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Editorial

We are pleased to publish the second issue of the twentieth volume of the *Coventry Law Journal*.

This issue includes articles in the areas of environmental law, international arbitration and victims of domestic slavery, together with recent developments and case notes on various aspects of human rights.

We are especially pleased to include articles by Dr Adeyemi from the University of Ilorin, Nigeria, and from two research students - Ekin Omeroglu from Kadir Has University, Turkey, and Vincent Umeukeje from the University of Greenwich.

2016 marks the 50th anniversary of the Law School at Coventry, and 20 years of the law Journal: we will be publishing a Special Issue of the Journal to mark these events.

We hope you enjoy reading this issue and we look forward to your contributions in future issues. If you wish to contribute to the Journal and want any advice or assistance in getting published, then please contact the editors: the next publication date is July 2015 and contributions need to be forwarded by early June.

The editors

ARTICLES

INTERNATIONAL ARBITRATION LAW

Taking Evidence in International Arbitration

Ekin Omeroglu*

Introduction

The parties' autonomy to determine arbitral procedure is one of the most fundamental characteristics of international arbitration. Most arbitration statutes and arbitration rules include a provision giving parties the freedom to determine the rules for taking evidence. Few provisions directly address the taking of evidence by and before arbitral tribunals in international arbitration rules, such as the Arbitration Rules of United Nations Commission on International Trade Law ("UNCITRAL Rules"), the Arbitration Rules of International Chamber of Commerce ("ICC Rules"), the Arbitration Rules of the London Court of International Arbitration ("LCIA Rules") and the American Arbitration Association Commercial Arbitration Rules ("AAA Rules"), and even fewer provisions in national arbitration statutes deal with the issue.

When it comes to the taking of evidence and evidence in international arbitration, obviously there are differences between common law and civil law legal systems. In common law countries, the initiative for the collection and presentation of evidence is almost exclusively within the hands of the parties. Conversely, in civil law countries judges take a more active role in conducting proceedings and the collection of evidence. Therefore, the manner in which evidence is presented at a hearing depends on the legal backgrounds of the tribunal and the parties. In order to address the different approaches to evidence in international arbitration in common law and civil law systems, the International Bar Association ("IBA"), adopted in 1999 and later amended in 2010, its Rules on the Taking of Evidence in International Arbitration ("IBA Rules of Evidence"). The IBA Rules of Evidence enjoy increasing recognition and acceptance by the international arbitration community. The aim of the IBA Rules is to provide an effective, efficient and fair process for the taking of evidence. The Rules not only provide mechanisms for the gathering and presentation of evidence, but also contain extensive provisions on evidentiary matters in arbitration, such as document production, witnesses, experts, evidentiary hearing and admissibility of evidence. Given that these Rules are crucial for evidence-taking procedures in international arbitration, the article will also largely focus on these Rules.

International Arbitration

International arbitration is a legal mechanism and generally informal trial procedure for the final and binding determination of disputes in accordance with procedures and structures chosen directly or indirectly by the parties. It has developed as a system for resolving disputes between parties from different legal systems. One of the major reasons in choosing arbitration is party autonomy, and therefore, increased flexibility; especially when compared

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with national courts. Parties have the freedom to engage in arbitration and to make specific provisions for the operation of their arbitration. Procedural flexibility permits the process to be tailored to the particular needs of each case.[1]

Obviously, arbitral tribunals need to rely on evidence in order to resolve disputes between parties. It is quite remarkable that most rules of arbitration – whether institutional or *ad hoc* – do not contain detailed rules on how to conduct the taking of evidence. As a result, the IBA Rules of Evidence are intended to provide an efficient, effective and fair process for taking of evidence in international arbitration.[2] Parties and arbitral tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings. Article 1(2) of the IBA Rules states that when the parties have agreed to apply the rules, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement. The Rules are not intended to provide a complete mechanism for conducting an international arbitration. Parties must select a set of institutional or ad hoc rules, such as the ICC, AAA, LCIA, and UNCITRAL Arbitration Rules. This article will often refer to the IBA Rules of Evidence, which play an important role in international arbitration and are a frequent source of inspiration for arbitrators. It will address firstly the party autonomy principle and its limitations, then the evidentiary means and the IBA Rules of Evidence.

The Party Autonomy Principle in the taking of evidence and its limitations

The Party Autonomy Principle in the taking of evidence

The party autonomy principle is the most fundamental characteristic of international arbitration. All modern arbitration statutes and arbitration rules recognize the party autonomy principle.[3] Parties are free to determine the arbitrators, number of arbitrators, place of arbitration, content of arbitration agreement, and rules applicable to the merits and the procedure of the dispute.[4] The parties can customize the arbitral process to their needs and eliminate legal rules that might be unsuitable.[5] It is generally accepted that party autonomy plays a significant role in determining how to conduct the procedure of the dispute. The opportunity to the parties to determine the arbitral procedures is provided in leading international acts and arbitration rules, such as article V (1)(d) of the New York Convention,[6] and article 19(1) of the UNCITRAL Model Law.[7] On the other hand, these arbitration rules

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[1] Lew, J D M, Mistelis, A and Kröll, S M *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), pages 1-3; Born, G *International Arbitration: Law and Practice* (Kluwer Law International, 2012), pages 3-5; Moses, M L *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012, 2nd ed.), pages1-4; Carbonneau, T E *The Law and Practice of Arbitration* (JurisNet, 2009, 3rd ed.), pages 1-11.

[2] Ashford, P *the IBA Rules on the Taking of Evidence in International Arbitration* (Cambridge University Press, 2013), page 2.

[3] See article 28(1) of the UNCITRAL Model Law, s. 46(1) of the English Arbitration Act, s. 1051(1) of the German Civil Procedure Act (*"ZPO"*), article 35(1) of the UNCITRAL Rules Art 35(1), article 21(1) of the ICC Rules, article 22(3) LCIA Rules.

[4] Lew, Mistelis, Kröll, *supra* n 1, 413; Yeşilırmak, A *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkisi Çözümünde Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri* (On İki Levha Yayıncılık, 2011), page 104.

[5] Carbonneau, *supra* n 1, page 41.

