECTS OF DETENTION

Whilst the social cost of detention is far from cheap, the financial costs are also much higher than alternatives. The cost of detaining an individual *per day* at Oakington was estimated by the Home Office to be £97 in 2005–6.⁹³ Additionally, it cost an estimated £500 to process the asylum claims of each applicant. Whilst the Home Office has made strident efforts to reduce the costs by employing private contractors who offer the cheapest deal, immigration detention is obviously more expensive than many of the alternatives. For the private companies running the centres this represents an extremely lucrative deal,⁹⁴ although the workers of these private detention companies do not fare particularly well: low-wages and high staff turnovers are common place.⁹⁵

The higher cost of detention is especially evident in situations where the detainee would have been able to find alternative accommodation without any expense on the part of the state. Monitoring and reporting regimes are clearly less expensive than detention facilities. Whilst the risk of absconding may generally be factored into a cost-benefit analysis of immigration detention, this does not apply to the analysis of the Oakington regime as detainees are deemed to present no significant risk of absconding.

PRACTICAL ASPECTS OF SHORT-TERM DETENTION

Detention at Oakington is only one element of the detention estate and many of those who are transferred from Oakington will find themselves incarcerated in other institutions pending removal. The media are keen to report the low rate of removals but they seldom report on the reasons for this. In 2007, 63,140 people were removed from the UK, of these only 13,585 were asylum applicants.⁹⁶ Removal is often complicated by the lack of appropriate travel documents or because the receiving state is unwilling to cooperate with the procedure. In some cases removal is not possible as the person will be in danger on return; as a result they may be left in legal limbo.⁹⁷ When asking to comment on the figures, Liam Byrne, the Immigration Minister, chose not to counteract this prejudice by differentiating between asylum and immigration removals: “We deported the highest ever number of foreign law-breakers – up by a huge 80 *per cent* – and we attacked illegal working much harder because it undercuts British wages, with 40 *per cent* more illegal working operations”.⁹⁸

⁹² Amnesty International, *Seeking Asylum is not a Crime: Detention of People who have Sought Asylum* (Amnesty International UK, 2005) at 17–18.

⁹³ This is a response to a request under the Freedom of Information Act and can be found at: <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-immigration/1381-oakington-costs?view=Html>.

⁹⁴ Christine Bacon notes that UK Detention Services made a turnover of £12.18 million for their management of the Harmondsworth removal centre in 2002. Bacon, C, *The Evolution of Immigration Detention in the UK. The Involvement of Private Prison Companies* Refugee Studies Centre Working Paper No 27 (University of Oxford, 2005) at 6.

⁹⁵ A 2004 report by DLAMCG Consulting found that private prison and detention centre staff in England and Wales received 43% less pay than public service counterparts: *Privately managed Custodial Services* (Prison Service Pay Review Body, September 2004); BBC *Detention Undercover: The Real Story* (2005).

⁹⁶ *supra* n4.

⁹⁷ This situation was recognised to effect several hundred Iraqi Kurds whose applications had been refused but who could not be safely returned: Home Affairs Select Committee, 4th report, session 2002–2003, para 61.

⁹⁸ “Asylum removals slump as applications rise”, *The Times Online*, 27 February 2008.

An investigation by *The Independent* newspaper in 2007 revealed that in the past two years 1,173 attempts at removal had been aborted. In many cases this was due to violent treatment from private security guards charged with removing the applicant.⁹⁹ In some cases the receiving state is unable to offer a guarantee that the applicant will be safe from persecution on arrival and in other cases the British judicial system intervenes to prevent the Home Office from removing applicants to areas which they deem to be unsafe.¹⁰⁰

Detention under UK law does not have a maximum time limit. In 1996 Amnesty International surveyed 150 detainees and found 82% had been continuously detained since their application and less than 7% had been detained solely to facilitate removal. The average length of detention of the sample was five months.¹⁰¹ In 2002, 32% of persons detained had been in detention for more than four months.¹⁰² However, despite the Home Affairs Select Committee's¹⁰³ recommendation for detailed records on the average length of detention, the Immigration and Nationality Directorate no longer record the length of detention and there is no information regarding the 1455 adult asylum seekers detained on 31 December 2007. The statistics do reveal that 35–40 children were detained, 15 of whom had been confined for more than one month.¹⁰⁴

In the Amnesty study, many expressed confusion as to why they were detained and when they might expect to be released or removed. As Pourgourides *et al* recognise, this uncertainty “maintains the mechanisms of persecution which precipitated their flight”.¹⁰⁵ The Chief Inspector of Prisons found that only 37% of inmates felt safe in immigration detention and this figure decreased the longer the person remained confined.¹⁰⁶

In theory, detainees have been sifted before arrival, yet it is alleged that this is not happening and people who are victims of torture, rape and trauma who require detailed psychological evaluation are not receiving it.¹⁰⁷

Compared to other centres, the regime at Oakington is described as “relaxed” and is therefore considered to be preferable to the other detention and removal centres. According to the Home Office Operational Enforcement Manual, cited in *Saadi*:

...The practical operation and facilities at Oakington are, however, very different from other detention centres. In particular, there is a relaxed regime with minimal physical security, reflecting the fact that the purpose is to consider and decide applications.¹⁰⁸

But the reality of Oakington became clear following a 2005 undercover BBC documentary which identified many incidents of racism, physical abuse and incompetence amongst the employees of Global Solutions Ltd who run the centre.¹⁰⁹ Fifteen

⁹⁹ “British guards ‘assault and racially abuse’ deportees”, *The Independent*, 5 October 2007.

¹⁰⁰ For example, the High Court ruled that the Home Office could not continue their policy of enforced removals to Zimbabwe in 2005. This was overturned by the Court of Appeal in *AA (Zimbabwe) v SSHD*, [2006] EWCA Civ 149, [2006] EWCA Civ 149, [2007] 1 WLR 3134, [2007] 2 All ER 160.

¹⁰¹ Dunstan, Richard, *Cell Culture* (Amnesty International, 1996).

¹⁰² HC Home Affairs Select Committee, 4th report, 2002–2003 para 77.

¹⁰³ *Ibid*, at para 82.

¹⁰⁴ The figures do not add up here as the individual lengths of detention suggest 40 children, but the total given on the table suggests 35 children.

¹⁰⁵ Pourgourides, C, “A second exile: The mental health implications for the detention of asylum seekers in the UK” (1997) 21 *Psychiatric Bulletin* 673–674.

¹⁰⁶ *supra* n102 at para 92

¹⁰⁷ Burnham, Emily, *Challenging Immigration Detention. A Best Practice Guide* (Immigration Law Practitioners Association *et al*, 2003) at 18; Amnesty International *Seeking Asylum is not a Crime: Detention of People who have Sought Asylum* (Amnesty International UK, 2005).

¹⁰⁸ *Saadi v UK* (2007) 44 EHRR 50, para 22.

¹⁰⁹ BBC, *Detention Undercover: The Real Story*, March 2005.

staff were suspended following the documentary¹¹⁰ and an inquiry by the Prisons and Probation Ombudsman followed. The ombudsman accepted the findings of the BBC investigation and produced a critical report with many key recommendations for staff to follow.¹¹¹ Between April 2006 and March 2007 there were 12 reported incidents of self harm at Oakington and the Chief Inspector of Prison's report for 2006 raised concern about the risk of suicide and self-harm as well as the lack of enforced procedures on anti-bullying and anti-racism.¹¹² These factors should have been relevant to any assessment of proportionality yet, lamentably, they were not even addressed by the ECtHR.

CONCLUDING OBSERVATIONS

The process of detention in the United Kingdom is unnecessary and arbitrary. It is unnecessary as there is no individualised assessment or need. It is arbitrary because it is not based on rational, predictable justifications. Theresa Hayter argues:

[i]t is therefore impossible to escape the conclusion that detention is merely intended to act as a deterrent and performs no function whatsoever in controlling refugees once they have arrived in Britain. Apart from an increased vulnerability to detention of certain nationalities, the process is arbitrary. The best advice to any intending asylum seekers would be to make sure he or she was at the back of the queue at the immigration counters.¹¹³

The ECtHR have ruled out any requirement that detention be necessary but international soft-law makes repeated reference to a consideration of all alternatives prior to a decision to detain. The arbitrary nature of detention can clearly be seen from the *Saadi* facts. Although his case was deemed to be capable of a quick decision predicated on the basis that he came from a supposedly safe country, he was in fact eventually granted refugee status. He never failed to comply with instructions and thus on the facts there was no justification for his detention at Oakington. Even if we accept Hathaway's contention that speedy processing is the only justification needed in such cases, Saadi's case was not speedily processed and neither were the cases of any of the original applicants. Speedy processing requires accurate and effective decision making, yet much of the evidence that has been presented shows poor quality decision making with many cases being overturned on appeal. The Immigration Law Practitioners' Association informed the Home Affairs Select Committee in 2003 that "the experience of our members is that the quality of initial decision making is poor" and that decision-makers were inadequately skilled and trained.¹¹⁴ The Refugee Council have similarly pointed to the rate of successful appeals as an indicator of poor initial decision-making.

Furthermore, speedy processing requires that an applicant is removed once all avenues of appeal have been exhausted. The reality of removal for asylum seekers is much more complicated and very few will be immediately removed following confinement at Oakington.

¹¹⁰ BBC News, "Probe into immigrant abuse claims", 1 March 2005.

¹¹¹ *Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort* (UK Borders Agency, July 2005).

¹¹² HM Chief Inspector of Prisons *Report on a short follow-up inspection of Oakington Reception Centre* (HMI, 5 – 7 June 2006).

¹¹³ *supra* n63 at 119.

¹¹⁴ *supra* n102 at para 34.

The financial cost of detention at Oakington is far greater than the cost of alternative methods, particularly where the applicant is self-sufficient and has relatives in the UK. So the question remains as to why the government are keen to push for the detention of asylum seekers for so-called “administrative convenience”. The only response must be that this is part of a package of measures aimed at deterring asylum seekers and reassuring the public that the government are tough on immigration. Yet the lumping together of asylum and immigration is highly problematic for the reasons enumerated. Dan Wilsher defends restrictions on liberty for new arrivals on the basis that their liberty interest is “not as extensive as that of a lawful resident because they have chosen to seek entry into another country”.¹¹⁵ Yet choice, as Nathwani has argued, is seldom a factor for those fleeing persecution¹¹⁶. The failure to distinguish asylum askers from ordinary immigrants permeates the media and society and it drives anti-asylum rhetoric.

