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Article 6 ECHR, Civil Rights, and the Enduring Role of the Common Law

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This article examines the role that the common law has played in Human Rights Act 1998 case law on the protection of ‘civil rights’ within the meaning of Article 6 ECHR. Focusing on Article 6 ECHR’s ‘disclosure’ and ‘full jurisdiction’ requirements, it highlights an increasingly nuanced relationship between the ECHR and common law in cases under and outside the Human Rights Act 1998. Although the general pattern within the case law has been one of domestic court fidelity to the ECHR – something that is wholly consistent with section 2 of the Human Rights Act 1998 – the article notes areas in which the courts have been reluctant to adapt common law principles, as well as instances of common law protections exceeding those available under Article 6 ECHR. The article suggests that such lines of reasoning reveal a robustness within the common law that brings a multi-dimensional quality to the Human Rights Act 1998. It also suggests that such robustness can be analysed with reference to ‘common law constitutionalism’ and a corresponding imagery of ‘dialogue’ between the domestic courts and European Court of Human Rights.

1 INTRODUCTION

It is now more than twelve years since the Human Rights Act 1998 (HRA) came into force in UK law and tasked the domestic courts with, among other things, reconciling common law principles with the law of the European Convention on Human Rights (ECHR).¹ In broad terms, the approach of the courts has been highly receptive to the demands of the ECHR, where a ‘mirror principle’ has operated within the framework of section 2 HRA to ensure that UK law remains in line with the ‘clear and constant jurisprudence’ of the European Court of

* Professor of Public Law, Queen’s University, Belfast. This is the revised text of the Annual Institute of European Public Law Lecture that was delivered at the University of Hull on 2 Mar. 2012. My thanks are due to Professor Birkinshaw both for inviting me to deliver the lecture and for commenting on an earlier draft of this text. Thanks for comments are also due to Professor Brice Dickson. Errors and omissions are mine.

¹ For commentary, see T. Hickman, *Public Law After the Human Rights Act* (Hart 2010); A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009); A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press 2009); and P. Birkinshaw, *The EU and National Constitutional Law* 183 (P. Huber ed., Boorberg, 2012).

Human Rights (ECtHR).² However, with an increased judicial familiarity with the ECHR has come a degree of circumspection about the applicability of some of its norms, and there have been isolated instances when UK courts have refused to modify domestic principle and practice.³ While these instances have very much been the exception rather than the rule – they have also been said to represent a ‘constructive dialogue’ with the ECtHR⁴ – the reality is that they have entrenched some domestic legal principles and their nationally defined judicial preferences. Common law principles have likewise proven robust in case law outside HRA where it was initially thought that they might change simply on account of having been exposed to the ECHR in cases embraced by section 2.⁵

The focus of this article is on how these patterns in judicial reasoning have been reflected in case law on Article 6 ECHR and the protection of ‘civil rights’ within the meaning of that Article.⁶ As is well-known, Article 6 ECHR provides in its text that, ‘In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. Within this, it is equally well-established that there are a number of minimum procedural guarantees that decision-makers should ordinarily observe and that, where they cannot do so, an individual’s rights under Article 6 ECHR will be safeguarded if he or she can have recourse to a court or tribunal with ‘full jurisdiction’ in the matter.⁷ These requirements have since resulted in a large body of case law that, while diverse in its content, has included two particularly dominant lines of reasoning on, respectively, the disclosure of evidence in civil proceedings and the

² On the ‘mirror principle’ see, most notably, *Re McCaughey’s Application for Judicial Review* [2011] UKSC 20; [2012] 1 AC 725; and for the term ‘clear and constant jurisprudence’ see *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 313, para. 26, Lord Slynn and *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, 350, para. 20, Lord Bingham.

³ E.g., *R v Horncastle* [2009] UKSC 14; [2010] AC 373 on the admissibility of hearsay evidence under Criminal Justice Act 2003, sec. 116. And see the subsequent ruling of the ECtHR in *Al-Khawaja v UK* (2012) 54 EHR 23, accepting that the admission of hearsay evidence does not automatically taint the fairness of criminal proceedings.

⁴ See, e.g., *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, 125, Lord Neuberger. On the theme of dialogue see further M. Amos, *The dialogue between United Kingdom courts and the European Court of Human Rights*, 61 Intl. & Comp. L. Q. 557 (2012) and N. Krisch, *The Open Architecture of European Human Rights Law*, 71 Modern L. Rev. 183 (2008).

⁵ Compare G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* Chs 7 & 8 (Hart 2002) and P. Daly, *Wednesbury’s Reason and Structure*, Pub. L. 238 (2011).

⁶ On which see D. Harris, *Judges, Transition and Human Rights: Essays in Memory of Stephen Livingstone*, 55 (J. Morison, K. McEvoy & G. Anthony eds., Oxford University Press 2007).

⁷ On the procedural guarantees see generally R. Clayton & H. Tomlinson, *Fair Trial Rights* (Oxford University Press 2010). And on ‘full jurisdiction’ see *Albert and Le Compte v Belgium* [1983] 5 EHR 533, 542, para. 29 and *Bryan v UK* (1996) 21 EHR 342, 360, para. 45.

question whether judicial review can ensure access to a court of ‘full jurisdiction’.⁸ Although the majority of the corresponding rulings have been marked by an adaptation of domestic principle and practice, there have been some points of retreat from change to the common law, as well as instances of common law protections exceeding those that are available under Article 6 ECHR. The trend has therefore been towards an increasingly nuanced relationship between domestic and European norms and, it would seem, a cyclical development of some common law principles.

In considering the nature of that relationship, the article begins with an outline of the ECtHR’s jurisprudence on the meaning of civil rights, the reach of disclosure requirements, and the concept of ‘full jurisdiction’. It thereafter divides into two sections which examine the domestic case law on disclosure and judicial review/‘full jurisdiction’, before considering the significance of the role that the common law has played in that case law. As will become apparent, the article suggests that much of the case law can be analysed with reference to ‘common law constitutionalism’, which emphasizes the primacy of the courts’ function in relation to, among other things, common law fundamental rights and the workings of judicial review.⁹ However, of related analytical value is the imagery of ‘dialogue’ that was noted above and which positions UK courts almost in a relationship of constitutional equivalence with the ECtHR. Such equivalence has been central to much literature on contemporary public law and, while it is not without controversy, it recognizes the enduring role of national legal norms at their intersection with international and supranational law.¹⁰ The article suggests that on that basis some of the existing dialogue around Article 6 ECHR can best be understood as an outworking of an evermore assertive common law constitutionalism. It also suggests that such constitutionalism may be the leading reason for the ECHR having only a more limited influence beyond the reach of cases embraced by section 2 HRA.

⁸ Other dominant lines have concerned the distinction between procedural and substantive bars on access to a court, and the test for apparent bias. On the former line see, most notably, *Barrett v Enfield LBC* [2001] 2 AC 550; *Matthews v. Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163; and T. Hickman, *The ‘uncertain shadow’: Throwing Light on the Right to a Court Under Article 6(1) ECHR*, Pub. L. 122 (2004). On bias see *Helow v. Home Secretary* [2008] 1 WLR 2416; *Porter v. Magill* [2002] 2 AC 357; and P. Havers & A. Henderson, *Recent Developments (and Problems) in the Law on Bias*, 16 *Judicial Rev.* 80 (2011).