[6] "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

[7] "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

are generally silent on specific procedures, such as the taking of evidence. However, arbitration statutes grant arbitrators broad authority to decide on evidentiary issues. For example, article 19(2) of the UNCITRAL Model Law provides that if parties fail to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[8] It appears that the party autonomy principle extends to the taking of evidence and the admissibility of evidentiary means.[9] For example, parties are free to agree on the production of documents or the evaluation of expert evidence. Institutional rules also contain general provisions confirming that the arbitral tribunal has control over the arbitral procedure or that the tribunal has the power to determine the admissibility and weight of evidence (article 22 and 24 of the ICC Rules, article 20(2) and 22(1) (f) of the LCIA Rules and article 27(4) of the UNCITRAL Rules). Article 9(1) of the IBA Rules similarly provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any evidence. Although arbitration tribunals will generally admit any evidence that a party deems necessary to establish its cases, a tribunal always has the authority to determine that evidence is inadmissible. Article 9(2)[10] of the IBA Rules provides the limitation on admissible evidence, whether oral or written.

Under article 2(1) of the IBA Rules, the arbitral tribunal shall consult the parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, effective and fair process for the taking of evidence. This provision presents an opportunity for the parties, their counsel and the arbitral tribunal to meet and to craft a procedure that is fit for the particular purpose of the parties.[11]

The limitations of the Party Autonomy Principle

The party autonomy principle has a number of limitations. Public policy considerations and the mandatory rules at the place of arbitration, if any, limit the party autonomy principle. Mandatory rules of procedure of the place of arbitration inform the parties which procedural provisions they must respect if they expect to validly arbitrate in the territory. As mandatory rules are not subject to party consent, the parties' own choice of law cannot bind the arbitrator's determination of which, if any, mandatory law will apply.[12]

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[8] Section 34 of the English Arbitration Act, article 1464 of the French Civil Procedure Act Art, article 182 of the Swiss Private International Law Act.

[9] Lew, Mistelis, Kröll, *supra* n 1, 558; Poudret, J F, Besson, S, Berti, S V and Ponti, A *Comparative Law of International Arbitration* (Thomson, Sweet & Maxwell, 2007), pages 550-551.

[10] "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Documents, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling, (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

[11] Ashford, *supra* n 2, page 34.

[12] Greenawalt, A K.A. 'Does International Arbitration Need a Mandatory Rules Method?' [2011] Mandatory Rules in International Arbitration (Juris), page 147.

Article 1(1) of the IBA Rules provides that the rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the parties or by the arbitral tribunal. These mandatory rules will usually be the substantive law of the agreement and the law at the place of arbitration proceedings. For example, the English Arbitration Act specifically itemizes in an annexed schedule the provisions of the Act that are mandatory. Section 43, on securing the attendance of witnesses, is a mandatory provision relating to taking of evidence. A tribunal does not itself have the power to require the attendance of a witness, but s.43 of English Arbitration Act provides that a party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. This provision may only be done with the permission of the tribunal or the agreement of the other parties. Subsection 43(3)(a) contains a limitation which applies also in court proceedings. The witness must be in the United Kingdom. The arbitral proceedings must be conducted in England and Wales or Northern Ireland. The procedures under this section may be invoked even if the seat of arbitration is outside the UK or no seat has been determined, as long as the arbitration is being conducted in one of those places.[13] Since s. 43 of the English Arbitration Act is mandatory, it will be implied in all rules.[14] However, some authors contend that mandatory rules have no application in international arbitration, because their application is inconsistent with the doctrine of party autonomy and the rights of the parties to select the procedural and substantive rules that should apply to their relationship.[15]

As far as the conduct of the arbitral proceedings is concerned, mandatory provisions primarily concern the fundamental procedural principles applicable to all arbitrations. There are two other fundamental principles: party equality and the equal opportunity to present one's case. "Party equality" means that no party shall be given an advantage over the other party, and "the equal opportunity to present one's case" is designed to ensure that each party has enough time when stating his case.[16] From the notion of equality follows a right to be heard. This principle must inform all stages of the arbitral process, from the constitution of the arbitral tribunal to the making of an award.[17]

The concepts of these fundamental principles have been associated with the terms "fairness" and "justice".[18] Similar provisions can be found in article V (1)(b)[19] of the New York

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[13] Section 2(3)(a): "The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined-(a) section 43(securing the attandance of witnesses)…but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

[14] Harris, B, Planterose, R and Tecks, J *The Arbitration Act 1996* (Blackwell Publishing, 2007), page 212; Lord Mustill and Boyd, S C *Commercial Arbitration* (Butterworths, London, 2001), page 323; Marshall, E A and Gill: *The Law of Arbitration* (Sweet &Maxwell, London, 2001), page 49.

[15] Goode, R 'The Role of the *Lex Loci Arbitri'* [2001] International Commercial Arbitration 17 *Arbitration International*, page172.

[16] Binder, P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2010), page 278.

[17] Petrochilos, G *Procedural Law in International Arbitration* (Oxford University Press, 2010), page 145.

[18] Lew, Mistelis, Kröll, *supra* n 1, pages 558-559; Binder, *supra* n 16, page 277; Kurkela, M S and Turunen, S *Due Process in International Commercial Arbitration* (Oxford University Press, 2010), page 17.

[19] "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case".

Convention and article 18[20] of the UNCITRAL Model Law. Modern arbitration rules also confirm the principle of due process.[21] In practice, however, the due process exception to enforcement proves to be one of the most popular claims to avoid enforcement.[22] In a New Zealand case,[23] the plaintiff sought to set aside the award alleging lack of opportunity to be heard. In considering the question of breach of natural justice, the court noted that article 18 of the Model Law provides that parties shall be treated with equality and that each party shall have the opportunity to present its case. In that case, the court took into account the length of the arbitration proceedings and the evidence submitted and concluded that the award issued by the arbitral tribunal was a reasonably foreseeable outcome with sufficient evidentiary support. The court thus dismissed the application to set aside the award.

The fundamental principles have particularly important connection with the taking of evidence. They imply that each party must be made aware of the evidence adduced by the other party and have an opportunity to submit observations thereon. The fundamental principles also include the right to be present when evidence is taken. In most cases, mandatory law imposes only very general, albeit important, guarantees of procedural fairness.[24]

Evidentiary Means

In international arbitration, there are four groups of evidentiary means: documents, witness testimony, experts (party-appointed or tribunal-appointed experts) and site or subject inspections.