As a response to the Grand Chamber decision, the use of routine, short-term detention of asylum seekers is likely to increase in Europe. The societal consequences of this development remain unaddressed by policy makers and politicians who, in difficult economic times, can redirect responsibility for society’s ills to immigrants and asylum-seekers. The familiar argument goes that if unemployment and homelessness are increasing this is attributable to immigrants coming to the UK taking houses and jobs.

Whilst for some writers, the criminalisation of asylum seekers is a racist response (for example, Shah describes the recent treatment of non-European refugees as “institutionalised racism”¹¹⁷ and Cohen contends that immigration controls are “inevitably and inherently and deliberately, racist”)¹¹⁸ this approach can serve to overlook the complexities of anti-asylum rhetoric and feeling. It assumes that the debate can be neatly categorised along ethnic lines, whereas in reality first and second generation immigrants often exhibit similar attitudes towards asylum seekers to that of the host population. Whilst there is truth in the accusation of racism in many cases (such as the notorious Dover Express),¹¹⁹ there are other causes which resonate more widely, notably economic insecurity and fear of crime, neither of which can be attributed to the acquisition of refugee status but their home-grown causes are so complex that it is much easier to blame the outsider. These are both issues which could be easily challenged and tackled by a responsible political debate and balanced media reportage.

Welch and Shuster argue that detention is a key aspect of the over-reaction in the form of a moral panic driven by politicians and the tabloid press. Considering the work of Stanley Cohen,¹²⁰ they warn that such over-reaction can simultaneously produce an under-reaction whereby human rights violations against those seeking refuge fail to reach a critical mass.¹²¹ Denial can permeate society at the highest level and filter through to all levels, preventing society from acknowledging its own part in human rights violations. These human rights violations continue when people are detained for no other reason than administrative convenience.

¹¹⁵ Wilsher, Dan, “Detention of asylum seekers and refugees an international human rights law” in Shah, P (ed) *The Challenge of Asylum to Legal Systems* (Cavendish, 2005) pp145–168 at 166.

¹¹⁶ *supra* n87.

¹¹⁷ *supra* n30 at 210, Hayter, *supra* n63 and Dummett, M, *On Immigration and Refugees* (Routledge, 2001).

¹¹⁸ *supra* n73 at 48.

¹¹⁹ “Illegal immigrants, asylum seekers, bootleggers and the scum of the earth – drug smugglers – have targeted our beloved coastline for some unwanted attention. We are left with the backdraft of a nation’s human sewage and NO CASH to wash it down the drain” (November 1998). On Thursday, 1 October, the Dover Express headline described asylum seekers as “human sewage”.

¹²⁰ Cohen, Stanley, *States of Denial* (Polity Press, 2001).

¹²¹ *supra* n84 at 410.

BOOK REVIEW

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

CORPORATE SOCIAL RESPONSIBILITY

The New Corporate Accountability, Corporate Social Responsibility and the Law, edited by DOREEN McBARNET, AURORA VOICULESCU and TOM CAMPBELL, United Kingdom, Cambridge University Press, 2007, xv + 585 pp, Hardback, £75-00, (US\$145-00), ISBN 978-0-521-86818-1.

In contemporary society the core issues of corporate social responsibility (CSR) are manifest, particularly in the context of environmental concerns over global warming and sustainable development, and also of appropriate adherence to human rights standards in overseas business operations. Hence, business matters ranging from the use of the humble, but ubiquitous, plastic carrier bag to the sourcing of diamonds are both issues for public debate and a source of corporate concern. This very timely book seeks to examine the principal existing and emerging elements constituting the broad governance environment in which companies do business, with a particular focus on the central relationship between CSR and the law.

Thus stated the objective sounds deceptively simple but in fact this is a mighty undertaking. As most of the contributors to the volume explicitly aver, the initial difficulty is that there is no generally accepted understanding of the scope of the CSR concept beyond the fact that it is usually characterised by a requirement that companies take a wider view of the impact of their activities than that entailed by a narrow and exclusive focus on profit maximisation on behalf of their shareholders. However, the problem deepens given the intersection between CSR and the field of regulation (itself currently burgeoning and contested in scope) together with the sheer number of substantive areas of law on which the CSR problematic impinges. The transnational nature of much corporate activity adds further layers of difficulty not only due to the fact that each host state will be subject to its own laws and political and social culture but also due to the corresponding international initiatives (eg through bilateral agreements or international law) that are increasingly exposing companies to complex fields of multi-level governance. If the multiplicity of actors and domains are thrown into the mix, then, to use Doreen McBarnet's words:

What is emerging in the arena of CSR is a complex interaction between government, business and civil society, private law, state regulation and self-regulation, at national and international levels, with social, legal, ethical and market pressures all being brought to bear in ways that cut across traditional pigeonholes, and which, . . . interrelate with and foster each other. (pp 55–56).

The aim, and significant achievement, of this book is to chart the intricacies of this landscape, through mapping both its abstract topography and its detailed nooks and

crannies, thereby revealing the emergence of CSR as "... a new, interweaving, multi-faceted form of corporate accountability" (p 56).

On the above basis it is hardly surprising that this is a substantial work running to some 564 pages of text. In terms of formal structure the book consists of 18 chapters and is divided into five parts. The first part consists of an extensive introductory essay by Doreen McBarnet. Part two examines various ways in which law is utilised to further CSR and is composed of four essays situated in the substantive areas of contract, public procurement and tort, an essay examining CSR and the WTO, and a more theoretical piece by Christine Parker analysing the role of meta-regulation in supporting CSR. Parts three and four are thematically related through the expansion of legal accountability and consist of five essays respectively. Part three broadly covers CSR and company law issues (the market effect of socially responsible investment, the function of the board, employees, shareholder activism, and European policy initiatives/cooperative agreements); whilst part four covers a more miscellaneous group of substantive areas (corporate criminal liability, international law and the UN Human Rights Norms for Corporations, and environmental law). Part five is the concluding section to the work and comprises an essay by Tom Campbell which seeks to develop a moral basis for the practice of CSR grounded in human rights.

In the context of a relatively short review it is not possible even to begin to do full justice to the breadth and depth of scholarship contained in this volume as perforce it is necessary to be very selective in terms of more detailed points of coverage and evaluation. It is thus important to note at the outset that the book is well produced and organised, evenly written throughout, and that each chapter demonstrates a high quality of individual academic endeavour whilst making a distinctive contribution to the thematic project as a whole. As befits a topic that is strongly connected with globalisation, the book's authors have backgrounds drawn from a wide range of common law and civil law jurisdictions and the particular perspectives thereby brought to bear are especially informative in the light of the examination of the emergent and creative aspects of CSR. Although the absence of contributions from outside the academic sector would seem easily justifiable given the legal focus of the book and the inevitable trade-off that has to be made between scope and depth of treatment in any such work, it would, perhaps, have been desirable to have an input from authors from typical "developing state" host nations of multinational corporate activity. This is not in any way to suggest that home nations are bereft of CSR issues (eg the ongoing BAE Systems affair in the UK) but simply to acknowledge that the illumination provided by host nation perspectives would surely be of great pertinence. However, the foregoing observation should not detract from the fact that overall the editors are to be congratulated, both for assembling such a distinguished group of scholars (many of whom are recognised leaders in their field) from such a wide and pertinent range of legal disciplines and, equally, for avoiding the diverse perspectives thus generated from becoming a veritable smorgasbord of unrelated topics by welding the book into a much more holistic medley.

McBarnet's introductory essay provides a fascinating survey of the development of CSR and the current CSR environment as well as introducing the principal themes of the book. Analysis is aided by liberal references to the major case studies, such as Shell and Brent Spar and the Kasky litigation against Nike, and also by the clear heuristic framework adopted. McBarnet dissects the interface between CSR and the law by utilising three categories: CSR beyond the law (activities undertaken without legal obligation), CSR through the law (an examination of a variety of forms of legal intervention and their effects upon CSR), and CSR for law (showing how CSR may itself buttress mandatory regulation, given the well known limitations that such

regulation suffers from). This typology enables a highly nuanced discussion of the complex and developing inter-relationship of CSR and the law. In particular, McBarnet is able to confront head-on the seeming paradox that any discussion of the legal dimensions of CSR must account for the fact that it is traditionally strongly characterised as purely voluntary, often for the very purpose of limiting the purchase of legal obligation (CSR beyond law).

Thus, one of the key themes of the book concerns an exploration of the reality of this claim and the related normative tension between the desirability of self-regulation and calls for mandatory regulation that permeate the CSR debate. To this end McBarnet indicates that voluntary CSR is in fact always driven by social and economic factors and provides an excellent survey of the principal arguments both for and against the two modes of regulation in the CSR context. However, the ultimate conclusion of her analysis establishes that the utilisation of this dual framework of regulation in a stark manner generates a false dichotomy. In part, this is because law is already present in CSR through legal devices such as contractual supply chains (CSR through law) but also it is due to the important, and generally less acknowledged, fact that voluntary CSR has a potentially significant role in supporting mandatory regulation (CSR for law). McBarnet's classic example of this (which draws upon her own previous well-known and influential research) concerns the pervasive gaming of rules by professionals in order to achieve creative compliance with a relevant regulatory regime. Such an approach has the aim of achieving business ends by circumventing the underlying objectives of the particular regulation whilst still enabling a claim for business legitimacy to be maintained through technically meeting the formal rules. As McBarnet explains, the significance of CSR beyond law here is that it provides a resource to place pressure on business to observe the spirit of the law and not simply its form, hence improving the effectiveness of mandated regulation.