⁹ On which see, by way of overview, J. Leslie, *Vindicating Common Law Constitutionalism*, 30 *Leg. Stud.* 301 (2010); and, e.g., *Axa General Insurance Ltd v. Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868, 913, para 51, Lord Hope and *R (Jackson) v. Attorney General* [2005] UKHL 56; [2006] 1 AC 262, 318, para. 159, Baroness Hale. Compare J Murkens, *The Quest for Constitutionalism in Public Law Discourse*, 29 *Oxford J. Leg. Stud.* 427 (2009).

¹⁰ See generally, J-B Auby, *La globalisation, le droit et l’État* (2d ed., Montchrestien, 2010).

2 ARTICLE 6 ECHR AND CIVIL RIGHTS: SOME PARAMETERS

The first – familiar – point to be made about ‘civil rights’ under Article 6 ECHR is that they bear the ‘autonomous’ meaning that is given to them by the ECtHR.¹¹ In historical terms, that meaning was associated with the conception of private law rights that is found in civil law systems¹² and with the need to provide procedural safeguards when there is a ‘dispute’ about such rights in proceedings that are determinative of the rights.¹³ However, the historical link to private law rights is no longer definitive of the reach of Article 6 ECHR, as the ECtHR has accepted that some administrative decisions can also be embraced by the Article’s procedural guarantees.¹⁴ While this broader interpretive approach has been the source of some of the difficulty in UK case law on the ‘full jurisdiction’ requirement – considered below – it is reflective of the idea that the ECHR is a ‘living instrument’ that is open to reinterpretation as the ECtHR deems necessary.¹⁵ The case law of the ECtHR has thus established that ‘civil rights’ can be engaged in disputes involving, among other things, land use,¹⁶ monetary claims against public authorities,¹⁷ licenses (whether to be applied for or to be revoked),¹⁸ social security and welfare benefits,¹⁹ and disciplinary proceedings.²⁰ On the other hand, there are categories of decisions that apparently remain outside the scope of the Article, for instance those relating to immigration and asylum²¹ and the employment rights of certain public servants.²²

The related procedural guarantees in Article 6 ECHR start from the premise that the right to a fair hearing itself is absolute, but that the component elements of a hearing are not.²³ Of course, the understanding that the right itself is absolute corresponds with the idea that access to justice is a fundamental constitutional value, and that the rule of law should be placed at the very heart of the ECHR system.²⁴ One corollary of this is that any limitation on the component elements

¹¹ On the autonomous meaning of provisions of the ECHR see, e.g., *Engel v. Netherlands* (1976) 1 EHRR 647.

¹² *Re Brolly’s Application* [2004] NIQB 69, para. 20.

¹³ *R (G) v. X Governors School* [2011] UKSC 30; [2012] 1 AC 167.

¹⁴ See P. Craig, *The Human Rights Act, Article 6 and Procedural Rights*, Pub. L. 753 (2003).

¹⁵ On the ECHR as a living instrument see, e.g., *Cossey v. UK* (1991) 13 EHRR 622, 639, para. 35.

¹⁶ E.g., *Ringisen v. Austria* (1979-80) 1 EHRR 455 and *Skarby v. Sweden* (1990) 13 EHRR 90.

¹⁷ *Editions Periscope v. France* (1992) 14 EHRR 597.

¹⁸ *Bentham v. Netherlands* (1986) 8 EHRR 1 and *Pudas v. Sweden* (1988) 10 EHRR 380.

¹⁹ *Feldbrugge v. The Netherlands* (1986) 8 EHRR 425; *Salesi v. Italy* (1998) 26 EHRR 187; and *Mennitto v. Italy* (2002) 34 EHRR 48.

²⁰ *Le Compte, Van Leuwen and De Meyere v. Belgium* (1982) 4 EHRR 1.

²¹ *Maouiia v. France* (2001) 33 EHRR 42; and *Algar v. Norway* (2012) 54 EHRR SE6.

²² *Pellegrin v. France* (2001) 31 EHRR 651 and *Eskelinen v. Finland* (2007) 45 EHRR 43.

²³ *Brown v. Stott* [2003] 1 AC 681, 719, Lord Hope.

²⁴ *Golder v. UK* (1975) 1 EHRR 524.

of a hearing – notification, disclosure, representation, reasons, etc²⁵ – must conform with both the principle of legality and that of proportionality. That latter principle is famously sensitive to the context within which limitations are effected,²⁶ but it still requires that limitations go no further than is necessary to allow the State to protect a countervailing public interest. Any limitation that sets one of the procedural elements at nought would thus be disproportionate almost by definition, as the limitation could not satisfy the ECtHR’s demand that measures meet a test of ‘careful design’.²⁷ Indeed, in that circumstance it could be said that the complete absence of one of the elements has gone beyond any question of qualifying procedural guarantees, and that the measures have trespassed, instead, upon the supposedly absolute nature of the right.²⁸

Perhaps the most commonly pleaded public interest justification for limiting the elements of the right to a hearing, most notably the element concerned with disclosure, is ‘national security’. In the UK, this has long been associated with the use of Public Interest Immunity (PII) certificates, where the courts have modified the common law’s approach to ensure compliance with the case law of the ECtHR (both in respect of criminal charges and civil rights).²⁹ However, while the law of PII retains a contemporary importance,³⁰ national security is now often safeguarded through the use of ‘closed material’ in proceedings where the interests of the individual are represented by so-called Special Advocates.³¹ This option, which will have its source in statute law,³² has inevitably been controversial as the individual will typically have been able to instruct his or her Advocate in relation to the closed material only before the Advocate has had sight of the material.³³ This has raised the difficult question of how much, if any, advance knowledge the individual should be given about the content of the material for the obvious reason that an almost total absence of knowledge would render instruction pointless.³⁴ In its leading ruling in *A v. UK*³⁵ – a right to liberty case concerning

²⁵ On the elements see Clayton & Tomlinson, *supra* n. 7.

²⁶ See generally E. Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

²⁷ On the need for which see *Open Door Counselling and Dublin Well Woman v. Ireland* [1993] 15 EHRR 244.

²⁸ For analysis to this effect see Lord Kerr’s dissenting judgment in *Tariq v. Home Office* [2011] UKSC 35; [2012] 1 AC 452.

²⁹ *R v. H* [2004] 2 AC 134; and P. Leyland & G. Anthony, *Textbook on Administrative Law* Ch. 10 (7th ed., Oxford University Press 2013).

³⁰ See *Al Rawi v. Security Service* [2011] UKSC 34; [2012] 1 AC 531, discussed below.

³¹ See generally A. Kavanagh, *Constitutionalism, Counter-terrorism, and the Courts: Changes in the British Constitutional Landscape*, 9 *Intl. J. Const. L.* 172 (2011).

³² E.g., Employment Tribunals Act 1996, secs. 7 and 10, and Schs 1 and 2 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861.

³³ See generally P. Birkinshaw, *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* Ch. 14 (K. Ziegler ed., Hart 2012).

³⁴ See, e.g., *Brady v. UK* [2012] 55 EHRR SE11.