Documents

In many cases, documents may be considered the most important evidence in international arbitration.[25] The main reason for the practice of international arbitration tribunals in relying upon evidence contained in documents is because the application of the so-called "best evidence rule" applies primarily to the weight of the evidence rather than to its admissibility.[26] The term "document" comprises any form of data that can be evidenced by a text or can otherwise be reproduced in readable, auditory, visual form (letters, faxes, emails exchanged between the parties, protocols, minutes of meetings, phone calls, account records,

[20] "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

[21] Article 22 of the ICC Rules, article 14, 20-22 of the LCIA Rules, article 38, 41 of the Arbitration Rules of China International Economic and Trade Arbitration Commission (*"CIETAC"*).

[22] Jana, A, Armer, A and Kranenberg, J K 'Article V(1)(b)' [2010] Recognition and Enforcement of Foreign Arbitral Awards, page 233; Holtzmann, H M and Neuhaus, J E *a Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989), page 550.

[23] *Trustees of Rotoaria Forest Trust v Attorney-General* [1998] Case Law on UNCITRAL Texts (CLOUT) Case No. 658, New Zeland: High Court (Commercial List) Auckland http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/567/83/PDF/V0656783.pdf?OpenElement accessed on 22 September 2015.

[24] Born, *supra n 1*, page 152; Poudret, Besson, Berti, Ponti, *supra* n 9, pages 477-479.

[25] Some arbitrations may be suited to adjudication upon documents alone. For example, ICC Case No. 10074 involved a dispute between German and Turkish banks, where the parties agreed no witnesses were to be heard. Bühler, M and Dorgan, C 'Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbiration – Novel or Tested Standards?' [2000] Journal of International Arbitration 17, pages 1, 4.

[26] Redfern, A, Hunter, M, Blackaby, N and Partasides, C *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004), page 298.

dock receipts, licences, etc.).[27] No definition of document appears in international arbitration acts or rules, except for the IBA Rules of Evidence, which offers the following definition: "document" means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings, or any other mechanical or electronic means of storing or recording information. This definition confirms the importance of writing and written proof in the taking of evidence. In this way, written evidence is often stronger and more credible than oral evidence.[28]

The admissibility of documents is generally left to the discretion of the arbitral tribunal, however Article 3(1) of the IBA Rules,[29] reflects the modern practice of rejecting the strict application of admissibility and expressly requires each party to submit all relevant documents.[30] The nature of article 3(1) of the IBA Rules of Evidence can be found expressly in the main institutional rules, e.g. article 25(1) and 25(2) of the ICC Rules[31] and article 15(6) of the LCIA Rules Article. Article 3(1) of the IBA Rules requires a party to submit the evidence on which it intends to rely within the time ordered by the tribunal. Past decisions by arbitral tribunals denying the admissibility of evidence tendered by a party because it was submitted after a deadline have been upheld by reviewing courts as consistent with due process principles. Thus, in *International Military Services Ltd v Ministry of Defence and Support for Armed Forces of Iran* case,[32] the Netherlands Supreme Court upheld the decision of an ICC tribunal to reject documentary evidence which had been proffered after the passing of a deadline.[33]

How documents are used and presented at the hearing is likely to divide lawyers from different legal traditions. The common law and civil law approaches to the production of documentary evidence are different. In common law systems, parties expect to be afforded discovery of the documents in the possession of the other party and to serve a request for production of those documents. In civil law systems, however, the documents that must be produced are those on which each party intends to rely.[34] In international arbitration practice, an arbitral tribunal may order document production, but generally this is limited to specific documents, which are directly relevant to the case, and there is no obligation to produce copies of documents requested by the opposing party unless the tribunal orders disclosure of documents. In contrast to common law, which allows the adversaries to conduct discovery via devices, the arbitrator in an international arbitration dispute is the only one who generally undertakes discovery.[35] The parties do not perform discovery to each other.[36]

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[27] Lew, Mistelis, Kröll, *supra* n 1, page 564; Berger, B and Kellerhals, F *International and Domestic Arbitration in Switzerland* (Sweet & Maxwell, Thomson Reuters, 2010), page 344.

[28] Lew, Mistelis, Kröll, *supra* n 1, page 564.

[29] "Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party."

[30] *ibid*, pages 565-566.

[31] In order to reduce the concerns of civil lawyers about discovery requests, ICC arbitration practitioners have adopted a different terminology, preferring to speak about document requests rather than discovery. Grierson, J and van Hooft, A *Arbitrating under the 2012 ICC Rules* (Wolters Kluwer, 2012), page 173.

[32] Hoge Raad 24 April 2009, NJ 2010/171.

[33] O'Malley, N D *Rules of Evidence in International Arbitration* (Informa, 2012), page 26.

[34] However, according to the amended s. 142 of the German Code of Civil Procedure, the judge may now order production of documents in the possession of the adverse or even a third party if one of the parties to the lawsuit has referred to such documents in its pleadings. A third party is privileged according to sections 383 to 385 of the Code.

[35] Article 24 of the UNCITRAL Model Law provides that the arbitral tribunal may require a party involved in the arbitration to produce documents, exhibits and other evidence.

[36] Lew, Mistelis, Kröll, *supra* n 1, page 567; Magnum, Y. W. NG *Evidence in Arbitration* (VDM Verlag Dr. Müller, 2009), page 29; Moses, *supra* n 1, pages 175-176; Ward, R K 'The Flexibility of Evidentiary Rules in

The arbitration statues are silent on document requests. The English Arbitration Act gives arbitral tribunals the power to decide whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage. Article 1460(3) of the French Code of Civil Procedure provides that where a party has in its possession some evidence, the arbitrator may enjoin him to produce the same. In the United States, s. 7 of the Federal Arbitration Act provides that arbitrators may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case.