This complex interaction lies at the root of the second principal theme McBarnet discusses: namely, the interplay and creative tension between her three conceptual categories. Mapping this theme is one of the major intellectual burdens of the chapter and requires the various social actors and governance mechanisms underpinning CSR to be identified and placed in relationship to each other. Given the multifaceted linkages between each of the elements, and that changes in any given relationship are not necessarily either unidirectional or discrete in effect, both the subtlety and clarity of the exposition and the emergent framework thereby sketched out represent a considerable academic achievement.

The third key theme that McBarnet explores is the extent to which CSR is central to an emerging corporate accountability framework which may be characterised as "new". Claims to novelty are always problematic as there are necessarily always continuities as well as discontinuities in any evolving social environment. Consequently careful analysis of pertinent factors is required at a high structural level. In this regard, McBarnet sketches the effects of the development of information technology on both activist networks and global capitalism and notes the increased adoption of outsourcing by companies and the growth of corporate brands with their attendant reputational risks and susceptibility to ethically motivated consumer or investor action. Equally, however, meaningful change can occur at a level of detail and, further, some changes may be re-configurations of existing readings which are invisible without significant contextual unpacking. A good example of these points might be seen in McBarnet's discussion of the business case for CSR where she examines different interpretations of the corporate profit maximisation principle. McBarnet observes that Milton Friedman interpreted the rule narrowly as making any deviation from the shareholder interest by

management impermissible, whereas, latterly John Parkinson read the rule as giving considerable latitude to managerial discretion such that CSR objectives would be compatible with long term profit maximisation. Given that the formal rule remained unchanged she notes how this slippage, "... provides the means of adopting a new model of CSR that is simultaneously the traditional model" (p 24). Capturing the indices of change is thus far from an easy task and not one which is aided by the sheer scope of the CSR canvas. This is perhaps the least fully developed of McBarnet's themes, in part, because, as she acknowledges, further empirical work is required (especially in connection with CSR drivers), and, in part, because it is the function of the rest of the book to engage in fleshing out the detail behind the central claim of the emergence of a new corporate accountability.

Overall McBarnet's introduction is a real *tour de force* and the first of four structural essays that act as a skeleton for the book. McBarnet's classification of CSR is adopted by way of organising the material in the rest of the book, which largely concentrates on CSR through law, each part being grouped broadly by substantive area. This formal model of organisation is perhaps slightly misleading as it overlooks the necessary interaction of the concepts involved therein. Hence, the essays which explicitly adopt McBarnet's model in their analysis all discuss the interrelationship between its various elements. Having said this, part two of the book is organised around an exploration of the various ways in which law already intrudes on CSR matters. Such intrusion is often indirect and utilises private law mechanisms such as contract or tort. In the latter context McBarnet and Patrick Schmidt's essay gives a thorough and engaging overview of the development of the US Alien Tort Claims Act as a means of holding companies accountable for certain egregious human rights abuses committed in a foreign jurisdiction. Given the origins of the statute in combating the consequences of acts of piracy, a significant amount of legal work has had to be undertaken by activists to develop the statute as a potential platform to hold companies to account. By way of acknowledging how legal creativity can also be used against business the authors wittily use the idea of creative enforcement by way of counterpoise to the well known adoption of creative compliance techniques by business.

The idea of creative enforcement is also central to the contribution of Carola Glinski who seeks to determine whether corporate codes of conduct raise moral or legal obligations. Glinski readily acknowledges that the standard understanding is clearly to the former position (p 120) and that there is as yet no case law directly governing CSR transnational economic activities in this respect (p 121). Nevertheless, she argues that it is possible to construct binding legal obligations from such codes through various EC and national instruments in consumer and competition law. This is perhaps the most speculative essay in this part of the book, and, whilst it undoubtedly raises an important area of development, it also illustrates the difficulty inherent in seeking to track multi-level governance structures across different jurisdictions (*eg* as Glinski herself notes some aspects of her argument do not transpose to the UK, p 130). By way of contrast, McBarnet and Marina Kurkchyan's essay is an empirically founded study of the use of "other regulation" by way of contractual clauses in supply chains to foster CSR. In the course of their evaluation the authors draw interesting parallels between relational contracts and compliance approaches to regulatory enforcement with the common emphasis being on dialogue rather than penalty. They also note that this form of private regulation is not purely voluntary as it invariably occurs as a result of private pressure exerted by civil society on multinationals. Despite the general view that "other regulation" has had positive effects, the ongoing need for such pressure as an accountability mechanism is demonstrated by the fact that, as the authors note, a

significant number of CSR breaches by suppliers arise as a direct response to the business demands of the purchaser itself, thus highlighting the very real tension between CSR and much contemporary commercial practice.

The final broadly contractually based piece by Christopher McCrudden is of a wider aspect and draws upon its author's well known expertise in the area of public procurement. McCrudden's analysis especially engages with the theme exploring the debate over the voluntary basis of CSR by developing the ambiguous nature of public procurement as partly constituted by public regulation and partly by market operation. He is also able to assess the novelty of the new corporate accountability in tracing the recent developments in the public procurement regime at both EC and national level. Nicola Jägers' chapter focuses on the relation between human rights (as a proxy for CSR) and the WTO. The first part of her essay, which could perhaps have had a little more emphasis due to its interest and significance, examines the institutional structure of the WTO and assesses the purchase of human rights concerns in the WTO framework. As the latter is at present somewhat limited, certainly in practice, Jägers gives a compelling argument to develop NGOs' capacity to participate in WTO proceedings in the concluding part of the chapter.

Christine Parker's analysis of meta-regulation as a tool for corporate accountability forms the second structural essay of the book and provides the link to the substantive company law issues to be discussed in part three. It picks up on the theme relating to the tension between CSR aims and business practice. Parker is suspicious that the exigencies of the latter will tend to subvert the substance of the former and hence rejects a pure self-regulatory voluntarism. Instead it is proposed that resort should be had to meta-regulation (the regulation of internal self-regulation) in order to construct a truly responsible company. Such a company would need to comply with three basic precepts: its values must transcend narrow self-interest, so that the company seeks to do the correct thing rather than simply meeting a formal outcome. Such values must be embedded through process in the organisation and culture of the company, and finally the company must pursue its main business goals within this responsibility framework. By allowing implementation of process at enterprise level meta-regulation maximises the flexibility to devise systems appropriate to particular businesses. Adequate internal processes will require the company to be permeable to outside values and stakeholders (hence Parker's critique of the ill-fated Operating and Financial Review in the UK). However, Parker is very clear that process of itself is not enough and that meaningful legal accountability can only arise where the substantive goals are both specified and enforced external to the company. Parker thus rejects the intelligibility of the notion of legal accountability for voluntary CSR and concludes her thought provoking and wide ranging essay with her view that, ". . . the whole notion of CSR makes sense only within the context of more substantive discussions of regulatory and social policy which tell us for *what* corporations must take responsibility" (p 237).

Part three of the book focuses on company law issues and Lawrence Mitchell's chapter picks up on the problematic nature of CSR as a concept by re-defining the issue in pragmatic terms as one of corporate governance. For Mitchell the practical way forward in promulgating CSR issues is to reform the function of the board, as the key decision-making institution in the company, so that it is able to move away from its focus on short term effects and its role as a liability shield to be free to make responsible decisions in the long term interests of the corporation. Just as Mitchell's contribution provides a very interesting perspective from the United States (where the board's liabilities are construed quite differently to those in the UK), Stephen Bottomley and Anthony Forsyth give a subtle account of the Australian approach to

CSR and corporate law, with a particular emphasis on whether employees' interests are given serious attention. Despite the obvious limitations presented by the formal rules of corporate law, with their emphasis on shareholder primacy, the authors find codes and guidelines have a growing significance and conclude that, "[r]ather than viewing corporate law as a discrete, self-referential category of law, we should be concerned with the way in which corporate law interacts with other categories of law, and with other mechanisms for influencing behaviour" (p 334). Two further essays in this part concern the role of the shareholder, either as investor or activist. Kevin Campbell and Douglas Vick discuss the former in the context of socially responsible investment and provide a welcome explanation of some of the difficulties in assessing the performance of ethical funds. Bruno Amann *et al* give a wide ranging account of shareholder activism in a number of jurisdictions and bring out a recurrent theme in the book by showing how both the subject matter and the intensity of shareholder CSR activity are profoundly affected by the prevailing state's institutional architecture.

The third structural essay in the book is by Aurora Voiculescu and concludes part three with a survey of the European dimension of CSR. This comprises a very useful examination of the historical unfolding of the concept, the contributions made by developments in various member states, and a comparison of the differing approaches of the Commission and European Parliament to the voluntary nature of CSR. The case study of the Cotonou Agreement provides an interesting example of how CSR concerns, especially in the guise of human rights, can be inserted within development cooperation agreements and how the EU as an institution is emerging as a potential vehicle for CSR issues. The introduction of human rights and the development of institutional CSR capacity provide a bridge to the themes in part four, which Voiculescu's second contribution leads off with a theoretical and comparative examination of corporate criminal capacity. Both aspects are handled very adeptly, as is the interplay between individualism and collectivism underlying the historical trajectory of criminal law in this context and the concomitant debate as to the extent to which the issues pertaining to the construction of responsibility therein are necessarily directly transposable to CSR.

The focus then moves to international law and Peter Muchlinski provides a masterly survey of the present state of play. Despite the fact that he finds specialised legislation on human rights and multinational enterprises to be virtually non-existent at national level there is an obviously significant bar to enforcing such rights through international law as only states are traditionally seen as subject to it. Muchlinski sees both the crystallisation of soft law into hard law and the increasing adoption of voluntary codes in this field as potential routes to corporate liability and David Kinley *et al*'s essay on the so far ill-fated draft UN Human Rights Norms for Corporations provides further support for these arguments.