³⁵ (2009) 49 EHRR 29.

the government's (now repealed) power to detain without trial foreign nationals suspected of involvement in international terrorism³⁶ – the ECtHR thus noted this possibility when holding that an individual must be given 'sufficient information . . . to enable him to give effective instructions to the special advocate' where his detention decision is based 'solely or to a decisive degree' on the closed material.³⁷ However, the ECtHR also stated that the question of sufficiency must be answered in context and on a case-by-case basis, and it would appear that less disclosure is required if the facts of a case move away from the right to liberty towards, for instance, the right to privacy.³⁸ The Strasbourg case law has thus left spaces between the different rights and, as will be seen below, this is one area where common law constitutionalism has asserted itself and provided for higher standards of protection.³⁹

An awareness of the importance of context also informs the ECtHR's case law on Article 6 ECHR's 'full jurisdiction' requirement. Broadly speaking, 'full jurisdiction' enables States to be in 'composite' compliance with their procedural obligations where a decision that has been taken in breach of Article 6 ECHR is subsequently challenged before an 'independent and impartial court or tribunal' that is able to revisit the impugned decision.⁴⁰ Whether that court or tribunal can be said to have 'full jurisdiction' then depends upon a range of factors that include 'the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal'.⁴¹ Of course, in the ideal-type of case the original decision-making body involved in the determination of civil rights would itself enjoy the necessary qualities of independence and impartiality, together with a final power to determine all questions of law and fact. However, when dealing with administrative decisions that are embraced by Article 6 ECHR, initial determinations will often be taken by persons or bodies who are not independent of the issues raised – for instance a government Minister or a local authority official – and it is clear that such decision-makers cannot satisfy the minimum requirements of Article 6 ECHR. Nevertheless, the ECtHR has held that this need not amount to a violation of Article 6 ECHR so long as the affected individual has a subsequent right of recourse to a judicial body that, at its height,

³⁶ Primarily under the Anti-terrorism, Crime and Security Act 2001, sec. 23; repealed by the Prevention of Terrorism Act 2005, sec. 16. But note that the Act of 2005 has since been repealed by the Terrorism Prevention and Investigation Measures Act 2011.

³⁷ (2009) 49 EHRR 29, para. 220.

³⁸ *Kennedy v. UK* (2011) 52 EHRR 4.

³⁹ *Al-Rawi v. Security Service* [2011] UKSC 34; [2012] 1 AC 531.

⁴⁰ *Albert and Le Compte v. Belgium* [1983] 5 EHRR 533, 542, para. 29. See further J. Maurici & S. Blackmore, *Focus on Article 6, Judicial Review* 56 (2007).

⁴¹ *Bryan v. UK* (1996) 21 EHRR 342, 360, para. 45.

has the power to retake the decision at hand. This thus accommodates overall compliance with the State's procedural obligations while recognizing the undesirability of subjecting administrative decision-making processes to the totality of Article 6 ECHR's judicial model of decision-making.⁴² In other words, if the decision of a Minister or public official is open to subsequent challenge before a court – most obviously by way of a full appeal – Article 6 ECHR will not be offended.

The resulting challenge for judicial review in the UK has been that the traditional common law grounds for review do not always afford the courts the requisite 'full jurisdiction'. Although it follows from the context dependent nature of 'full jurisdiction' that a court or tribunal need not always be able to substitute its decision for that of the original decision-maker, UK public law orthodoxy holds that the judicial review courts should *never* substitute their decisions for those of the original decision-maker.⁴³ This is the well-known territory of *Wednesbury* unreasonableness whereby judicial intervention is envisaged only where a decision 'is so unreasonable that no reasonable' authority could have taken it;⁴⁴ or, as Lord Diplock alternatively said, 'is outrageous in its defiance of logic or accepted moral standards'.⁴⁵ That standard of review was to attract far-reaching criticism even before the enactment of HRA,⁴⁶ but it was case law under HRA that prompted debate about whether *Wednesbury* could provide for more intensive judicial scrutiny of decisions in accordance with human rights norms.⁴⁷ This soon led to *Wednesbury* being displaced in HRA cases by the (potentially) more intensive standard of proportionality review,⁴⁸ and the courts likewise drew upon a more demanding 'error of fact' doctrine when reacting to Article 6 ECHR's 'full jurisdiction' requirement.⁴⁹ However, while it was thought that such developments might also lead *Wednesbury* to receive 'its quietus' in case law outside HRA,⁵⁰ that

⁴² See *Re Foster's Application* [2004] NI 248, 257, paras. 39ff., Kerr J.

⁴³ Although note the limited exceptions within the Tribunals, Courts and Enforcement Act 2007, sec. 141, and the Judicature (Northern Ireland) Act 1978, sec. 21.

⁴⁴ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223, 233, Lord Greene MR.

⁴⁵ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 410.

⁴⁶ Most famously in J. Jowell & A. Lester, *Beyond Wednesbury: Substantive Principles of Administrative Law*, Pub. L. 368 (1987).

⁴⁷ Following the lead given by the ECtHR in *Smith & Grady v. UK* (1999) 29 EHRR 493.

⁴⁸ *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 and *Re E (A Child)* [2009] 1 AC 536.

⁴⁹ *Runa Begum v. Tower Hamlets LBC* [2003] 2 AC 430, 439, para. 7, Lord Bingham, and *R (A) v. Croydon LBC* [2009] UKSC 8; [2009] 1 WLR 2557. On error of fact see P. Craig, *Administrative Law* Ch. 17 (7th ed., Sweet & Maxwell, 2012).

⁵⁰ *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, 549, Lord Cooke. See, to like effect, *R (British Civilian Internees – Far Eastern Region) v. Secretary of State for Defence* [2003] QB 1397.

has not happened and now no longer looks like it will.⁵¹ Moreover, to the extent that Article 6 ECHR had drawn the courts towards closer review for factual error, the Supreme Court has since greatly lessened the need for such review by holding that ‘civil rights’ are not engaged by important aspects of decision-making in the modern administrative state.⁵² The result is that the expected progression towards a post-*Wednesbury* setting in UK administrative law has not quite occurred.

3 DISCLOSURE, ‘SUFFICIENT INFORMATION’, AND COMMON LAW FAIRNESS

The starting point under this heading is the much discussed decision of the House of Lords in *Home Secretary v AF (No 3)*, which was one of a large number of cases arising out of the ‘war on terror’.⁵³ Although there had been earlier House of Lords rulings that had considered the compatibility of ‘closed material’ and Special Advocates with Article 6 ECHR,⁵⁴ *AF* was the first to do so in the light of the ECtHR’s above-mentioned decision in *A v UK*.⁵⁵ The ECtHR’s finding in that case had been made under Article 5(4) ECHR in relation to a legislative scheme that allowed foreign nationals to challenge detention orders made against them on account of their suspected involvement in international terrorism.⁵⁶ The power of detention under that scheme had previously also been the subject of a declaration of incompatibility in the domestic courts,⁵⁷ and *AF* concerned the workings of the legislative scheme that had been enacted in its place. The scheme in question – contained in the Prevention of Terrorism Act 2005 – allowed the government to counter the terror threat by making ‘control orders’ that could be either ‘derogating’ or ‘non-derogating’ in nature (the former typically amounting to a de facto deprivation of liberty; the latter interfering with other rights such as privacy and expression).⁵⁸ Both types of orders were subject to judicial control within a

⁵¹ For application see *R (E) v JFS Governing Body* [2009] 1 UKSC 1; [2009] 1 WLR 2353; for recent discussion see generally *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868; and for qualified academic support see Daly n. 5 above.

⁵² *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39, considered below.

⁵³ [2009] UKHL 28; [2010] 2 AC 269, analysed in, e.g., Kavanagh, n. 31 above and M. Elliott, *Stop Press: Kafkaesque Procedures are Unfair*, 68 Cambridge L.J. 495 (2009). On the wider body of terror case law, see C. Walker, *Terrorism and the Law* (Oxford University Press 2011).

⁵⁴ Notably *Home Secretary v MB* [2007] UKHL 46; [2008] AC 440.