None of the institutional rules provide for compulsory discovery in general terms; most simply provide that the arbitral tribunal can direct parties to produce documents (article 24(3) of the UNCITRAL Rules Article, article 21 of the AAA Rules)
In order to try to achieve a common ground between the civil law and common law approaches to document requests, the IBA Rules of Evidence provide a mechanism. Under article 3(2)[37] of the IBA Rules, a request for document production shall be addressed to both the arbitral tribunal and the other parties. This enables parties not raising an objection to comply spontaneously with such a request without the intervention of the tribunal.[38]

Article 3(3) of the IBA Rules of Evidence stipulates what the request to produce shall contain and limits the extent of disclosure. As document disclosure has become more common in international arbitration, there has developed a checklist of requirements that a request for production must meet. In brief, these five requirements are: 1. It sufficiently describes the document; 2. if a category of documents is requested, then it provides a narrow and specific[39] description of the category; 3. It provides a reasoned explanation as to why they are relevant to the case and material to its outcome;[40] 4. It confirms that the documents are not in its control; 5. It explains why the documents are assumed to be in the control of the other party.[41]

Generally, an arbitral tribunal lacks the authority to order the production of documents in the possession of a third party, even where these documents are relevant to the case.[42]

International Trade Dispute Arbitration Problems Posed to American-Trained Lawyers' [1996] 13 Journal of International Arbitration 3, page 14.

[37] "Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce".

[38] Kühner, D 'The Revised IBA Rules on the Taking of Evidence in International Arbitration' [2010] 27 Journal of International Arbitration 6, page 671.

[39] In *International Thunderbird Gaming Corp (United States of America) v United Mexican States* case, arbitral tribunal explained: "In accordance with article 3(3)(a) of the IBA Rules, the categories of documents to be produced should be "narrow and specific" which the Tribunal interprets to mean narrowly tailored, ie, reasonably limited in time and subject matter in view of the natüre of the claims and defenses advanced in the case."

[40] A good example of this principle is found an English case, *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388, which considered the standards found in article 3 of IBA Rules in an application to set aside an LCIA award. The requesting party claimed that it had been unfairly discriminated against when a number of its document requests were denied by the tribunal during the arbitration. The tribunal noted that there did appear to be a relevant connection between the document request and the claiming party's arguments in the case. However, it was still appropriate for the tribunal to deny document production because the arbitral record showed that arbitrators no longer regarded the argument itself to be material to its award., O'Malley *supra* n 33, page 58.

[41] O'Malley *supra* n 33, page 40.

[42] Redfern, Hunter, Blackaby, Partasides, *supra* n 26, page 303.

Furthermore, international arbitration rules do not provide for third party evidence. The reason for this is that arbitration is a consensual process between the parties. However, the scope of arbitration has widened; as arbitration becomes an accepted private form of rendering justice, there is a public interest that the results are arrived at based on a reasonable amount of information including evidence from third parties.[43]

Article 3(9)[44] of the IBA Rules allows a party to request the arbitral tribunal to take steps that are legally available to it to obtain disclosure from the non-party. The term "legally available" is generally seen as a direct reference to national or domestic laws that afford a tribunal the right to issue subpoenas or otherwise petition a local court for assistance in taking evidence. If it is not possible to obtain the documents in question without initiating legal process, an arbitral tribunal may through a court's assistance obtain documents, which are in the possession of a third party. Article 27 of the UNCITRAL Model Law is representative of arbitration statutes providing for judicial assistance in evidence taking. Article 27 of the UNCITRAL Model Law provides that "The Arbitral Tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence." However, the level of assistance available under national laws similar to article 27 of the UNCITRAL Model Law will vary according to jurisdiction. Some courts may interpret their domestic legislation as not permitting court assistance to secure documentary evidence, while other courts make provision for only limited assistance, expressly prohibiting pre-hearing disclosure to be ordered on behalf of an arbitral tribunal.[45] As an example, the High Court of Hong Kong, in *Vibroflatation AG v Express Builders Co* case, held that it had jurisdiction to grant subpoenas in order to assist arbitral tribunals in taking evidence on the grounds that an international arbitration covered by UNCITRAL Model Law was involved, since the parties had their places of business in different States and that, while subpoenas could not be characterized as interim measures of protection falling under article 9 of the UNCITRAL Model Law, they could be granted under article 27 of the UNCITRAL Model Law if requested by the arbitral tribunal or by a party with the approval of the arbitral tribunal, since the domestic law of Hong Kong provided for subpoenas.[46]

As noted in article 3(9) of the IBA Rules of Evidence, an arbitral tribunal may authorize a party to pursue court action to obtain documents on their own. In doing so, an arbitral tribunal may issue a written directive recording its acquiescence to such an action. Article 27 of Model Law does not make specific reference to the procedure to be followed by the tribunal, but the practice in some jurisdictions which have enacted the Model Law is that a party,

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[43] Webster, T H 'Obtaining Evidence from Third Parties in International Arbitration' [2001] 17 Arbitration International 2, page 146.

[44] "If a party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The party shall submit such request to the Arbitral Tribunal and to other Parties in writing, and the request shall contain the particulars set forth in article 3(3), as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of article 3(3), as applicable, have been satisfied and (iii) none of the reasons for objection set forth in article 9(2) applies."

[45] O'Malley *supra* n 33, page 67.

[46] *Vibrofloatation A.G. v Express Builders Co. Ltd* [1994] Case Law on UNCITRAL Texts (CLOUT) Case No. 77, Hong Kong: High Court of Hong Kong http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V94/270/11/IMG/V9427011.pdf?OpenElement (accessed on 22 September 2015).

following a procedural order by the arbitral tribunal authorizing it do so, may pursue the subpoena on its own.[47]

Article 3(10) of the IBA Rules of Evidence aims to empower the arbitral tribunal to initiate requests for document production of its own accord. Under article 3(10) of the IBA Rules, the arbitral tribunal may: 1) request any party to produce documents; 2) request any party to use its best efforts to take; or 3) itself take, any step that it considers appropriate to obtain documents from any person or organization. The arbitral tribunal's powers in article 3(10) of the IBA Rules should be distinguished from article 3(9). Whereas article 3(9) is directed towards obtaining documentary evidence from third parties based upon a party's request for production, article 3(10) empowers an arbitral tribunal of its own initiative to seek to obtain evidence from one of the parties presently before them in the arbitration or to take appropriate measures to obtain documents from a third party which may include seeking court assistance.[48]