Neil Gunningham's chapter draws upon his considerable body of empirical work concerning the regulation of companies operating in industries with the potential to cause significant environmental damage and develops a powerful model of analysis. His thesis is that CSR is not voluntary but made in response to social pressure and that, "... [corporate environmental regulation] and law are in fact inextricably intertwined, that the relationship between them is interactive, negotiable and complex, and that understanding this relationship has important normative implications" (p 480). To this end he identifies four separate "licences to operate": legal, economic, social and collective (*eg* industry self-regulation). These licences are in a dynamic relationship with each other and the normative implication for regulators is that this gives them a significant range of policy levers to effect change (*eg* by allowing NGO representation in decision-making processes through altering the legal licence the social licence is also

made more effective). Moving to the international sphere, Amy Sinden seeks to argue that corporate environmental wrongs should be a matter falling under the umbrella of human rights. In the course of her argument she makes two particularly salient points: first, that such recognition would be important in the light of the expressive function of law and, secondly, that the contemporary dominant economic models of the corporate entity have not facilitated a human rights perspective due to their focus on competitive markets rather than distributions of power.

Part five of the book comprises a concluding essay by Tom Campbell which seeks to establish a normative grounding for CSR in human rights (hence it is the last of the four structural essays) as well as to draw together some of the earlier points. The chapter is very clearly and closely argued. It seeks to delineate the CSR concept by differentiating it from corporate business responsibility (market conduct essentially focused around shareholders and the requirements of a fair market) and corporate philanthropy (regarded as largely a distributional matter removed from the mainstream business process). CSR is thus viewed as arising in relation to the social consequences of mainstream business decisions, and is itself further sub-divided being either instrumental (*ie* profit orientated) or intrinsic (*ie* addressing social ends in themselves) in nature. Campbell's main concern lies with intrinsic CSR as it perforce cannot be justified by means of the profit maximising business case. Though this rationale is often underplayed in the CSR context, thereby generating the danger of a "... false antithesis between business and morality" (p 538), Campbell stresses that, "... the pursuit of profitability within market norms may itself be regarded as socially beneficial activity" (p 537), and that this raises a strong presumption in its favour. However, this presumption is subject to the accountability claims over corporate activity derived from human rights. Campbell concludes his stimulating essay by finding that such claims give a moral justification for limited intrinsic CSR activity in the sense that human rights both, "...circumscribe as well as affirm the scope of CSR" (p 564).

In sum, this is a very fine book which brings a broadly based, rigorous analysis to an increasingly important arena of activity, and one which furthermore has proved traditionally hard to capture within a legal framework. It is surely destined to be an important contribution to the CSR debate as CSR is increasingly mainstreamed so as to move from the exceptional and peripheral to the quotidian and core in corporate behaviour. Whilst the book should be of relevance to scholars from a wide range of legal disciplines it is ventured that its diverse substantive mix will be of particular interest to regulation, human rights and corporate lawyers. Certainly in the case of the latter group it provides a welcome set of perspectives to expand the perhaps unduly narrow conception of the company that predominates in much traditional doctrinal and law and economics based scholarship in the field. Indeed, one of the book's greatest strengths lies in the manner in which it negotiates the dangers implicit in an inherently wide range of subject matter through successfully balancing the need for a strong overarching thematic and theoretical framework against the need to avoid being overly syncretic so as to allow the conceptual space to develop and explore a variety of topics and approaches. As McBarnet's introduction indicates, the book is consciously written in such a manner that it will engage not only academics but also policy-makers, activists and people from the business sphere; and, whilst it must surely be a recommendation for any university library, it is to be hoped that the book does also attract the wider audience that it both seeks and richly deserves.

GARY WILSON*

NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

This edition's Nottingham Matters takes the form of the text of an inaugural professorial lecture given by Professor Adrian Walters, immediate past editor of the *Nottingham Law Journal*, at Nottingham Trent University on 23 April 2008. Walters leads the Insolvency and Corporate Law Research Group within Nottingham Law School the members of which have research and teaching interests in corporate insolvency law, personal insolvency law, cross border insolvency law, insolvency and creditors' rights systems in transition economies, secured transactions, general corporate law and business regulation.

INDIVIDUAL VOLUNTARY ARRANGEMENTS AND CONSUMER DEBTORS: PAST, PRESENT AND FUTURE

INTRODUCTION

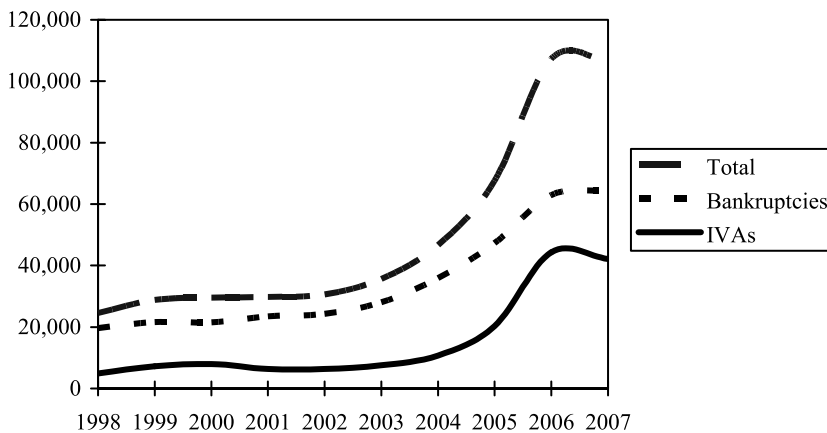
Ladies and gentlemen, it does not need me to tell you that credit and debt are all pervasive features of our economy and society. Of course, it is generally accepted in a capitalist system that debt is by and large a "good thing": it enables businesses to invest and leverage growth and individuals to defer payment for present consumption. However, the downside is what happens when debt burdens become unsustainable? In these circumstances, debtors and creditors may find that they need to have recourse to insolvency law which, in broad terms, is concerned with how we as a society allocate the risks and consequences of financial failure. Given that debt and the associated risk of default are pervasive, insolvency law and insolvency professionals may be engaged in a wide variety of contexts ranging from households to companies to partnerships to banks (very much in the headlines after Northern Rock and Bear Stearns) to monoline insurers to football clubs, even to municipalities and sovereign states. However, the specific context on which I will concentrate this evening is personal insolvency. In particular, I want to use this occasion to tell some of the story behind the recent up tick in the rate of individual insolvencies in England and Wales making particular reference to the emergence and role of individual voluntary arrangements as a legal and market mechanism for the relief of consumer over-indebtedness.

The Incidence of Individual Insolvencies in England and Wales

In absolute terms over the last five years or so there has been a boom in the number of individuals in England and Wales seeking the shelter of the formal debt relief procedures found in our Insolvency Act 1986. The two procedures that the Insolvency

Table 1: Individual Insolvencies (Bankruptcies and IVAs) in England and Wales, 1998–2007

YEAR	BANKRUPTCY ORDERS	IVAs	TOTAL
1998	19,647	4,902	24,549
1999	21,611	7,195	28,806
2000	21,550	7,978	29,528
2001	23,477	6,298	29,775
2002	24,292	6,295	30,587
2003	28,021	7,583	35,604
2004	35,898	10,752	46,650
2005	47,291	20,293	67,584
2006	62,956	44,332	107,288
2007	64,481	42,166	106,647

**Figure 1:** Individual Insolvencies (Bankruptcies and IVAs) in England and Wales, 1998–2007

Act makes available are *bankruptcy*, a debt relief mechanism which in one form or another has been around for centuries, and *individual voluntary arrangements* – IVAs for short – an alternative debt relief mechanism to bankruptcy which has been around since the mid-1980s. Table 1 and Figure 1 reveal the extent of the boom. Total numbers of bankruptcies and IVAs were relatively flat at around 25,000 to 30,000 per annum from the late 1990s until around 2002. After 2003 we then see a steep acceleration with total numbers exceeding 100,000 for the first time in 2006 before levelling out in 2007.

By comparison, the previous peak in total individual insolvencies at the height of the last major recession in 1992 and 1993 was around the 37,000 mark of which the vast majority were bankruptcies. IVA numbers did not break out of the 4,000 to 8,000 per annum range until 2004.

The demographics of personal insolvency have also changed significantly. Historically, the bankruptcy system in England and Wales functioned as a system for the adjustment of business debts. Up until the late nineteenth century it was only merchants and traders who could get access to bankruptcy relief. Non-traders, householders – what we would nowadays call consumers – would end up in debtors' prison if they were unable to pay their debts.¹ These days we prefer not to leave

¹ See generally, V Markham Lester, *Victorian Insolvency – Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth Century England* (Oxford: Clarendon Press, 1995).

debtors quite so starkly at the mercy of their creditors. What we have seen in less than two decades is a shift from the world of the early-1990s where the majority of individuals using the bankruptcy system were still at that point in time self-employed traders to the world of the present decade where the overwhelming majority of users are now consumers.

Returning to the numbers, there are two other important points that I need to make which go to the heart of my discussion this evening. The first point is that in the period 2003 to 2006, IVA numbers grew year on year at a *significantly faster rate* than the bankruptcy numbers albeit from a lower starting point. Year on year, bankruptcies grew steadily while IVA growth soared culminating in the more than doubling of IVA numbers in 2006 compared to 2005: 118.4% year on year. Moreover, a quick glance at Table 1 shows that by 2006 IVAs had come to account for over 40% of individual insolvencies under the Insolvency Act. Increasing numbers of consumer debtors were entering IVAs during this period. The second point is that while bankruptcies still grew marginally in 2007, IVAs *declined* on the 2006 numbers by around 5%. So it was the decline in IVA numbers in 2007 that drove the small decline in the total numbers of individual insolvencies that year.

One other thing that I need to throw into the mix is the Enterprise Act 2002. With effect from 1 April 2004 this legislation made a number of important amendments to bankruptcy law. Perhaps ironically in light of the prevailing demographics of personal insolvency, the policy behind these changes was business focused. The underlying theory was that fear of failure creates a disincentive to entrepreneurial activity and that bankruptcy law tended to reinforce that disincentive. The Enterprise Act changes were therefore designed to make bankruptcy more accommodating to entrepreneurs who fail as a result of having taken socially desirable business risks.² As a result, debtors who go bankrupt are generally entitled to an automatic discharge one year after the date of the bankruptcy order. You are debt free after a year whereas before the Enterprise Act it was three years. The Act also lifted many of the extensive restrictions, disqualifications and prohibitions that the law had previously imposed on bankrupts which were designed, in effect, to castigate bankruptcy as a form of social and moral failure. Bankrupts are still subject to some restrictions. It is an offence to obtain credit without disclosing the bankruptcy, you are banned from acting as a company director without the court's permission and there are certain other occupational restrictions. However, there is a vast array of public and private offices to which debtors are no longer denied access simply because they are bankrupt. You can retain your seat in parliament or on the local council. You can perform any number of other interesting and esoteric community functions from which you were previously banned. So, for example, you can retain your membership of a local flood defence committee or an internal drainage board should you so desire. Instead the law now tries to be more discriminating and seeks only to impose this wider body of restrictions and prohibitions on bankrupts whose conduct is regarded as suitably blameworthy and it does this through the mechanism of an application by the Secretary of State for Business, Enterprise and Regulatory Reform for something called a bankruptcy restrictions order which can last for up to fifteen years after the debtor has been discharged from bankruptcy.