⁵⁵ (2009) 49 EHRR 29.

⁵⁶ Anti-terrorism, Crime, and Security Act 2001, secs. 25–27, as read with the Special Immigration Appeals Commission Act 1997. Secs. 25–27 were repealed by the Prevention of Terrorism Act 2005, sec. 16. But note that the Act of 2005 has since been repealed by the Terrorism Prevention and Investigation Measures Act 2011.

⁵⁷ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

⁵⁸ Sections 1–4, now repealed. For judicial consideration of the nature of the orders and, in particular, the question of when the conditions attached to a non-derogating order can amount to derogating conditions see *Home Secretary v AP* [2010] UKSC 24; [2011] 2 AC 1.

statutory framework that permitted use of Special Advocates when the court was asked to consider whether ‘closed material’ justified the imposition of limitations on an individual’s rights. The net issue in *AF* was thus whether recourse to closed material under the Act should be permitted only where the individual who was to be affected by it was given prior and ‘sufficient information’ about its content.

The corresponding ruling of the House of Lords represented something of a high-water mark in terms of domestic court adherence to Strasbourg case law. Although the House of Lords’ earlier rulings had held that the Special Advocates procedure could ensure overall fairness – a point that Lord Hoffmann in *AF* thought was still true – the House was unanimous in holding that *A v. UK* required that individuals in control order cases should be given advance notification of the essence of the information to be used against them (Lord Hoffmann did so with ‘very considerable regret’).⁵⁹ In doing so, their Lordships did not hold that the scheme under the Act would automatically transgress Article 6 ECHR, but rather that it could have that effect. All would here depend on context, and the Lords emphasized that, to remain compatible with Article 6 ECHR, a controlee had to be given the ‘gist’ of the allegations against him or her so as to enable him or her to give effective instructions to his or her Special Advocate (the term ‘gisting’ is now often used in the case law⁶⁰). The Lords on that basis held that, so long as the gisting requirement was satisfied, there could be a fair hearing without the need for detailed disclosure of the sources of evidence on which the allegations were based. However, where the disclosed material consisted of only general assertions and the case against the controlee was based solely or to a decisive extent upon undisclosed materials, the requirements of a fair trial under Article 6 ECHR would not be satisfied and any control order would be unlawful.⁶¹

Of course, the reality of *AF* was that it undermined the long-term viability of the control order system as there would inevitably be cases in which the government would prefer to safeguard agents and so on rather than to disclose information that could imperil intelligence gathering.⁶² Indeed, the control order system has since been replaced by a new scheme for monitoring the activities of

⁵⁹ The earlier authority was *Home Secretary v. MB* [2007] UKHL 46; [2008] AC 440. Lord Hoffmann’s comments can be found at [2009] UKHL 28; [2010] 2 AC 269, 356, para. 70.

⁶⁰ E.g., *R (SAMS) v. Ministry of Justice* [2012] EWHC 562 (Admin).

⁶¹ As in, e.g., *AT v. Secretary of State for the Home Department* [2012] EWCA Civ 42.

⁶² Lord Hope expressed the point as follows: ‘[T]here are bound to be cases where . . . the procedure will be rendered nugatory because the details cannot be separated out from the sources or because the judge is satisfied that more needs to be disclosed than the Secretary of State is prepared to agree to. Lord Bingham used the phrase “effectively to challenge” . . . [This] sets a relatively high standard. It suggests that where detail matters, as it often will, detail must be met with detail . . . There may indeed be . . . a significant number of cases of that kind. If that be so, the fact must simply be faced that the system is unsustainable’. See [2009] UKHL 28; [2010] 2 AC 269, 362, para. 87.

terror suspects and, while that system retains a role for Special Advocates, it also includes provisions that seek to accommodate the ‘sufficient information’ requirement.⁶³ That said, case law has now also established that the principle in *AF* is less far-reaching than might have been expected, and that it does not automatically apply to national security cases more generally.⁶⁴ This is the result of the Supreme Court’s ruling *Tariq v. Home Office*,⁶⁵ which arose in the context of an employment dispute. The claimant was a man of Pakistani and Muslim heritage who brought a race and religious discrimination action after he had been suspended from his position as an immigration officer because some of his relatives had been involved in terrorism. The government sought to reply upon ‘closed material’ and Special Advocates in accordance with provisions of the applicable tribunal legislation,⁶⁶ and Mr Tariq argued, with reference to *AF*, that he should be given the gist of the information to be relied upon.⁶⁷ Rejecting that argument, a majority of the Supreme Court adopted the context-based logic of the ECtHR when distinguishing control order cases that could have implications for the liberty of the individual from the very different circumstances of an employment dispute.⁶⁸ To quote from Lord Hope:

There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing [fairness] on one side with [national security] on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will give rise to can to some extent be minimized and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office.⁶⁹

⁶³ Terrorism Prevention and Investigation Measures Act 2011, Sch. 4. For commentary, see C. Walker & A. Horne, *The Terrorism Prevention and Investigation Measures Act 2011: One Thing but not Much the Other?* *Crim. L. Rev.* 421 (2012).

⁶⁴ And note that there can also be exceptional circumstances when the courts will accept that individuals can rely upon anonymous witnesses when challenging government decisions taken for reasons of national security. See *W (Algeria) v. Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 AC 115 – permissible for an individual appellant to the Special Immigration Appeals Commission to keep the identity of one of his or her witnesses secret where the witness had important evidence to give but would face danger if their identity became known.

⁶⁵ [2011] UKSC 35; [2012] 1 AC 452.

⁶⁶ Principally Rule 54 of the Employment Tribunals Rules of Procedure as set out in Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861.

⁶⁷ Arguments were also advanced, unsuccessfully, in relation to EU law and the need for effective protection of Mr Tariq’s rights under Council Directive 2000/43/EC (race equality) and Council Directive 2000/78/EC (equal treatment in employment).

⁶⁸ See too, e.g., *Re Davidson’s Application* [2011] NICA 39, rejecting the argument that *AF* was applicable to prison disciplinary proceedings.

⁶⁹ [2011] UKSC 35; [2012] 1 AC 452, 507, para. 83.

The sole dissenting voice in *Tariq* was that of Lord Kerr who considered that the absence of advance knowledge in the case offended not only Article 6 ECHR but also the common law right to a fair hearing. In relation to Article 6 ECHR, his Lordship was of the view that a failure to disclose sufficient information ultimately offended the very essence of the ECHR's guarantee, notably the 'equality of arms' principle.⁷⁰ On the matter of the common law, his Lordship also noted that the right to a fair hearing is a fundamental guarantee and that it can be overridden only by express statutory words or words that have that effect by way of necessary implication, such words here being absent.⁷¹ This was not a point that was built upon or contested by other members of the Court, although his Lordship's comments did provide something of a bridging point between *Tariq* and the Supreme Court's ruling on the same day in *Al-Rawi v. Security Services*.⁷² The claim in that latter case – which was concerned with common law approaches to procedural fairness – had been brought by a number of individuals who alleged that they had been tortured overseas as part of the war on terror in circumstances where the UK government had been complicit in that torture (the case had been settled before reaching the Supreme Court but was heard given the points of principle that were involved). At the beginning of the trial, the government had argued that there were very large portions of evidence that would attract PII, and it invited the High Court, in the absence of a legislative scheme that allowed for 'closed material' etc, to use its inherent jurisdiction to create a parallel 'closed hearing' at which such evidence could be assessed. This raised the question whether the common law would tolerate such whole-scale procedural change and, while it was noted that it was open to Parliament to enact legislation of the kind in *AF* and *Tariq*, the Supreme Court held that the common law would not facilitate such change. Although there were some differences within the reasoning of the Justices, with Lord Clarke dissenting as to the result, the dominant conclusion was that open justice is a key component of the common law, and that there should be no limitation upon that form of justice save to the extent that could occur through the mechanism of PII. Any other approach would apparently deprive the common law of one the very values that define it.