Witness Testimony

Arbitral procedure will determine who and in what form a person may be heard and examined as a witness. In international arbitration any person, including parties and their legal representatives (both internal and external),[49] are generally permitted to testify as a witness.[50] The approach in international arbitration about who can be a witness is similar to the approach in common law countries. However, in some civil law countries (e.g. Germany and France), there is a bar against a party appearing as a witness.[51] Article 4(2) of the IBA Rules provides that any person may present as a witness, including a party or a party's officer, employee or other representative. Indeed, in many situations the key witnesses of fact will be employees.[52] Article 20(6) of the LCIA Rules also deals with this cultural issue.[53]

In general, witness testimony can be divided into two categories: written testimony and oral testimony. The submission of written testimony is well suited to international arbitration. In

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[47] *Jardine Lloyd Thompson Canada v Western Oil Sands Inc* [2005] AJ 943, O'Malley *supra* n 33, pages 61, 68.
[48] *ibid*, page 73.
[49] *In Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12, the tribunal allowed the outside counsel representing the respondent in the arbitration to testify to certain key facts during the jurisdictional phase of the proceedings. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2551_En&caseId=C661 accessed on 05 October 2015.
[50] It may be further noted that a connection between a witness and a party may also be an adverse connection. In *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No. ARB/06/8, the respondent argued that four witnesses who had absconded from Turkey to flee judicial investigation should not be permitted to testify. The respondent claimed that, it would be wrong as a matter of law and judicial propriety to permit the four witnesses to testify. However, tribunal rejected this motion and arranged to hear the witnesses. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2251_En&caseId=C77 accessed on 05 October 2015.
[51] Lew, Mistelis, Kröll, *supra* n 1, page 571; Poudret, Besson, Berti, Ponti, *supra* n 9, page 557; Berger, Kellerhals, *supra* n 27, page 347; Moses, *supra* n 1, page 179; Magnum, *supra* n 36, pages 36-37; Turner, P and Mohtashami, R *A Guide to The LCIA Arbitration Rules* (Oxford University Press, 2009), page 134. For example, in ICC Case No. 7319, the sole arbitrator decided that a party, including its legal representatives could not be heard as a witness. Bühler, Dorgan, *supra* n 28, page 7.
[52] Ashford, *supra* n 2, page 99.
[53] "Subject to any order by the Arbitral Tribunal otherwise, any individual intending testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party."

principle, parties provide written witness testimony or identify witnesses and the substance of their testimony before the hearing. In civil law countries (e.g. France and Turkey), documentary evidence is the main evidence where the plaintiff submits the documents in support of his case together with his statement of claim and then the defendant submits his own supporting documents when the statement of defense is given. In other words, civil law countries will give less significant weight to the oral testimony of a factual witness than in common law countries. In ICC case No. 1512, the sole arbitrator refused to hear the oral evidence because the arbitrator himself considered that the matter could properly be decided on the documents submitted by the parties.[54]

The use of written testimony can enhance the efficiency and shorten the overall duration of the proceedings.[55] In many arbitral proceedings, the written testimony alone will contain sufficient information, so that the oral testimony of many witnesses will neither be necessary from the viewpoint of the arbitral tribunal nor required by the opposing party.[56] Most rules of arbitration do not establish detailed provisions on witness testimony and thus do not provide detailed guidance on that issue. However, article 20 of the LCIA Rules sets out the broad framework of the tribunal's powers with respect to the submission and examination of witness testimony. According to article 20(2) [57] of the LCIA Rules, the initiative for the submission of written witness statements is in the hands of the parties. The submission of written witness statements is usually addressed in the tribunal's procedural directions.[58] Moreover, article 4(6)[59] of the IBA Rules provides that the parties may submit revised or additional witness statements to respond to matters contained in another party's witness statements.

The rules of certain national codes (e.g. France, Switzerland and Belgium) and bar associations forbid or deem it unethical for witnesses to be contacted or interviewed by the parties or counsel before they testify. Different legal systems impose various restrictions on the contact between the parties' lawyers with witnesses. In international arbitration, it is well recognized that witnesses may be interviewed. This is confirmed by at least two sets of rules in common use. Article 20(5) of the LCIA Rules and article 25(2) of the Swiss Rules of International Arbitration ("Swiss Rules") expressly permit witness interviews, and article 4(3) of the IBA Rules of Evidence provides that it shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.[60] Article 4(3) of the IBA Rules of Evidence considers communications between parties or its counsel and those witnesses it has or intends to present, but does not expressly apply to communications between party representatives and adverse witnesses. However, in *Azinian et al. v United Mexican States,*[61] the tribunal considered the request by

[54] Magnum, *supra n 36*, pages 33-35.
[55] *ibid*, page 33; Born, *supra* n 1, page 168; Bühler, Dorgan,*supra* n 28, page 12.
[56] Oetiker, C 'Witnesses before the International Arbitral Tribunal' [2007] 25 *ASA Bulletin* 2, page 254.
[57] "Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document."
[58]Redfern, Hunter, Blackaby, Partasides, *supra* n 26, page 306; Turner, Mohtashami, *supra* n 51, page 132.
[59] "If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Export Reports or other submissions that have not been previously presented in the arbitration."
[60] Lew, Mistelis, Kröll, *supra* n 1, page 573; Ashford, *supra* n 2, page 99; Redfern, Hunter, Blackaby, Partasides, *supra n 26*, page 307; Berger, Kellerhals, *supra* n 27, page 349; Moses, *supra* n 1, page 181; Turner, Mohtashami, *supra* n 51, page 134.
[61] *Azinian et al. v United Mexican States*, ICSID Case No. ARB(AF)/97/2, O'Malley *supra* n 33, page 115.

the claimant to interview the respondent's witnesses and found it permissible for a party to conduct such interviews.

