"Civil Rights" Revisited: *R (Reprieve) v The Prime Minister*

By Jonathan Lewis

In *R (Reprieve & Ors) v Prime Minister* [2020] EWHC 1695 (Admin), the Divisional Court held that Article 6 ECHR did not apply to a judicial review challenge to the Prime Minister's decision not to order an independent judge-led inquiry into UK complicity in torture and rendition. Its decision turned on the meaning of the concept of "*civil rights*" in Article 6 ECHR.

INTRODUCTION

1. The claimants, a human rights organisation and two members of Parliament, applied for judicial review of the Prime Minister's decision announced in July 2019 that it was not necessary to establish a public inquiry to investigate allegations of involvement of the UK intelligence services in torture, mistreatment and rendition of detainees in the aftermath of events on 11 September 2001.

2. The claim was advanced on two grounds. First, on the basis that the prohibition of torture, inhuman and degrading treatment or punishment in article 3 of the European Convention on Human Rights ("**ECHR**") imposes a *positive* obligation on States to conduct an effective independent investigation into allegations of ill-treatment and that that obligation was breached in this case.[1] Second, on the basis that the decision was irrational because the various steps taken by the Government were not a sufficient reason for abandoning the previous decision that a public inquiry was necessary. The

[1] Relying on *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 E.H.R.R. 25.

claimants primarily sought an order quashing the decision not to hold an independent, judge-led inquiry.

3. The defendant resisted the claim on the grounds that there was no need for a public inquiry because there was no unmet investigative obligation, as the issues had been considered in other reviews and reports. Further, it was said that a public inquiry would be disproportionately costly and that the decision under challenge was reasonable. The defendant sought to rely on "*sensitive material*".

4. Sharp P and Farbey J were called upon to decide two preliminary issues. First, whether art.6(1) ECHR applied to the proceedings. Second, if so, whether the claimants were entitled to disclosure to the extent set out in *SSHD v AF (No 3).*[2] This alerter is only concerned with the first issue.

THE CONCEPT OF "CIVIL RIGHTS"

5. In relation to civil proceedings, art.6(1) ECHR stipulates that "*in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing…*". It is well established that the concept of "*civil rights and obligations*" cannot be interpreted solely by reference to national law but has an autonomous meaning within art.6(1).[3] Further, some rights classified domestically as "*public law*" rights may be classified as civil rights under the ECHR if "*the outcome was decisive for private rights and obligations*" (at [13]).[4]

[2] [2009] UKHL 28, [2010] 2 AC 269.
[3] See *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin) at [34] citing *Ferrazzini v Italy (*2002) 34 E.H.R.R. 45 at [24].
[4] Citing *Ferrazzini* at [27].

6. The Divisional Court made clear that claims made in public law proceedings cannot simply be "*elided*" with "*civil rights*" under art.6(1). It did so by giving examples in the context of immigration decisions (such as the expulsion of non-nationals). One might intuitively think that decisions must entail the determination of civil rights. However, that is not the case. This is because the effect of an expulsion decision on an individual's civil rights (such as his family life) is *incidental* to the exercise of administrative powers exercised by the State for the purpose of immigration control.[5] Similarly, a person might argue that deportation might put her at risk of torture or other ill-treatment (in breach of art.3). However, the nature of the risk and the importance of art.3 does not mean that art.6(1) applies. Hence the court said: "*The importance of the individual rights that stand to be incidentally affected cannot convert public law proceedings into civil proceedings"* (at [15]). The criterion for determining whether art.6(1) is engaged is "*the nature of the proceedings and not the articles of the Convention which are alleged to be violated*".[6]

7. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment,*[7] *"civil rights"* were equated with "*rights in private law*". Decisions taken by administrative authorities which are decisive of the enforceability of private law contracts would involve the determination of civil rights. As would individual claims for compensation, including claims in respect of ill-treatment by agents of the State.

8. The Divisional Court suggested that there are indications in the case law that any human right protected by the Human Rights Act 1998 will be a "*civil right*" in so far as breach of the right would constitute a statutory tort.[8] Whilst not deciding the point,

[5] *Maaouia v France* (2001) 33 E.H.R.R. 42.
[6] Taken from *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 AC 110 at [175].
[7] [2001] UKHL 23; [2003] 2 AC 295.
[8] At [16], relying upon *QX* (footnote 3 above) at [42]-[44].

the Court was minded to accept that "*civil rights*" must be rights that inhere in a particular individual as opposed to reflecting the public interest more generally (at [17]). It held that art.6(1) will not be engaged in procedures that do not "*determine*" civil rights and obligations in the sense of adjudicating upon and making a dispositive legal determination of rights (at [18]) noting that the result of the proceedings must be "*directly decisive*" of a civil right or obligation.

THE COURT'S CONCLUSION

9. The Claimants' case was that art.6(1) applied because the court is being asked to determine the nature and scope of the Claimants' right to a lawful decision in respect of the investigative obligation under art.3. The Court found however that the right to a lawful decision by the executive does not in itself give rise to a "*civil right*" (at [40]). It noted that the claim was brought on public law grounds and sought public law relief.

10. The Claimants' argument failed for a further reason. Even if a breach of the art.3 investigative duty may in principle give rise to individual rights that may be classified as "*civil rights*" (e.g. a claim for damages), in any public inquiry, the claimants would not seek a determination of their *own* art.3 rights but would raise the rights of others who they say may have been the subject of mistreatment. The claimants themselves were not the victims and the proceedings did not have anything to do with *their* civil rights (at [41]). Whilst the claimants had standing to bring the challenge, that did not mean they could step into the shoes of the real victims (at [42]).

11. The concept of "*civil rights*" remains somewhat difficult to apply as it is not a domestic concept and does not neatly align to a domestic characterisation of rights. However, this decision provides a very helpful distillation as its defining features.

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