There are two related points to be made about the above cases at this stage. The first concerns the disjunction between *Tariq* and *Al-Rawi* on the question of fairness under Article 6 ECHR and the common law.⁷³ Although it is true that

⁷⁰ [2011] UKSC 35; [2012] 1 AC 452, 519, paras. 124 ff.

⁷¹ [2011] UKSC 35; [2012] 1 AC 452, 514–5, paras. 108–109, citing, among other cases, *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann.

⁷² [2011] UKSC 34; [2012] 1 AC 531.

⁷³ On the case, see further J Ip, 'Al Rawi, Tariq, and the Future of Closed Material and Special Advocates' (2012) 75 *Modern L. Rev.* 606.

both cases permitted evidence to be withheld in the interests of national security – *Tariq* with reference to statute and *Al-Rawi* with reference to PII – *Al-Rawi* clearly posited an improved standard of protection for the individual under the common law. Of course, this is the outworking of ‘common law constitutionalism’ that was noted above, as the Supreme Court recognized open justice as a value that is central to domestic judicial reasoning and as not to be compromised by the courts.⁷⁴ By safeguarding that value in *Al-Rawi* to a standard in excess of *Tariq*, the Supreme Court thus complemented a line of common law decisions on the right to a fair hearing that has its genesis long before the enactment of HRA.⁷⁵ Moreover, it did so, as Lord Dyson noted, without presenting any challenge to the integrity of the wider ECHR system:

It is true that, by a majority, this court has decided in [*Tariq*] that the use of a statutory closed material procedure before the Employment Tribunal is lawful under article 6 of the European Convention on Human Rights . . . But the lawfulness of a closed material procedure under article 6 and under the common law are distinct questions . . . It is . . . open to our courts to provide greater protection through the common law than that which is guaranteed by the Convention.⁷⁶

The second point is cautionary, as the Supreme Court’s recognition, in *Al-Rawi*, that the legislature could provide for a closed material procedure is now being acted upon at Westminster.⁷⁷ This raises questions of fundamental importance for common law constitutionalism, most obviously of the approach that the courts might adopt when faced with primary legislation that lowers the *Al-Rawi* standard of protection. Although case law at the apex of common law constitutionalism has suggested that an Act of Parliament might be constitutionally reviewed where it proposes to abolish common law rights of access to the courts,⁷⁸ closed material procedures fall short of that more draconian outcome. This would then leave only the common law interpretive presumption noted by the Lord Kerr in *Tariq* or, on the assumption that express words will be used in any forthcoming legislation, the alternative review mechanisms provided by HRA. In that latter scenario, the Supreme Court would almost inevitably be faced with a further appeal that would require it to revisit its rulings in *AF* and *Tariq* and to decide which ruling, if either, should enjoy priority. Indeed, while the nature of any appeal would be fact specific and dependent on the rights affected by government (in)action – Article 3

⁷⁴ On which themes, see TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003).

⁷⁵ E.g., *Bagg’s Case* (1615) 11 Co Rep 93b. See further Leyland and Anthony, n. 29 above, Ch. 17.

⁷⁶ [2011] UKSC 34; [2012] 1 AC 531, 586, para. 68.

⁷⁷ Justice and Security Bill 2012, at <http://services.parliament.uk/bills/2012-13/justiceandsecurity.html>.

⁷⁸ *R (Jackson) v. Attorney General* [2005] UKHL 56; [2006] 1 AC 262, 302-3, para. 102, Lord Steyn, and [2006] 1 AC 262, 318, para 159, Baroness Hale, analysed in J. Jowell, *Parliamentary Sovereignty under the New Constitutional Hypothesis*, Pub. L. 562 (2006).

ECHR, Article 8 ECHR, etc. – it would likely also offer the Supreme Court the chance to consider whether *Al-Rawi* could be of residual relevance to its attempts to reconcile *AF* and *Tariq*. The significance of this point – and what it means for common law constitutionalism – is returned to below.

4 'FULL JURISDICTION' AND JUDICIAL REVIEW

The 'full jurisdiction' case law has also seen the common law reassert itself alongside the ECHR, although the emphasis here has been less on the vindication of rights and more on the parameters of judicial review in the modern administrative state. The concept of 'full jurisdiction', as outlined above, allows a State to be in composite compliance with its obligations where a decision that has been taken in breach of Article 6 ECHR is subsequently challenged before an 'independent and impartial court or tribunal' that is able to revisit the impugned decision (examples of decisions that might be challenged include those taken by Ministers with a policy role in relation to the matter at hand, or by local authority officers who are reviewing a determination made by their employer/local authority). For judicial review, the prospect of such compliance prompted debate about the intensity of review that could be achieved through, among other things, use of the proportionality principle and review for error of fact. Those standards provide for closer look review either through an enquiry into the balance within an administrative decision and/or the question whether the decision-maker has considered all relevant facts and given them a justified weighting (albeit that the 'discretionary area of judgment' doctrine can limit the scope for intervention).⁷⁹ However, while judicial review was to move towards such review in case law under HRA more generally as well as in some purely domestic law disputes,⁸⁰ concerns remained about the potential for too much judicial intervention in administrative decision-making – the worry of so-called 'over-judicialisation'. To guard against that possibility, the Supreme Court has recently placed important aspects of administrative decision-making outside Article 6 ECHR's meaning of 'civil rights', thereby rendering moot much of the debate about the required intensity of judicial review.⁸¹

The approach of the courts was initially synonymous with the House of Lords' rulings in the celebrated *Alconbury* case and in *Runa Begum*.⁸² The focus

⁷⁹ See further D. Feldman, *Proportionality and the Human Rights Act*, in Ellis ed., *supra* n. 26, at 117, 127–128; and on the 'discretionary area of judgment' see *R v. DPP, ex Kebeline* [2000] 2 AC 326, 381, Lord Hope.

⁸⁰ E.g., *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 (on proportionality) and *E v. Secretary of State for the Home Department* [2004] QB 1044 (error of fact).

⁸¹ *Ali v. Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39.

⁸² *R (Alconbury) v. Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Runa Begum v. Tower Hamlets LBC* [2003] 2 AC 430.

within both of those rulings was very much on the context dependent nature of ‘full jurisdiction’ and the understanding that the role of a court should be conditioned by ‘the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal’.⁸³ For instance, in *Alconbury*, the issue was whether the Secretary of State’s power to ‘call in’ and recover planning appeals under, among other statutes, the Town and Country Planning Act 1990 was compatible with Article 6 ECHR. Holding that it was compatible, the House of Lords relied upon the separation of powers doctrine when concluding that the traditional grounds for judicial review – illegality, irrationality, procedural impropriety – were sufficient in cases where challenges were made to the decisions of a Minister who had overall responsibility for planning policy. Although the Minister clearly was not impartial when calling in and recovering planning appeals, the House of Lords considered that judicial restraint of the kind associated with the traditional grounds for review was appropriate both because Parliament had entrusted the Minister with a particular policy-making function that was accompanied by detailed procedural rules and because the Minister was thereafter answerable to Parliament for the manner in which he performed the function.⁸⁴ And in *Runa Begum*, the House of Lords likewise held that the traditional grounds were sufficient in a homelessness case centred upon a factual dispute about the suitability of housing that had been offered to the individual (the local authority accepted that the individual was unintentionally homeless, and that it had a statutory duty, under the Housing Act 1996, to provide her with secure accommodation). The individual had argued that the traditional grounds were insufficient precisely because they did not enable the court to substitute its finding of fact for that of a local authority official who had been deputed to conduct a review of the authority’s original decision. However, in holding that Article 6 ECHR did not require an independent fact-finder in the case, the House of Lords emphasized that ‘the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators’.⁸⁵ Situating the case within its welfare context, the House of Lords concluded that it was perfectly legitimate for the legislature to entrust decisions of the kind at hand to administrators with specialist expertise in the area, as they would be required to reach their decisions in accordance with particular

⁸³ *Bryan v. UK* (1996) 21 EHRR 342, 360, para. 45.