How witnesses are examined is left to the discretion of the arbitral tribunal, unless the parties have decided on the issue. Commonly, witnesses who have presented a witness statement will, at the hearing, be examined or cross-examined first by counsel for the opposing party. The questioning of witnesses is normally dealt with by agreement of the parties or in a procedural order of the arbitral tribunal, after consultation with the parties. In practice, the presiding arbitrator will conduct direct examination, following which the opposing party will have the opportunity for cross-examination.[62] Cross-examination is broad, even where neither the parties nor their counsel are of common law origin, and may address any matter relevant to the case.[63] The modern approach to the questioning of witnesses in international arbitration is to adapt the procedure as appropriate on a case-by-case basis through party autonomy. The starting point in international arbitration should be a neutral concept of witness questioning.[64]

Article 4(9) of the Rules also states that if a party wants to call a witness who will not appear voluntarily, the party may ask the tribunal to take whatever steps legally available to obtain the testimony of that person, or seek leave from the tribunal to take such steps itself. According to article 8(1) of the IBA Rules, a fact witness or party-appointed or a tribunal-appointed expert, if requested by any party or by the arbitral tribunal, must appear in person for testimony at the evidentiary hearing, unless the arbitral tribunal has agreed to permit the use of videoconference or other technology. This provision is functional, since the group of witnesses who have submitted written witness testimony will not be identical to the group of witnesses who will actually appear at the hearing.[65] If a witness who has submitted a witness testimony refuses to testify at the evidentiary hearing, the arbitral tribunal will disregard the witness testimony. This is common in arbitration practice and is also provided under article 4(7) and article 4(8) of the IBA Rules.[66]

Experts

Expert evidence assists the arbitral tribunal in forming an opinion in relation to highly technical issues of specialist knowledge such as construction, engineering, and oil and gas.[67] The determination of such issues can be made by the arbitral tribunal with the assistance of experts, unless the tribunal possesses this expertise itself. There are two categories of expert evidence: appointed by parties and appointed by the arbitral tribunal. In civil law countries, tribunal-appointed experts assist the arbitral tribunal. The parties may submit the reports of experts with their pleadings. The expert proceeds as ordered by the tribunal and reports his findings directly to the tribunal. For example, in France, expertise is frequently ordered in

[62] Cross-examination became much more acceptable after the experience of the arbitrating community at the Iran-U.S. Claims Tribunal. The Iran – U.S. Claims Tribunal was established in 1981 to arbitrate commercial claims of U.S. citizens against Government of Iran. One of the primary issues was whether the Tribunal would permit cross-examination, which is a right not explicitly granted under the UNCITRAL Rules. http://www.iusct.net accessed on 25 September 2015; Davidson, R B and Mueller, W 'Procedural Matters Checklist' [2009] International Arbitration Checklists (Juris), page 85.

[63] Lew, Mistelis, Kröll, *supra* n 1, page 574; Poudret, Besson, Berti, Ponti, *supra* n 9, page 558; Born, *supra* n 1, page 169.

[64] Cremades, B M and Cairns, D J A 'Cross-Examination in International Arbitration: Is it worthwhile?' [2010] Take the Witness: Cross-Examination in International Arbitration (Juris), page 225.

[65] Kühner, *supra* n 38, page 674.

[66] Ashford, *supra* n 2, page 136; Moses, *supra* n 1, page 185.

[67] Lew, Mistelis, Kröll, *supra* n 1, page 575; Poudret, Besson, Berti, Ponti, *supra* n 9, page 560; Moses, *supra* n 1, page 185.

order to have the expert investigate the merits of the dispute. In contrast, expertise is used to discover information that in common law jurisdictions would be obtained through pre-trial discovery and party-appointed experts tend to be the rule.[68]
Many arbitration rules specifically address the role of a tribunal-appointed expert, but not the role of a party-appointed expert; only articles 30 and 31 of the Netherlands Arbitration Institute ("NAI") Arbitration Rules deal expressly with both party-appointed and tribunal-appointed experts. Besides, the Charted Institute of Arbitrators ("CIArb") created the CIArb's Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration. This protocol goes further and gives more detailed guidance than the IBA Rules.

Party-Appointed Experts

Party-appointed experts assist each party in the preparation of evidentiary hearings and putting their case forward.[69] The IBA Rules define a "party-appointed expert" as a person or organization appointed by a party in order to report on specific issues determined by the party. In international arbitration, it is common practice that the experts will be required to submit their written report to the tribunal and that the reports will be exchanged between the parties before the hearing. Article 5(1) of the IBA Rules[70] provides that the party-appointed expert shall submit an "Expert Report". Accordingly, under the IBA Rules, the expert report means a written statement by a tribunal-appointed expert or a party-appointed expert.

According to article 5(2) of the IBA Rules of Evidence, the expert report must contain: the name and address of the expert and his present and past relationship with any of the parties together with a description of his background, qualifications, training and experience; a description of the instructions pursuant to which he is providing his opinions and conclusions; a statement of the facts on which he is basing his expert opinions and conclusions; a statement of his independence from the parties, their legal advisors and the arbitral tribunal; his opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions; and an affirmation of his genuine belief in the opinions expressed in the expert report and the signature of the party-appointed expert and its date and place. Article 5(4) of the IBA Rules of Evidence permits the tribunal to order the party-appointed experts to meet and to discuss the issues considered in their reports before their reports are submitted and to attempt to reach an agreement. To obtain the desired effect from this meeting and discussion, special care is required in issuing procedural orders with expert reports followed by rebuttal reports.[71]

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[68] Lew, Mistelis, Kröll, *supra* n 1, page 575; Redfern, Hunter, Blackaby, Partasides, *supra* n 26, page 308; Berger, Kellerhals, *supra* n 27, page 350; Born, *supra* n 1, page 170; Sachs, Lörcher, '1049 ZPO – Experts appointed by Arbitral Tribunal' [2007], *Arbitration in Germany* (Wolters Kluwer), page 335; Smit, H 'Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence' [1996] *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration ICCA Congress Series* (Kluwer Law International), page 163.
[69] Lew, Mistelis, Kröll, *supra* n 1, page 578.
[70] "A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report."
[71] *ibid*; Ashford, *supra* n 2, page 117; von Segesser, G 'The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010' [2010] 28 *ASA Bulletin* 4, pages 748-749.