Although the policy rationale of the Enterprise Act was directed towards entrepreneurs, these changes were universal. They were not confined to business debtors. It became a popular belief that in making bankruptcy more "debtor friendly" this would not only lead to more bankruptcy *but would also make IVAs less attractive*. Indeed,

² See further, D Milman, *Personal Insolvency Law, Regulation and Policy* (Ashgate, 2005); A Walters, "Personal Insolvency Law After the Enterprise Act: An Appraisal" (2005) 5 *Journal of Corporate Law Studies* 65.

there were one or two commentators in 2004 who were openly contemplating the possible demise of the IVA. Yet, as we have seen, while the bankruptcy numbers certainly continue to grow in a straight line after 1 April 2004, the intuition that the Enterprise Act would have an immediate downside impact on IVAs turns out to have been wrong. IVA growth year on year outstripped bankruptcy by a considerable margin between 2004 and 2006 despite the apparent easing of the bankruptcy procedure.

In the rest of the time I will proceed as follows. First, I will briefly address why we have experienced this up tick in total consumer insolvencies (bankruptcies and IVAs in aggregate). Then I will try to address the two puzzles in the numbers: (i) how come IVAs grew faster than bankruptcies between 2004 and 2006 when many had predicted the opposite; (ii) how come IVA growth hit the buffers in 2007? I will then say something about the future prospects for IVAs as a tool of consumer debt relief before drawing to a close.

THE RISE IN CONSUMER INSOLVENCIES

Why more consumer insolvencies? Well the simple answer is more consumer debt. Between 1995 and 2005 we experienced a rapid expansion of consumer credit availability in the United Kingdom and there is good evidence from scholars such as Ronald Mann that increases in consumer debt (and, in particular, credit card debt) strongly correlate to increases in rates of individual insolvency subject to a time lag.³ Aggregate household debt in this period went past the £1 trillion mark. The household debt to income ratio was rising. More debt was being taken on by homeowners leveraged off rising house prices. There was (and remains) greater per capita credit card penetration in the United Kingdom compared to anywhere else in Europe.

Not only did credit expand. The social penetration of credit also deepened. Credit became available to people in society to whom it had not been previously available. This is a phenomenon that has been referred to as the “democratisation” of credit.⁴ Everyone has now heard of sub-prime lending. In the famous words of the Cork Committee: “[s]ociety facilitates the creation of credit, and thereby multiplies the risk of insolvency.”⁵ The available evidence cumulatively implies that the main driver behind increasing individual insolvency rates is the accumulation of debt. There was a marked acceleration of consumer borrowing as a percentage of national household income. Naturally, the media have had a field day. There has been talk of “spendemics”, a nation gripped by “affluenza” and so on. In the interests of time, you will perhaps forgive me for adopting a position of moral neutrality on the question of why we borrowed so much. I merely reiterate Sir Kenneth Cork’s simple point that credit expansion tends to increase the risk of default and insolvency among the community of borrowers.

³ See RJ Mann, *Charging Ahead – The Growth and Regulation of Payment Card Markets* (Cambridge University Press, 2006).

⁴ J Niemi-Kiesiläinen, I Ramsay and W Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Oxford and Portland, Oregon: Hart Publishing, 2003), pp 2–4.

⁵ Report of the Review Committee, *Insolvency Law and Practice*, Cmnd 8558 (1982), para 23. Whenever democratisation of credit is mentioned I like to tell the story of Monty Slater, a shih-tzu dog who achieved notoriety after being offered a gold credit card with a £10,000 credit limit by the Royal Bank of Scotland: see “Sounding the Retreat”, *The Economist*, 13 July 2006.

THE RISE OF IVAS

That then brings me to the next question: how come IVAs grew faster than bankruptcies in 2004 to 2006 despite, in the light of the Enterprise Act, predictions to the contrary? Before I can address this question, I need to spend some time surveying the nature of the choices that confront consumers whose debt problems have become insurmountable. The options divide broadly into two groups: formal resolution options under the Insolvency Act – bankruptcies and IVAs – and informal options available outside the bankruptcy system, principally debt management plans and various forms of refinancing.

Bankruptcy

Bankruptcy amounts to a statutory bargain. Debtors are required to surrender their assets which form the bankruptcy estate⁶ the proceeds of which are used to pay creditors. In return, your creditors must stop harassing you and, subject to one or two exceptions (such as student loans and fines) your debts are released one year from the date of the bankruptcy order. You are not required to surrender all your assets. Tools of trade and basic domestic necessities are exempt.⁷ The policy is not to reduce debtors to utter penury or to inhibit their ability to earn a livelihood. Nevertheless, there is a very clear downside for homeowners with equity in their properties.⁸ As well as surrendering assets, debtors who are in receipt of regular income (usually by virtue of salaried employment) can also be required to make payments from income for up to a maximum of three years provided that – to use the statutory language – the payments do not reduce their incomes below what appears to be necessary to meet their and their families' reasonable domestic needs.⁹ As I mentioned earlier when referring to the Enterprise Act changes, debtors remain subject to a handful of legal restrictions in the period before discharge from bankruptcy and debtors whose conduct is considered sufficiently blameworthy run the risk of being subjected to post-discharge restrictions that will further impair their credit histories.¹⁰

In terms of process, bankruptcy can be initiated either by creditors or debtors themselves by an application to the court.¹¹ The vast majority of bankruptcy orders are self-initiated: so-called “debtor own” petitions. Once the order is made, all bankruptcy cases pass into the hands of the official receiver attached to the relevant court.¹² Official receivers are state officials employed by the Insolvency Service of which there are around forty or so spread across England and Wales. They handle both bankruptcies and compulsory liquidations of insolvent companies. They have a statutory duty to investigate the conduct and affairs of every bankrupt¹³ and, broadly speaking, they act in the interests of creditors and in the wider public interest. The next thing that happens is that the bankruptcy order is publicised. Details are gazetted, advertised in the newspaper and entered onto a statutory insolvency register.¹⁴ Once the official receiver has completed an initial enquiry into the bankrupt's financial affairs it is open

⁶ Insolvency Act 1986 (“IA 1986”), ss 283, 306–308A, 436.

⁷ IA 1986, s 283(2).

⁸ Tempered to a limited extent by IA 1986, ss 283A, 313A, 335A–337.

⁹ IA 1986, ss 310–310A.

¹⁰ IA 1986, s 281A, Sched 4A. See also A Walters and M Davis-White, *Directors' Disqualification and Bankruptcy Restrictions* (London: Sweet & Maxwell, 2005), chap 11.

¹¹ IA 1986, ss 264–272.

¹² IA 1986, s 287.

¹³ IA 1986, s 289.

¹⁴ Insolvency Rules 1986 SI 1986/1925 (“IR 1986”), rr 6.46(2), 6A.4.

to the creditors or the government to appoint a private sector insolvency practitioner to take over the case and act as trustee in bankruptcy.¹⁵ A trustee can only take office if he or she is a licensed insolvency practitioner (“IP”) authorised to take insolvency appointments under the Insolvency Act by one of several recognised insolvency regulators which include the main accountancy bodies.¹⁶ An IP will usually only be appointed if the case is complex and there are sufficient assets to make the appointment worthwhile taking into account the IP’s fees. In practice, there are rarely any significant assets in consumer cases and so consumer bankruptcies are largely state-administered. The system is funded by its users – debtors and creditors – from fees that debtors have to pay as a pre-condition to entering bankruptcy and from the proceeds generated from any assets and income payments. Going bankrupt is not cheap. There is a court fee and the official receiver’s deposit (which covers the initial administrative costs) to pay. It currently costs around £500 to initiate your own bankruptcy.¹⁷

IVAs

IVAs are agreements between debtors and creditors facilitated by an insolvency practitioner within a statutory framework. They were first established in the Insolvency Act of 1986 and it is clear from the legislative history that they were originally intended to provide an alternative to bankruptcy for self-employed traders and professionals.¹⁸ The debtor makes a proposal to repay what he or she can reasonably afford for the duration of the arrangement. IVAs are flexible. You can offer contributions from income or assets or some combination of the two. Ultimately it comes down to what your creditors are prepared to accept. This is because an IVA only becomes legally binding if it is approved by in excess of 75% of the creditors by value.¹⁹ Under current law creditors can demand modifications to the proposal before approving it.²⁰ So, for example, they could seek to insist on higher monthly payments. However, the debtor and creditors cannot agree terms that would affect the rights of secured creditors to enforce their security without those creditors’ consent.²¹ In practice, this means that a home owning debtor will need to continue paying the mortgage and this will need to be factored into the proposal. There is no statutory minimum or maximum duration although the current market expectation within the credit industry is that an IVA based on monthly payments should run for five years.

The way the process works is that the debtor goes to an IP who assists in drawing up the proposal.²² The IP profession currently enjoys a statutory monopoly over IVA provision as by law a licensed IP is required to be involved in setting up and

¹⁵ IA 1986, ss 292–296.

¹⁶ IA 1986, ss 388–392; the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 SI 1986/1764. See also A Walters and M Seneviratne, *Complaints Handling in the UK Insolvency Practitioner Profession – A Report for the Insolvency Practices Council* (2008) available online at <http://ssrn.com/abstract=1094757>.