⁸⁴ See, e.g., [2003] 2 AC 295, 344, para. 141, Lord Clyde: ‘Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister responsible to Parliament’. And note that a subsequent application to the ECtHR was deemed inadmissible: Appl 2352/02, *Holding and Barnes plc v. UK*, Mar. 12, 2002.

⁸⁵ [2003] 2 AC 430, 454, para. 59, Lord Hoffmann.

procedures, and their decisions would thereafter be subject to review on the traditional grounds. This, it was held, would avoid an ‘over-judicialisation’ of the workings of the welfare state and, by analogy, other regulatory areas such as those concerned with licensing and planning. In contrast, a more involved role for the courts was envisaged where decisions had implications for the private rights of individuals or where they were concerned with alleged breaches of the criminal law.

The earlier case law also suggested that, where the context of a case required more intensive invigilation of decisions, judicial review could provide such scrutiny. This was essentially a point about flexibility within the common law’s grounds for judicial review and the fact that ‘the spectrum of challenge by way of judicial review is not inconsiderable . . . [t]he breadth of challenge available . . . must go some considerable way to assuage concerns about the protection of such rights as may arise under [Article 6 ECHR]’.⁸⁶ That flexibility, in turn, has long been central to the reinvention of judicial review in the UK, and it has included – though by no means been limited to – the above-noted recognition of proportionality and the development of a more expansive error of fact doctrine.⁸⁷ Drawing on the significance of that latter doctrine, Lord Bingham thus noted in *Runa Begum* that judicial review allows the courts ‘not only to quash a decision . . . if it is held to be vitiated by legal misdirection or procedural impropriety or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact’.⁸⁸ Moreover, while his Lordship noted that the *Begum* case itself did not demand ‘anxious scrutiny’ or the ‘enhanced approach to judicial review’ associated with the proportionality principle,⁸⁹ his mention of those standards provided further insight into the range of control mechanisms available to the courts. The imagery was therefore of a variable remedy that was wholly consistent with the context specific character of the full jurisdiction requirement.

Notwithstanding such *dicta*, there were cases that established that judicial review may not always satisfy Article 6 ECHR. The foremost authority on the point was *Tsfayo v. UK*,⁹⁰ which arose out of a local authority housing benefit review board’s decision that the individual had not shown good cause for a delay

⁸⁶ *Re Foster’s Application* [2004] NI 248, 261, para. 47, J. Kerr, On the flexibility of the grounds see, most famously, J. Laws, *Law and Democracy* Pub. L. 72 (1995).

⁸⁷ See *supra* n. 80. And on the grounds for review more generally see Leyland & Anthony, *supra* n. 29, Chs 11–17.

⁸⁸ [2003] 2 AC 430, 439, para. 7.

⁸⁹ [2003] 2 AC 430, 440, para. 7.

⁹⁰ (2009) 48 EHRR 18. See too, e.g., *Kingsley v. UK* (2002) 35 EHRR 177. But compare *Crompton v. UK* (2010) 50 EHRR 36.

in making a claim for welfare entitlements (the review board was comprised of three councillors from the local authority and was therefore neither independent nor impartial). In finding that there had been a violation of Article 6 ECHR, the ECtHR drew a distinction between cases involving disputed questions of fact that ‘required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims’ (as in *Alconbury* and *Runa Begum*) and those, such as the instant case, in which the decision-maker ‘was deciding a simple question of fact, namely whether there was “good cause” for the applicant’s delay in making a claim’.⁹¹ In cases of this latter kind, the ECtHR considered that a reviewing court should be able to substitute its findings for those of the original decision-maker as ‘no specialist expertise [is] required to determine this issue . . . [Nor] . . . can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take’.⁹² However, the ECtHR noted that there had been no possibility of such review in the instant case, as the domestic error of fact doctrine does not extend so far as to permit the High Court to substitute its own findings of fact for those of the original decision-maker. There was, in the result, no composite compliance with Article 6 ECHR.

Tsfayo was clearly an important ruling and some authors suggested that its reasoning undermined the logic of *Alconbury* and *Runa Begum*. This was certainly the view of John Howell QC who considered that while ‘it may appear that the ECtHR simply distinguished the decisions in the *Alconbury* and *Runa Begum* cases . . . [*Tsfayo*] is more significant in its implications and it is inconsistent with the decisions in those cases’.⁹³ However, it is here that more recent Supreme Court case law on the concept of ‘civil rights’ is of importance, as it has served to blunt *Tsfayo* by limiting the reach of Article 6 ECHR in cases involving administrative decisions. The leading case is *Ali v. Birmingham City Council*,⁹⁴ which concerned a single mother who wished to challenge, before the County Court, the Council’s determination that it had discharged its statutory duties to her under the Housing Act 1996 when offering her accommodation which she had rejected. The powers of the County Court were essentially the same as those of the High Court on a claim for judicial review and the individual argued, among other things, that she did not have access to a court of ‘full jurisdiction’ for the purposes of Article 6

⁹¹ (2009) 48 EHRR 18, para. 45.

⁹² (2009) 48 EHRR 18, para. 45.

⁹³ *Alconbury Crumbles*, 12 Judicial Rev. 9, 11 (2007).

⁹⁴ [2010] UKSC 8; [2010] 2 AC 39. And for a forerunner see *R (A) v. Croydon LBC* [2009] UKSC 8; [2009] 1 WLR 2557.

ECHR.⁹⁵ Rejecting that submission, Lord Hope read *Tsfayo* not as doubting *Runa Begum* but rather as accepting it, and held that *Ali* was thereby governed by the earlier House of Lords' authority.⁹⁶ But much more fundamental was the Court's finding on the anterior question whether Article 6 ECHR was even engaged by the housing decision.⁹⁷ In holding that it was not engaged, the Court drew a distinction between the class of social security and welfare benefits whose substance was defined precisely, and which could therefore amount to an individual right, and those benefits which were essentially dependent upon the exercise of judgment by the relevant authority.⁹⁸ The Court on that basis said that cases in the latter category, where the award of services or benefits in kind was dependent upon a series of evaluative judgments by the provider, did not amount to a 'civil right' within the existing Strasbourg case law. As the entitlement to accommodation in this case fell into the latter category – a local authority officer was required to assess the suitability of accommodation that had been refused by the homeless individual – it followed that no issue arose under Article 6 ECHR.⁹⁹

This marked a very different approach to the problem of 'over-judicialisation'. While *Alconbury* and *Runa Begum* had preferred to meet that challenge by emphasizing that the traditional, restraint-based grounds of review would often suffice for the purposes of 'full jurisdiction', *Ali* stultified the debate about whether something more was needed by redrawing domestic law's perception of the boundaries of Article 6 ECHR. Explaining that choice, Lord Hope referred to the earlier reasoning of the House of Lords in *Runa Begum* when noting that there will be cases in which closer judicial involvement is needed, for instance those concerned with alleged breaches of the criminal law or disputes about competing private law rights.¹⁰⁰ However, the imperative in a case such as *Ali* was said to be very different indeed and shaped, in part, by wider 'utilitarian considerations'. As his Lordship expressed the point: 'It is not in the public interest that an excessive proportion of the funds available for the regulation of social welfare should be consumed in administration and legal disputes'.¹⁰¹

That said, it is not yet known whether *Ali* is a precedent that will be limited to basically its own facts or whether it will apply to evaluative decisions taken

⁹⁵ Appeals were on a 'point of law': Housing Act 1996, sec. 204. On the similarity between such appeals and judicial review see *Nipa Begum v. Tower Hamlets LBC* [2000] 1 WLR 306.