Tribunal-Appointed Experts

Tribunal-Appointed experts are preferred in many legal systems.[72] They are appointed to advise the tribunal on technical questions and issues as well as other issues, which require special expertise to be determined.[73] The IBA Rules also offer a definition of tribunal-appointed expert - a person or organization appointed by the arbitral tribunal in order to report to it on specific issues determined by the arbitral tribunal. Article 26 of the UNCITRAL Model Law provides that, unless the parties agree otherwise, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal and may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. This obligation of the parties to collaborate with the expert can be of fundamental importance for the experts to perform their task.[74]

Article 6 of the IBA Rules offers a comprehensive set of rules relating to tribunal appointed experts. Before appointing an expert, the arbitral tribunal shall consult the parties on the name of the person and their qualifications. The arbitral tribunal shall establish the terms of reference for any tribunal-appointed expert, also in due consultation with the parties. Following the example of party-appointed experts, tribunal-appointed experts must describe their qualifications and ensure that no conflict of interest exists with respect to the parties, their legal advisors and the tribunal. In *Hussman (Europe) Ltd v Al Ameen Development&Trade Co*,[75] the arbitral tribunal decided to instruct an expert witness orally, without notifying the parties of the content of the instruction. The claimant challenged the decision as a procedural irregularity. However, the tribunal did not find a serious irregularity because of the complaining party's general agreement to afford the tribunal considerable latitude, but noted the right to be heard principle. According to article 6(3) of the IBA Rules of Evidence, the expert may request a party to provide any relevant and material information or to provide access to any relevant documents, goods, samples, property or site for inspection. The expert must record in the report any non-compliance by a party and shall describe its effects on the determination of the specific issue. Article 6(4) of the IBA Rules sets out detailed requirements for the content of the report of a tribunal-appointed expert; these requirements are basically the same as the one applicable to party-appointed experts in article 5(2) of the IBA Rules.

Article 6(5) of the IBA Rules of Evidence permits the parties to examine any documents that the tribunal-appointed expert has examined and any correspondence between the arbitral tribunal and the tribunal-appointed expert.[76] The article also provides any party with the opportunity to respond to a report by a tribunal-appointed expert, within the time ordered by

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[72] Article 1049 of the ZPO, s. 37 of the English Arbitration Act, article 25(4) of the ICC Rules Art, article 21 of the LCIA Rules, article 29 of the UNCITRAL Rules; artice 27 of the Swiss Rules.

[73] Oetiker, C 'Tribunal-Appointed Experts' [2005] Swiss Rules of International Arbitration (Schulthess), page 245.

[74] Binder, *supra* n 16, page 324; Sachs, Lörcher, *supra* n 68, page 337.

[75] *Hussman (Europe) Ltd v Al Ameen Development&Trade Co* [2000] App LR 04/19, O'Malley *supra* n 33, pages 168-169.

[76] Some legal systems support the position that it is not a breach of due process if an expert fails to reveal documents that were received over the course of the investigation, as the expert did not rely upon them in reaching his conclusions. See the *Société Unichips Finanziaria SpA and Unichips International BV, Netherlands v François et Michèle Gesnouin*, Cour d'appel, Paris, 12.02.1993, van den Berg, A J (ed.), [1994] *Yearbook of Commercial Arbitration* 19, page 649.

the arbitral tribunal. In *Paklito Investment Ltd v Kockner East Asia Ltd*,[77] the expert report that had been provided to the tribunal was delivered to the parties seven days before the final award. In the intervening period, the respondent had notified the tribunal to submit counter evidence and comments on the report; nevertheless, the tribunal set its award shortly thereafter. The High Court of Hong Kong refused enforcement of the award due to breach of the respondent's right to be heard. The tribunal-appointed expert shall be available for questioning at the evidentiary hearing. Nevertheless, the scope of this questioning is limited to the issues covered in his or her expert report and the responses provided pursuant to Article 6(5) of the IBA Rules.[78]

Inspection

The fourth method of presenting evidence is for the arbitral tribunal itself to inspect the site or subject matter of the case. An inspection is a means by which the arbitral tribunal determines an asserted fact by obtaining first-hand experience of that fact.[79] An arbitral tribunal has discretion to order a site or subject matter inspection, unless the parties have expressly excluded such power.[80] Site or subject matter inspections are more common in construction, engineering and mining disputes.[81]

Some institutional rules of arbitration are silent on the question of inspection. Article 29(3) of the UNCITRAL Rules only refers to the obligation of the parties to make available to any experts appointed by the arbitral tribunal any relevant information for inspection. However, article 22 of the LCIA Rules and article 36 of the AAA Rules make specific provision for any inspection or investigation that the arbitral tribunal may require.[82] Each of these sets of international arbitration rules provides that the parties may be present at such inspection, if they wish. Article 7 of the IBA Rules provides for on-site inspection and grants the tribunal the discretion to carry out inspection of any site, property, machinery or other goods or process or documents, as it deems appropriate. Under this rule, the arbitral tribunal has the power to require the inspection by a tribunal-appointed or a party-appointed expert.

Conclusion

Most international arbitration statutes and institutional arbitration rules include a provision allowing parties the freedom to determine the rules for taking evidence. Institutional rules and some arbitration statutes also contain general provisions confirming that the arbitral tribunal has control over the arbitral procedure or that the tribunal has the power to determine the admissibility and weight of evidence. However, few provisions in international arbitration rules, and even less in national arbitration statutes, deal with the taking of evidence by and before arbitral tribunals. When it comes to the taking of evidence in international arbitration, obviously there are some detailed provisions and there are differences between common law and civil law legal systems. Therefore, the IBA Rules attempt to provide a balance between the common law and civil law practice and are particularly useful when the arbitrators and parties come from different legal cultures. The IBA Rules may almost be described as a

[77] *Paklito Investment Ltd v Kockner East Asia Ltd*, Supreme Court of Hong Kong, High Court, 15.01.1993, van den Berg, *supra 76*, page 665.
[78] Ashford, *supra* n 2, page 127.
[79] Berger, Kellerhals, *supra* n 27, page 353.
[80] Ashford, *supra* n 2, page 128; Magnum, *supra* n 36, page 43.
[81] Lew, Mistelis, Kröll, *supra* n 1, page 579; Redfern, Hunter, Blackaby, Partasides, *supra* n 26, page 314.
[82] Redfern, etc, *ibid*, page 315.

codification of the generally accepted principles for the taking of evidence in international arbitration. They are used both in commercial and investment arbitration and designed to be used in conjunction with, and adopted together with, institutional, *ad hoc* or other rules or procedures governing international arbitration.

The IBA Rules of Evidence organize evidentiary means in separate provisions and also give a place to major trends, such as e-disclosure, video-conferencing and witness conferencing. Although the arbitral tribunal is not strictly bound to follow the IBA Rules, the rules provide a rational basis to the arbitral tribunal in the determination of evidentiary issues.