¹⁷ A new debt relief order procedure has been brought onto the statute book to provide a bankruptcy alternative for debtors with limited income and assets who cannot afford to pay the official receiver’s deposit. See Tribunals, Courts and Enforcement Act 2007, s 108 and Scheds 18–20. For background, see D McKenzie Skene and A Walters, “Consumer Bankruptcy Law Reform in Great Britain” (2006) 80 *American Bankruptcy Law Journal* 477.

¹⁸ Report of the Review Committee, *Insolvency Law and Practice*, Cmnd 8558 (1982), paras 91–92.

¹⁹ IA 1986, ss 257–258, 260; IR 1986, r 5.23. Strictly, the IVA takes effect if it is approved by in excess of 75% by value of creditors who actually cast their vote one way or the other. Creditors who are on notice but choose not to vote are ignored.

²⁰ IA 1986, s 258(2)–(5).

²¹ IA 1986, s 258(4)–(5).

²² IA 1986, ss 253 (with interim order); 256A (without interim order). The vast majority of IVAs are proposed without an application first being made to court for an interim order (a form of moratorium on collection efforts by individual creditors) under the section 256A procedure which was introduced by the Insolvency Act 2000.

implementing an IVA.²³ Once the proposal has been drafted, the IP agrees to act in the statutory parlance as “the nominee”. The IP has to report to the court on whether the proposed IVA has a reasonable prospect of being approved and implemented before convening a creditors’ meeting which votes on whether or not to approve the proposal.²⁴ In his or her capacity as nominee the IP is obliged by professional rules to be satisfied that debtors considering making a proposal have received advice about their available options including bankruptcy.²⁵ If the IVA is approved, there is a role switch: the IP ceases to be “the nominee” and becomes “the supervisor”.²⁶ As supervisor, the IP is both debtor and creditor facing. If the debtor’s financial circumstances worsen over the lifetime of the arrangement – if, for example, the debtor becomes ill or loses his or her job – the IP may need to broker a variation of the IVA terms. However, the IP’s primary legal responsibility as supervisor is to oversee implementation of the IVA, collect and distribute the debtor’s payments net of his or her fees and ensure that the debtor complies with the IVA terms. Although the nominee is obliged to report to the court on the viability of the proposal and the outcome of the creditors’ meeting,²⁷ the court has no role in the approval process unless there is some irregularity.²⁸ An IVA is essentially a private deal between the debtor and the creditors with very few legal limits on what can be agreed.

Why may a debtor prefer an IVA to some other option? Here are a few reasons:

1. An IVA will put a stop to creditor harassment and freeze interest on the outstanding debts. This is industry standard.
2. The debtor gets what amounts to a conditional release. Generally you will be proposing to repay what you can reasonably afford over a fixed period and this will be less than a 100p in the pound. So if you successfully complete the IVA, a proportion of the original debt will be wiped out. The downside is that you run the risk of being bankrupted²⁹ or at best ending up back at square one if you fail to make the payments that you have agreed to make under the IVA.
3. IVAs do not attract the same degree of publicity as bankruptcy orders. Your details will go on the statutory insolvency register³⁰ and be picked up by the credit reference agencies but there is no requirement for IVAs to be advertised in the newspaper.
4. IVAs have advantages for members of occupational and professional groups for whom bankruptcy has a more severe impact. For example, a solicitor who goes bankrupt is automatically suspended from practice under the Solicitors Act. So IVAs provide salaried consumer debtors as well as self-employed debtors in these groups with a debt relief alternative.
5. IVAs also provide scope for debtors to protect their assets. If you are a homeowner you will not automatically lose your home. However, the credit

²³ IA 1986, ss 388(2)(c), 389. Section 389A (introduced by the Insolvency Act 2000) provides scope for diluting the IP monopoly by allowing the Secretary of State to recognise bodies that could authorise non-IPs to act in relation to individual and/or corporate voluntary arrangements. To date, no such body has been recognised under this provision.

²⁴ IA 1986, ss 256, 256A, 257.

²⁵ See Statement of Insolvency Practice No 3 (England and Wales), Version 4 (effective April 2007) available at <http://www.r3.org.uk/publications/?p=80>. The debtor must be provided with a copy of the booklet *Is a Voluntary Arrangement right for me?* (revised edition, April 2004) also available at <http://www.r3.org.uk/publications/?p=80>.

²⁶ IA 1986, s 263(2).

²⁷ IA 1986, ss 256, 256A, 259.

²⁸ IA 1986, s 262. The decision of the creditors’ meeting to approve an IVA can be challenged by a dissenting creditor on limited grounds within the period of 28 days beginning with the day on which the IP reports the outcome to the court in accordance with section 259.

²⁹ IA 1986, s 264(1)(c).

³⁰ IR 1986, r 6A.3.

industry currently expects homeowners to agree to contribute a lump sum out of any equity that may accrue during the course of an IVA in addition to monthly payments from income. So there is an expectation that the debtor will re-mortgage towards the end of the IVA to release capital for the benefit of creditors, an expectation which rests on the now shakier assumption of stable or rising house prices.

From the standpoint of creditors, IVAs offer the prospect of better returns than bankruptcy. The available evidence suggests that creditors get very little by way of a return out of consumer bankruptcies. From a social standpoint, there may be “spill over” benefits. An industry standard five-year IVA is not a “free lunch”. It requires the debtor to keep to a strict budget and so may in theory promote financial rehabilitation going beyond simply wiping the slate clean. If debtors are to complete an IVA successfully they will need to demonstrate personal financial responsibility. To borrow a phrase used by my friend and colleague Jason Kilborn writing in the American context, the IVA can be theorised as “a responsible reaction to the challenges of the open credit economy”.³¹ In theory then the IVA looks like a “win, win”. Creditors will not recover 100p in the pound but should get better returns across a run of cases than they would get in bankruptcy (half a loaf is better than no loaf). Salaried debtors, especially those who have assets to shelter or who belong to certain occupational groups, should be better off assuming that they can comply with the IVA terms. Furthermore, there may be wider “spill over” benefits.

Informal Debt Resolution

As well as the formal debt resolution options available under the Insolvency Act, there are a range of informal options. First, there is a considerable market for non-statutory debt management plans (“DMPs”) offered by a mix of commercial and voluntary sector providers. DMPs are simply rescheduling agreements which extend time for repayment. The classic pattern is that the debts are consolidated and the debtor makes a single monthly payment to a provider who then distributes the payments among the creditors. DMPs generally provide for repayment in full over time. DMPs have advantages for debtors, particularly homeowners, as they can be entered into without the debtor having to give up assets. There are several downsides. DMPs do not strictly put a stop to collection efforts by individual creditors (they are informal and no more legally binding than a unilateral promise to forbear). Unlike IVAs, DMPs do not bind dissenting minority creditors. There is usually no interest freeze and invariably DMPs do not provide debt relief. You are reducing your monthly payments by stretching out the repayment period. Ultimately the whole debt together with interest remains repayable. It follows then that the higher the debtor’s debt to income ratio, the longer a DMP will need to last. Anecdotally it is understood that debtors have entered DMPs for seven, ten, even upwards of 15 years or more.

The other route to informal resolution is some form of refinancing either by means of a consolidation loan or home equity release. All you are doing here is rolling over old debt into new debt so these are only going to be viable solutions for debtors who can afford to service the new debt. After the recent credit crunch, these options are looking less appealing than they did two or three years ago.

There is then a substantial market for informal resolution and it follows that the official rates for bankruptcies and IVAs are a crude indicator of the level of financial

³¹ JJ Kilborn, “Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy” (2003) 64 *Ohio State Law Journal* 855 at p 890.

discomfort within the overall population. Not everybody who gets into difficulties goes down the Insolvency Act route and it is important to bear in mind that as well as a choice of formal option (bankruptcy or IVA) there is a choice between formal and informal options (bankruptcy/IVA or DMP/refinancing).

Explaining the Rise of IVAs: the Role of IVA Factories

This brings me back to the main plot. Given this range of options why were more debtors suddenly choosing to do IVAs against the background of an apparent easing of the bankruptcy regime? Did this have something to do with the profile of debtors? Maybe one answer is that there was simply more financial distress among people for whom IVAs appear to be a natural solution: higher income debtors with assets to shelter and/or people in occupational or professional groups most impacted by bankruptcy. However, this still begs the question why these “natural constituents” would suddenly opt for IVAs rather than DMPs which can also be used to shelter assets and avoid the remaining legal restrictions that apply to bankrupts.

What is more, an analysis of over 6,000 IVAs entered into during the second half of 2005 by PricewaterhouseCoopers³² suggests that the average IVA debtor is likely to be “unskilled, earning less than £30,000 a year and living in rented accommodation”. So it seems that increasing numbers of salaried debtors who do not own their homes were ending up in IVAs. What is interesting about this development is that for these debtors – salaried debtors who have little by way of assets to protect – the *economic* choice between going bankrupt and doing an IVA does not compellingly favour the IVA. You are looking at a five-year payment plan with a conditional discharge in an industry standard IVA over against a maximum three years of income payments with a one-year automatic discharge in bankruptcy. Also at point of entry the available evidence suggests that IVAs and bankruptcies are treated no differently by the credit reference agencies. One implication is that for these debtors non-economic factors – perceptions of stigma associated with bankruptcy, concerns about the additional publicity and/or a moral impulse to repay as much as possible – may be more important determinants than pure economic factors.

So far I have presented the choice between the various options – in particular the choice between bankruptcy and IVA – on the assumption that debtors will calculate the relative costs and benefits and act accordingly. But this kind of rational choice calculus, emphasising agency-based explanations of behaviour at the expense of structural explanations, ignores the point that choice of option is very likely to be influenced by the debtor’s interaction with the wide range of intermediaries out there that offer debt advice and debt solutions from across the public, private and voluntary sectors. The role of intermediaries is likely to be of particular significance where the choice is complex and marginal as is the case, at least in economic terms, between bankruptcy and IVA for salaried debtors who do not own their homes and otherwise have few assets. I am suggesting then that we cannot fully explain the exponential growth in IVAs between 2004 and 2006 without some account of what was happening on the supply side of the equation.