⁹⁶ [2010] UKSC 8; [2010] 2 AC 39, 62-3, paras. 53-57.

⁹⁷ See further, T. Cross, *Is There a 'Civil Right' under Article 6? Ten Principles for Public Lawyers*, 15 *Judicial Rev.* 366 (2010).

⁹⁸ Considering, among other authorities, *Feldbrugge v. The Netherlands* (1986) 8 EHRR 425; *Salesi v. Italy* (1998) 26 EHRR 187; and *Mennitto v. Italy* (2002) 34 EHRR 48.

⁹⁹ [2010] UKSC 8; [2010] 2 AC 39, 61, para. 49.

¹⁰⁰ [2010] UKSC 8; [2010] 2 AC 39, 47, para. 5.

¹⁰¹ *Ibid.*

across the welfare state more generally.¹⁰² Moreover, to the extent that Article 6 ECHR no longer applies to some welfare decisions, it is apparent that other Articles of the ECHR may apply and that these can require the courts to engage in ‘closer look’ review that goes beyond that envisaged by *Alconbury* and *Runa Begum*. A good example is provided by *Manchester City Council v. Pinnock (Nos 1 & 2)*,¹⁰³ where the local authority had brought County Court proceedings for a demotion order against one of its secure tenants under section 82A of the Housing Act 1985 for the reason that the family of the tenant had been involved in anti-social and criminal behaviour. The tenant wished to invoke his Article 8 ECHR rights by way of defence and the corresponding question for the Supreme Court was whether the County Court should thereby have the power to assess the proportionality of making an order and, in undertaking that assessment, to resolve any relevant dispute of fact. Holding that such powers of enquiry were necessary, the Supreme Court departed from an earlier, well-established line of House of Lords authority that had rejected the need for any such judicial assessment of the respective interests and rights of authorities and tenants.¹⁰⁴ Given the point, it may therefore be that the courts will still be required to have what would amount to ‘full jurisdiction’ in some cases, albeit that the language and elements of Article 6 ECHR will be absent.

5 THE ROLE OF THE COMMON LAW

What, then, do the above cases reveal about the role of the common law in the HRA era? Certainly, an obvious comment would emphasize the distinction between cases under and outside HRA, and the fact that the common law has inevitably had a fuller influence in cases in the latter grouping. However, while that comment is supported by the logic of section 2 HRA – where the courts ordinarily follow the ‘clear and constant jurisprudence’ of the ECtHR¹⁰⁵ – it fails to explain more complex patterns that can be discerned in the case law. As has been seen above, there have been instances where traditional common law principles have continued to apply even in some Article 6 ECHR cases, and this posits a nuanced interplay of norms under and outside HRA. So what are the

¹⁰² For an indication that it will so apply see, e.g., *R (Saava) v. Kensington and Chelsea RLBC* [2010] 13 CCL Rep 227, the High Court noting *obiter* that the creation of personal budgets for sick and disabled persons falls outside Art. 6 ECHR (Ali was only mentioned on appeal: [2011] 14 CCL Rep 75). And for subsequent consideration in the housing context see, e.g., *Bubb v. Wandsworth LBC* [2012] BLGR 94.

¹⁰³ [2010] UKSC 45; [2011] UKSC 6; [2011] 2 AC 104.

¹⁰⁴ *Harrow LBC v. Qazi* [2004] 1 AC 983; *Kay v. Lambeth LBC* [2006] 2 AC 465; and *Doherty v. Birmingham City Council* [2009] AC 367.

¹⁰⁵ *R (Ullah) v. Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, 350, para. 20, Lord Bingham.

factors that have governed that interplay of norms, and how far can they be conceived of in terms of ‘common law constitutionalism’? And what is the explanatory value of the ‘constructive dialogue’ that was noted in the introduction and which places UK courts almost in a position of equivalence with the ECtHR?

Taking first the insights offered by ‘common law constitutionalism’, the emphasis that such constitutionalism places upon the protection of common law fundamental rights has already been discussed in relation to the *Al-Rawi* case. That said, an emphasis on rights is not its sole point of relevance to UK public law, as it is a model of constitutionalism that envisages a much more general role for the courts in delimiting the reach of judicial review and on wider matters of constitutional design.¹⁰⁶ Corresponding matters include the possible control of the legislative choices of the Westminster Parliament and devolved legislatures,¹⁰⁷ and the question of how the courts might approach any legislation that diminishes the *Al-Rawi* standard of protection is returned to below. But equally important to common law constitutionalism is the function of the courts in moderating domestic law’s reception of international and supranational legal norms. While that function was historically associated with a particularly rigid form of constitutional dualism,¹⁰⁸ the overlap of legal orders in Europe was taken to demand a more reflective approach to a reality in which external norms can enjoy primacy within domestic law.¹⁰⁹ The resulting judicial approach was to accept that external norms can have that status within domestic law but only because the common law facilitates that outcome through the ascription of constitutional status to selected Acts of Parliament that include HRA.¹¹⁰

This approach to the reception of norms clearly attributes a wider legitimating role to the common law, and it helps to contextualize the imagery of ‘constructive dialogue’.¹¹¹ Although that imagery perhaps adheres to a disputed ‘pluralist’ vision of inter-institutional relations in Europe and beyond,¹¹² it recognizes that national courts may refuse to accept an external norm, and that

¹⁰⁶ The corresponding body of literature is voluminous. For an overview see Leslie, *supra* n. 9. And for some of the earlier contributions see Allan, *supra* n. 74; and M. Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001).

¹⁰⁷ *Axa General Insurance Ltd v. Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 and *R (Jackson) v. Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

¹⁰⁸ See, most famously, *R v. Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

¹⁰⁹ The leading account remains M. Hunt, *Using Human Rights Law in English Courts* (Hart 1997), Chs 1–3.

¹¹⁰ *Thoburn v. Sunderland City Council* [2003] QB 151.

¹¹¹ See further A.O’Neill, *Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act*, Pub. L. 724 (2002).

¹¹² N. Walker, *The Idea of Constitutional Pluralism*, 65 *Modern L. Rev.* 317 (2002) and, most famously, Cases C-402 and 415/05, *Kadi v. Council and Commission* [2008] ECR I-6351. For criticism see G. de Búrca, *The EU, the European Court of Justice, and the International Legal Order*, 51 *Harv. Intl. L.J.* 1 (2010). And compare *HM Treasury v. Ahmed* [2010] UKSC 2 & 5; [2010] 2 AC 534 and *Al-Jedda v. UK* (2011) 53 EHRR 23.

their explanation for doing so may lead the originator of the norm – here, the ECtHR – to revisit its initial reasoning.¹¹³ Of course, that is not in any way to suggest that instances of refusal have been commonplace in the Article 6 ECHR case law, as the House of Lords/Supreme Court has willingly departed from even some of its more recent precedents where that has been deemed necessary to give effect to Strasbourg case law (as in *AF* and *Manchester City Council v. Pinnock*).¹¹⁴ But what it does envisage – and what has occurred – is an occasional rejection of European standards and/or the common law leading debate about the current state of development of the ECHR. Indeed, the idea that the common law can lead debate would appear to have been a driving consideration in the Supreme Court’s ruling in *Ali*. Having noted in that case that the ECtHR had not moved to resolve uncertainty about Article 6 ECHR’s application in the welfare context, Lord Hope said that:

the time has come for the [Supreme Court] to address this question and take a decision upon it. The present state of uncertainty as to the administration of social welfare benefits . . . is unhealthy. It encourages litigation . . . The delay and expense that uncertainty on this issue gives rise to involves a waste of resources which would be much better deployed elsewhere in the public interest.¹¹⁵

Ali’s retreat from an ‘over-judicialisation’ of administrative decision-making also illustrates how the courts can use common law precepts to delimit the reach of judicial review, including under HRA. Although *Pinnock* would suggest that there are other routes to ‘closer look’ review in the welfare setting – subject, presumably, to arguments about the ‘discretionary area of judgment’ doctrine¹¹⁶ – *Ali*’s reference to utilitarian considerations resonates with other long-established lines of common law reasoning on judicial restraint.¹¹⁷ This is thus a clear instance of the nuanced interplay of norms, as it has introduced common law arguments into disputes under HRA and highlighted orthodox concerns about what the courts can – and should – do. Moreover, to the extent that this has marked a need for restraint in some cases under HRA, it corresponds with – and may explain – a

¹¹³ See, e.g., *Al-Khawaja v. UK* (2012) 54 EHRR 23, as read in the light of *R v. Horncastle* [2009] UKSC 14; [2010] AC 373.

¹¹⁴ And for more general patterns in the case law see B. Dickson, *The Record of the House of Lords in Strasbourg*, 128 L. Q. Rev. 354 (2012).

¹¹⁵ [2010] 2 AC 39, 56, paras. 31–32. See, too, the dialogue around Art. 6 ECHR and the practice of ‘striking-out’ negligence actions against public bodies in *Osman v. UK* (2000) 29 EHRR 245; *Barrett v. Enfield LBC* [2001] 2 AC 550; and *Z v. UK* (2002) 34 EHRR 97. Although note that striking out can give rise to issues under Art. 13 ECHR: see, e.g., *MAK v. UK* (2010) 51 EHRR 14.

¹¹⁶ *R v. DPP, ex Kebeline* [2000] 2 AC 326, 381, Lord Hope. And for an example of its application in the welfare context see *Camden LBC v. NW* [2011] UKUT 262.

¹¹⁷ E.g., *Hill v. Chief Constable of West Yorkshire* [1989] AC 53, subsequently followed in *Brooks v. Metropolitan Police Commissioner* [2005] UKHL 24; [2005] 1 WLR 1495 and *Smith v. Chief Constable of Sussex* [2008] UKHL 50; [2009] 1 AC 225.

resurgence of interest in the logic of *Wednesbury* unreasonableness outside HRA.¹¹⁸ As was outlined earlier, it was expected that *Wednesbury* would be subsumed by proportionality in a defining act of legal Europeanization that would lead towards what was sometimes described as a more transparent and coherent model of review.¹¹⁹ However, that has not happened and, while the proportionality principle now has a place within the common law,¹²⁰ the previously unfashionable principle of unreasonableness has retained relevance.¹²¹ There has therefore been something of a robustness to the common law that has both safeguarded *Wednesbury* and led to related, more recent *dicta* about the courts performing only a limited role through review for error of fact.¹²²

Aside from matters of restraint, the other area in which the common law has proven robust remains that covered by *Al-Rawi*.¹²³ Obviously, its robustness here can be associated more immediately with activism than restraint, as the case was centrally concerned with the common law's protection of the right to a fair hearing. However, its activism was also tempered by the recognition that Parliament can interfere with the right, with earlier judicial comments envisaging common law review only if a legislative choice purports to abolish the constitutional right of access to a court.¹²⁴ That said, if it can be assumed that the legislative measures presently being considered will not reach that threshold, this will place any future review of legislation under HRA and require the Supreme Court to revisit *AF* and *Tariq* and, almost inevitably, to consider the relevance of *Al-Rawi*. While the factual differences between the cases may mean that they would be regarded as essentially discrete – as was the Supreme Court's approach when considering *AF* in *Tariq* – a willingness to absorb *Al-Rawi* into the HRA case law may inevitably result in a more interventionist outcome. This is because the reasoning in *Al-Rawi* is much closer to that in *AF*, where the emphasis was on preserving 'core, irreducible minimum' standards of fairness. In the event that *Al-Rawi* emboldens that approach, common law constitutionalism will have further defined the HRA era.

¹¹⁸ Daly, *supra* n. 5; J. Sumption, *Judicial and Political Decision-making: The Uncertain Boundary*, 16 *Judicial Rev.* 301 (2011); and T. Dyke, *Judicial Review in an Age of Austerity*, 16 *Judicial Rev.* 202 (2011).

¹¹⁹ See Anthony, *supra* n. 5, Chs 7–8; and R (*Daly*) v. *Secretary of State for the Home Department* [2001] 2 AC 532, 549, Lord Cooke. But compare M. Elliott, *The Human Rights Act 1998 and the Standard of Substantive Review*, 60 *Cambridge LJ.* 301 (2001).

¹²⁰ Notably in relation to legitimate expectations: see R (*Niazi*) v. *Secretary of State for the Home Department* [2008] EWCA 755.

¹²¹ See, among others, R (*E*) v. *JFS Governing Body* [2009] 1 UKSC 1; [2009] 1 WLR 2353 and *Axa General Insurance Ltd v. Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868.

¹²² *MA (Somalia) v. Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65, 80–81, paras. 43–45.

¹²³ See too, e.g., *HM Treasury v. Ahmed* [2010] UKSC 2 & 5; [2010] 2 AC 534.

¹²⁴ R (*Jackson*) v. *Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

6 CONCLUSION

All that, however, is for future case law, and firm conclusions can be drawn only on the basis of the existing authorities. Insofar as those confirm the near absolute pattern of national court fidelity to ECtHR rulings,¹²⁵ they also make clear that the common law can play much more than just a residual role under and outside HRA. When doing so, it is of course trying to find the most appropriate ‘fit’ between national and ECHR norms to ensure that any doctrinal changes occur in the manner best suited to the domestic setting. While this perhaps begs the question whether the optimum approach has always been adopted,¹²⁶ the interplay of ‘common law constitutionalism’ and ‘constructive dialogue’ has evidently given the Article 6 ECHR case law a multi-dimensional quality. It is thus here that the common law has reasserted itself and why its role can be expected to endure.

¹²⁵ See the various commentaries at n. 1 above.

¹²⁶ E.g., the retention of *Wednesbury*, read in the light of Jowell and Lester, n. 46 above. See also, in relation to the negligence liability of public authorities, n. 117 above, and G. Anthony, *Positive Obligations and Policing in the House of Lords*, 12 EHRLR 538 (2009).