The growth in IVA numbers occurred against the background of significant changes in the market for debt resolution. In particular, in the first few years of the present decade new players – usually referred to as “IVA factories” – emerged. These are businesses which can process high volumes of debtors through IVAs. A number of major players controlling between them high levels of market share established

³² *Living on Tick: The 21st Century Debtor* (2006) available at <http://www.pwc.com/uk/eng/about/svcs/brs/PwC-IVAReport.pdf>.

themselves rapidly. Some of these acquired stock market listings on the Alternative Investment Market. It is essentially these volume providers that drove the transformation of the IVA from a restructuring tool for self-employed debtors and professionals into a volume “debt solution” for salaried consumer debtors.

In terms of the overall evolution of the market the factories amount to a second stage in the development of volume provision of consumer debt resolution within the private sector. The first stage in the evolution was the emergence of the unregulated debt management sector. Fee charging companies offering debt management plans grew strongly during the 1990s as an alternative source of provision to third sector debt advisory services offered by organisations such as the CAB and the Money Advice Trust. This was during a period when IVAs were stuck in a range of around 4,000 to 5,000 per annum, were still being used primarily by self-employed traders and professionals (much as was originally intended) and were being set up in the main by small independent firms of insolvency practitioners. The IP profession as a whole was not particularly geared up to meet demand from rising numbers of consumer debtors notwithstanding its statutory monopoly over IVAs. It has tended to be organised along traditional professional service lines and the vast majority of its fees were (and still are) derived from corporate insolvency and corporate restructuring work. IPs traditionally get their work through referrals from banks, solicitors and accountants, a referral network that functions well in generating business and corporate case loads but not consumer cases. Some have argued that the IP profession’s failure to capitalise on the rising tide of consumer over-indebtedness was a failure of entrepreneurship.³³ The situation was exploited by new entrants who learned from the success of the early debt management companies. These new entrants realised that IVAs could be made available in much the same way as debt management plans through aggressive high profile advertising and volume business processes with the added advantage that, in contrast to DMPs, IVAs offer some prospect of debt relief. Some providers carefully targeted occupational groups such as the police force and the armed services for whom bankruptcy is perceived to carry the risk of disciplinary consequences and possible job loss.

The factory model that emerged is one in which a handful of IPs are employed in the business to process high volumes of IVAs after initial screening of the debtors has been carried out by low paid staff in a call centre or over the internet using a financial template designed to identify whether an IVA is a viable solution for the debtor’s circumstances. Each element of the process tends to be handled by separate teams of staff to create an efficient division of labour.³⁴ So once the initial contact yields a possible IVA, one team will verify the financial information provided by the debtor and generate a draft proposal for review by the “in house” IP who is going to act as nominee, another team will handle the approval process and yet another team will support performance of the IP’s supervisory and collection functions after the IVA is approved. By 2004 then, the IVA factories had entered the market alongside the debt management companies, the free advice sector and lenders offering consolidation loans and equity release. There was therefore a significant increase both in the public profile of IVAs and in the market’s capacity to deliver them.

As market provision of IVAs expanded, it is plausible to suggest that they not only drew debtors away from bankruptcy but also from DMPs. In the absence of publicly available data on DMP volumes it is not possible to arrive at a definitive conclusion

³³ Most notably, Michael Green. See M Green, *IVAs: Over-indebtedness and the Insolvency Regime* (2002), short form report available at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/ivapolicyresearch/shortformreport.doc>.

³⁴ Volume IVA processes are described in more detail in Walters and Seneviratne, *op cit*, pp 31–33.

on the extent of any substitution effect. However, among the commercial providers, the IVA factories were bringing a new product to market offering salaried debtors debt relief rather than penal servitude in a debt management plan. This implies that at least some of the growth in IVA numbers can be explained by salaried debtors who might previously have entered DMPs (or, indeed, who were already in DMPs) switching to IVAs instead.

These developments on the supply side of the debt resolution market have occurred in a broadly supportive policy environment. The government's policy is that the IVA is the optimal tool for balancing the interests of debtors and creditors. This is premised on the "win, win" argument. IVAs are good for creditors because over a run of cases they should generate better returns than bankruptcy ("half a loaf. . ."). IVAs are good for debtors because in return for a fixed period of financial discipline debtors will get some degree of debt relief; contrast DMPs which offer no debt relief and which, depending on the debtor's circumstances, may last for many years. In line with this policy, the government is on the cusp of introducing a new "simple" IVA ("SIVA") procedure onto the statute book alongside the existing procedure that I have already described.³⁵ The SIVA is a streamlined IVA which will be available exclusively for debtors whose undisputed unsecured debts do not exceed £75,000. The main aim of the SIVA reform is to reduce fixed costs that currently have to be incurred by the IP regardless of the size of the debtor's liabilities. So for example, it is proposed to replace the current mandatory requirement for a "real" creditors' meeting with the use of voting by correspondence and to remove several of the IP's existing reporting requirements. Some dilution of creditors' rights is also contemplated. Creditors will no longer be able to ask for modifications – it will be a case of "take it or leave it" – and proposals will be capable of acceptance by a simple majority of creditors by value rather than the current 75% plus. The Insolvency Service has also done a great deal to encourage dialogue between the various repeat players involved in the IVA process through the establishment of the IVA forum. The SIVA reform that I just mentioned was itself a product of a working party the members of which included representatives from the IVA factories and the credit industry.

THE RELATIVE DECLINE OF IVAS IN 2007

Let me turn now to the second puzzle in the numbers: why the downturn in IVAs compared to bankruptcies in 2007? Just to remind you, the overall rate of individual insolvencies dropped away slightly last year but this was entirely attributable to a 5% fall in new IVAs. This may not seem like a big deal but for providers whose business models are dependent on turnover at 2006 levels to service start up, advertising and overhead costs, the short term trajectory of the market is rather important.

So what was the story behind the 2007 numbers? Well the main determinant appears to have been creditor behaviour. Remember that under the law as it stands an IVA can only take effect if it is approved by in excess of 75% of the creditors. Ultimately, the consumer IVA market functions on the basis of continuous interaction between the providers and repeat players from the credit industry – the banks and the intermediaries that they appoint to represent their interests and cast their votes in the IVA

³⁵ See Insolvency Service, *Improving Individual Voluntary Arrangements* (2005) available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/improvingIVAs.pdf; Insolvency Service, *A consultation document on proposed changes to the IVA regime* (2007) available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/proposedchangestoIVA.pdf. See also McKenzie Skene and Walters, *op cit*.

approval process – intermediaries such as The Insolvency Exchange (TiX for short) which is part of the TDX Group based here in Nottingham. As things stand, if you control or can co-ordinate a block of one quarter of the value of the debts you can vote down an IVA. If creditors do not all take an active interest in the approval process then, in practice, a creditor holding significantly less than 25% by value may be in a position to determine the outcome (because approval depends only on sufficient votes in favour as a proportion of votes *actually cast* rather than as a proportion of total debt). Repeat players within the credit industry are therefore a powerful and concentrated source of market discipline. They are in a position to influence the outcome of many consumer IVA proposals and to dictate overall industry standards. If the creditors do not trust the product or the providers then the number of IVA approvals is likely to go down all other things being equal.

The Bank of England estimates that in the first nine months of 2006 the banks wrote off around £3.6 billion on unsecured loans. This coincided with the rising numbers of IVA approvals during that year. It is perhaps then not surprising that a concerted backlash against the IVA factories began towards the end of 2006. The first stage of this creditor backlash was a sustained call by the credit industry for greater government regulation of the factories. Concerns were expressed about misleading advertising, quality of advice and the reliability of the providers' due diligence processes for verifying the financial information upon which IVA proposals are based. Many of these concerns were and remain legitimate. Some providers had claimed that an IVA could "write off up to 90% of your debt" when as far as we can tell the projected write off in the majority of IVAs is in the range of 60 to 70%. These providers were duly rapped over the knuckles by the Office of Fair Trading. Equally, even though IPs who set up IVAs are professionally obliged to satisfy themselves that debtors have had their options fully explained to them, it is easy enough to see the potential conflict of interest. An IVA provider has no particular financial incentive to recommend that debtors opt for bankruptcy rather than an IVA. Nevertheless, the government's response to credit industry calls for greater regulation was robust. In essence, the message was, "you chose to lend the money, live with the consequences" although, in practice, much has been done to promote dialogue and industry self-regulation behind the scenes, a point to which I will return before I close.

The second and more decisive stage of the creditor backlash was a determined campaign by creditors through their voting agents to stiffen the criteria on which they were prepared to vote in favour of IVA proposals. During 2007 creditors began increasingly to insist on so-called "hurdle rates" and ceilings on fees. Hurdle rates are minimum projected rates of return. So, for example, a group of banks might insist on a projected rate of return of at least 40p in the pound as a pre-condition for approving IVAs regardless of what individual debtors can reasonably afford. Several of the large banks also insisted that the provider's fees shouldn't exceed certain fixed levels expressed as a percentage of the debtor's projected monthly payments. This stance appears to have had two immediate consequences: (i) an increase in the numbers of IVA proposals rejected out of hand without any consideration of their merits for the individuals concerned; (ii) downward pressure on fees with implications for the providers' margins and business models.

What were the banks playing at? Clearly, their behaviour during 2007 is evidence of a loss of confidence in the capacity of volume IVA providers to deliver what banks consider to be acceptable returns. But if debtors who cannot pay their debts have their IVAs rejected what else are they going to do? One obvious response is to file for bankruptcy which is unlikely to produce much of anything by way of return to

creditors. What about the “win, win” and the “half a loaf” arguments? Were the banks just being perverse?

Well maybe not entirely. While recent events have reminded us that banks are not immune from perverse or foolish behaviour there may be some degree of method in their madness. One theory is that the double whammy of hurdle rates and fees caps amounts to hard-nosed attempt by some credit providers to channel debtors away from the IVA factories and, more generally away from licensed IPs, towards their own direct collection functions or towards favoured intermediaries that they control and fund within the debt management sector. This may be thought of as a process of *disintermediation* in which the banks seek to limit the supply of IVAs and reassert direct control over their customers in order either to (i) sweat the debt out by recourse to ordinary debt collection and enforcement techniques such as charging orders or (ii) to promote informal resolution options such as loan consolidation or debt management without having to incur the higher costs associated with professional IP intermediaries. So, for example, there is anecdotal evidence from before the credit crunch began in late-2007 that certain banks which will remain nameless were in the habit of offering their customers consolidation loans after having used their votes to reject those same customers’ IVA proposals. It has also been suggested that banks have perverse incentives to channel customers into DMPs because under accounting rules debts brought under an approved IVA have to be immediately written off in the banks’ books whereas the same is not the case with debts brought under debt management. In these troubled times for the banking industry, a customer doing debt management apparently impacts less on the bottom line than a customer doing an IVA, at least in the short term.

WHERE NEXT FOR IVAS?

I have endeavoured to offer an account of how the IVA has been transformed from a bankruptcy alternative for the self-employed, little known outside the insolvency profession (“past”), to a high profile volume debt solution for financially stricken salaried consumer debtors (“present”). What about the future? Where next for IVAs? Was 2007 a blip or the start of a downward trend?

The nice thing about this kind of occasion is that no-one will mind too much if I duck my own question. In this respect, I align myself with the legendary Harvard economist, JK Galbraith who is said to have observed that the purpose of economic forecasting is to make astrology look respectable! Nevertheless, I will try and offer a few thoughts.

Most commentators and forecasters seem to agree on one thing and that is that there will continue to be sustained or increased demand by consumer debtors for debt resolution during 2008 and 2009. These forecasters point to rising inflation, rising energy costs, falling house prices and the difficulties now faced by homeowners whose fixed rate mortgage deals are running out. In this climate you would think that IVAs would have a useful role to play. Conceptually, the IVA looks like a policymaker’s dream. It offers debt relief but in return for a considerable *quid pro quo*. It appears to strike a fair balance between debtors’ and creditors’ interests. As debtors are required to repay what they can reasonably afford it deflects the criticisms that the provision of debt relief erodes the social importance of keeping to our bargains and encourages moral hazard: the argument that if people know there is a nice easy “get out of jail free card” it will incline them to borrow more recklessly. Then there are the potential

“spill over” benefits. The possible educative value for debtors of working to a managed budget. The scope for debtors who complete the process to repair their credit histories and put their finances on a much surer footing for the future. On this last point, some of the providers have begun to grasp that debtors who succeed in IVAs make good prospective customers for savings and pensions products and there are signs that a market in financial services for successful “completers” is emerging. At risk of betraying my own prejudices on the question of the proper balance between borrowing, spending and saving I think this is a welcome potential spin-off development.

However, even if we assume that IVAs offer a socially desirable solution to the financial problems of salaried consumer debtors, in light of recent experience can the market deliver the policy? There remain concerns over whether IVAs are the “right” option for all of the debtors who end up in them and whether debtors are signing up with their eyes fully open to the risk that if they cannot keep up the payments they could end up being bankrupted or otherwise back to square one at the mercy of their creditors. There have been dark mutterings about “misselling” of IVAs in some quarters.

Concerns about quality of advice are being addressed in several ways through a variety of regulatory and other means. I will just quickly mention four of these:

1. The market has gone through a process of consolidation with the result that most providers now offer a range of different options, not just IVAs or debt management. The factories have become the financial conglomerates of the bankruptcy world. This to some extent mitigates the risk that debtors dealing with “one trick ponies” will be sold the one trick that is inappropriate for their circumstances.
2. Debt advice provision is regulated by the Office of Fair Trading under the consumer credit licensing regime and with effect from last April debtors can now bring complaints about providers to the Financial Ombudsman who has extensive powers to order redress.³⁶
3. The IP licensing bodies have raised their game in terms of how they monitor the IPs involved in volume provision. They now assess the whole advice process from initial contact through to approval and they are also monitoring conversion and early failure rates. The conversion rate measures the proportion of people seeking advice from a provider that actually end up doing an IVA. A low conversion rate – and historically across the industry the rate has been well under 10% – tends to imply that IVAs are, on the whole, being appropriately targeted. The early failure rate measures the proportion of a provider’s IVAs that fail in the first year. Needless to say, the higher the rate, the greater the cause for concern about the quality of the advice that debtors are receiving.
4. The industry in conjunction with the Insolvency Service is also working on a debtor’s guide to all the available debt resolution processes that providers will be expected to supply to debtors as part of their overall advice packages.

Despite all this regulation, there are many who still believe that bankruptcy is the best route especially for salaried debtors who have few assets and these critics point to the providers’ lack of financial incentives to recommend the bankruptcy option. But – respond the providers – what if you genuinely *do not* want your name in the *Evening Post*; what if you genuinely *do* want to pay as much as you can over five years because

³⁶ This change was brought about by the Consumer Credit Act 2006.

that is your moral preference? So long as you are properly informed, is that not your privilege?

The risk of market failure does not just lie with the providers. The insistence on hurdle rates and fee caps that we saw from creditors during 2007 may have a number of negative consequences. The squeeze on fees may diminish capacity if good providers are driven from the market. Lowering the price may also lower the quality (“pay peanuts, get monkeys”). Hurdle rates have two potentially negative effects: (i) they increase the prospects that some debtors will accede to creditor pressure to contribute more than they can reasonably afford leading to the approval of unsustainable IVAs with greater potential for early failure (and ultimately no benefit to debtors or creditors) and (ii) they increase the prospects that perfectly sustainable and sensible IVAs projected to deliver reasonable returns to creditors but returns that are lower than the hurdle rate will just be rejected without any consideration of their merits.

Of course if the market is to deliver government policy, trust between the providers and the credit industry remains vital. This is the obvious lesson of 2007. The credit industry needs to have the confidence that the product will yield better returns than other alternatives. A lot of work has been done to try and build trust. Earlier this year the providers and the British Bankers Association on behalf of its members signed up to an IVA Protocol for straightforward consumer IVAs, a voluntary industry code that was brokered by the Insolvency Service through the IVA forum. This establishes a standard framework for dealing with consumer IVAs.³⁷ Under the Protocol the providers are expected to take greater steps to verify debtors’ income and outgoings and make use of pro forma documents including standardised financial statements and agreed guidelines on allowable expenditure. In return, the banks are expected to accept IVAs without modification “wherever possible”. This does not mean that they are bound to approve a Protocol compliant IVA but if they vote against they have agreed to disclose their reasons to the provider. In theory this should improve the prospects that cases will at least be considered on their individual merits by making it more difficult for creditors to erect artificial barriers such as hurdle rates that may bear no relation to what debtors can realistically afford. Fee levels are left to be determined by the market as any attempt to agree parameters in the Protocol would have been vulnerable to challenge under competition law as illegal price-fixing. Of course, it does mean that the credit industry can maintain downward pressure on fees through the approval process.

It remains to be seen just how committed the banks will be. Another interesting feature of the Protocol is that debtors are required to disclose previous attempts to deal with their financial problems and explain why these were unsuccessful. The implication is that debtors should pursue informal solutions to their problems by speaking directly to their main creditors first instead of jumping straight into an IVA. This sort of approach – in which the banks strive to maintain control over their own customers – is in keeping with the process of informal resolution through bank-customer dialogue envisaged in the recently revamped Banking Code. It looks then as if the banks are hedging their bets: sticking with the IVA for now while at the same time pursuing alternative collection strategies outside the insolvency regime altogether that cut the factories and IP intermediaries out of the action. Will the deal hold? The operation of the Protocol is being kept under review by a standing committee populated by representatives from the credit industry, the providers and the IP community. Time will tell.

³⁷ For details see <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

The impression that the consumer IVA market is at a crossroads is reinforced by a couple of “known unknowns” that may affect the overall dynamics. The first one is the “simple” IVA reform that I touched upon briefly a bit earlier. This is currently meandering its way through the legislative process and should be in force by late 2008, early 2009. In theory, the simple IVA model should reduce the providers’ costs therefore making SIVAs more palatable to the banks. At the same time, the banks may have less scope to block SIVAs because of the change to simple majority voting. The future is bright, the future is SIVA?! Maybe.

Another legislative change that augurs less well for IVAs is the introduction in the Tribunals, Courts and Enforcement Act 2007 of a statutory debt management framework. This reform has been promoted by the Ministry of Justice. If it comes into effect, it will enable non-business debtors to propose a statutory debt repayment plan for a fixed period with a facility for debt write-off as long as you keep to the plan. Sound familiar? Debt repayment plans will have to be administered by approved operators but will not depend on creditor approval in order to have legal effect. So if it gets off the ground this legislative scheme will potentially offer a functional substitute for IVAs and SIVAs without the need for, and cost of, professional IP intermediaries.

In light of the 2007 experience it is difficult to avoid the conclusion that in the short term the IVA market will be what the banks and credit card companies want it to be. As we have seen the banks appear to have good incentives to pursue alternative strategies outside of the Insolvency Act for containing their write-offs: informal resolution, debt management plans, and – who knows – in time statutory debt repayment plans under the Tribunals, Courts and Enforcement Act. We could say that the acid test is whether IVAs – especially those entered into in the last two or three years – deliver acceptable returns to the banks at a reasonable cost. However, because creditor behaviour around the approval process can impact on the affordability and sustainability of IVAs, their potential in policy terms can only be fully realised if the banks cut the providers some slack.

Caught between the banks and the providers, faced with a range of debt resolution options mediated by a host of commercial, public sector and third sector debt advisory services, it is hard not to feel considerable sympathy for debtors who face having to navigate a complex system and make complex choices. The complexity of our debt resolution system underscores the critical need for intermediaries to provide proper advice on the full range of options.³⁸

Thank you.

ADRIAN WALTERS*

³⁸ See further McKenzie Skene and Walters, *op cit.* In its *Annual Report* for 2007 at p 4, the Insolvency Practices Council observes that “distressed debtors face a confused marketplace, populated by an ‘alphabet soup’ of debt advisers and ‘debt solutions’ without adequate objective information about their pros and cons and performance”. The Report is available online at http://www.insolvencypractices.org.uk/reports/2007/annual_report.htm.

* Geldards LLP Professor of Corporate and Insolvency Law, Nottingham Law School, Nottingham Trent University.

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