ENVIRONMENTAL LAW

An examination of legal regulation and the environmental impacts of telecommunications installations in Nigeria

Dr. Ariyoosu Dauda Adeyemi*

Introduction

For telecommunications services to be effective and meet minimum global standards in a given economy, telecommunications installations need to be technically specified and regulated. This is to ensure efficient control and management of the environment where the installations are being made. The environmental impact of the installations therefore cannot be over-emphasised. This article examines the legal regulation of telecommunications installations, especially masts and towers. It also considers the environmental impacts of telecommunication installations and the roles of concerned regulatory authorities *vis-a-vis* their regulatory functions in the provisions of effective telecommunications services through telecommunications installations and provision of healthy environment.

Despite the statutory regulation of telecommunications on one hand and the environment on the other, there appears to be statutory overlaps in the functions of regulatory authorities. This has resulted in a face-off among the relevant authorities. The issue is whether the provision of telecommunications services must be given priority to the detriment of a healthy environment. This article recommends that there should be periodic review of relevant regulations and guidelines on telecommunications installations for effective telecommunications service delivery without unnecessarily tampering with the health of the citizenry.

The Nigerian Communications Commission is the sector specific regulator in the Nigerian Telecommunications Industry while the National Environmental Standards and Regulations Enforcement Agency is charged with the responsibility for the protection and development of the environment. It can be argued that there can be no effective and quality of telecommunications service, especially in the area of mobile telephony, without installation of telecommunications equipments such as masts and towers. It is equally arguable that the

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rate at which uncontrolled and unregulated telecommunications contribute to unhealthy environment is not insubstantial.

The world is fast becoming a global village and a necessary tool for this is communication of which telecommunication is a key player. The development is now at a crossroads with respect to the impact of telecommunications on the environment. It is now a matter of the right to quality of telecommunications service versus the right to a healthy environment.

Legal regulation of telecommunications installations

Telecommunications regulatory bodies are established in different countries and are burdened with the responsibility of regulating the activities and affairs of the telecommunications industry. In Nigeria, the Nigerian Communications Commission (NCC) is the specific regulatory body in the telecommunications industry. The NCC was first established in 1992 by the Nigerian Communications Commissions Act No 75 of 1992. The Nigerian Communications Act 2003 repealed the Nigerian Communication Commission Act.83 The NCC is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name. It is conferred with the power to do all such things that are necessary for or incidental to the carrying out of its functions and duties under the law.84 The NCC has many functions under the Act,85 but with particular reference to installation of telecommunications equipment and facilities, the commission has the function of:

- Proposing, adopting publishing and enforcing technical specifications and standards for the importation and use of communications equipment in Nigeria and for connecting and interconnecting communications equipment and systems;86
- Formulating and managing Nigeria's inputs into the setting of international technical standards for communications services and equipment;87
- Carrying out type approval tests on communications equipment and issuing certificates on the basis of technical specifications and standards prescribed from time to time by the Commission.88

Technical Specifications for the Installation of Telecommunications Masts and Towers

Under the Act, the NCC published Guidelines on Technical Specifications for the Installation of Masts and Towers in 2009.89 The guidelines provide standards to be adhered to by telecommunications services providers/operators, designers, fabricators and installers of

83 The Nigerian Communications Act 2003 is now embodied in *Cap N97, Laws of the Federation of Nigeria 2004.*

84 Section 3(2) of the Nigerian Communications Act 2003.

85 See generally Section 4(1) of the Nigerian Communications Act 2003 for the functions of the NCC.

86 Nigerian Communications Act 2003, s. 4(1) (c).

87 *Ibid*, s.4 (1) (m).

88 *Ibid*, s.4 1(n).

89 Other guidelines and regulations published by the Commission include: Enforcement Regulations 2004; Consumer Code of Practice Regulations 2007; Determination of Interconnect Rate 2006 (which replaced Interconnection Rate Determination 2003); Guidelines on Procedure for Granting Approval to Disconnect Telecommunications Operations; Guidelines on International Gateway Access and Voice Over Internet Protocol (VOIP); Dispute Resolution Guidelines 2004; Telecommunications Network Interconnection Regulations 2003 (now replaced by the Telecommunications Networks Interconnection Regulation 2007); Universal Access and Universal Service Regulation 2007; Competition Practices Regulations 2007; Frequency Spectrum (Fess & Pricing, e.t.c) Regulations 2004

telecommunications towers towards ensuring environmental safety and sound engineering practices. The guidelines take cognizance of types and constituents of tower structures and also provide a comprehensive data on wind speed in Nigeria, which may be used as reference materials for engineers in the design of masts and towers. In the guidelines, concerns about public safety and safety of personnel and equipment are addressed and accordingly the responsibilities of owners, designers and fabricators of telecommunications masts and towers relating thereto are set out.90

Siting of Towers and Masts

The sitting of telecommunications masts and towers must take cognizance of the provisions of the Nigerian Communications Act and be guided by the provisions of the Guidelines on Collocation and Infrastructure Sharing issued by the Commission in such a way as to minimize the number, protect and promote public safety, and mitigates THE adverse visual impacts on the community.91 All masts and towers sited within residential areas must conform to the stipulated set back guidelines to mitigate the effect of heat, smoke and noise pollution arising from generating sets.92 Thus, the general rule is that telecommunications towers above 25 metres in height will not be permitted within residential areas.93 However, the Commission may permit towers above 25 metres height and in such a case, the towers must be placed at a minimum of 5 metres distance to the nearest demised property, excluding the fence. What is important here is that prior permission of the NCC must be obtained. The commission reserves the power to remove any tower or mast sited in contravention of the guidelines on sitting of towers and masts and the owner will bear the cost of such removal.94

All towers must be located within the buildable area of the property and not within the front, rear or side building setbacks. All towers in excess of 150 metres in height must be set back by a minimum of 50 metres from the right of way of all controlled access designed as freeways in order to provide unobstructed flight paths for helicopter. In respect of demised properties, the distance for setback is 5 metres excluding the fence or the distance specified as a potential hazard area by the designer of the structure.95

Environmental Requirements

Generally, the maximum height for a telecommunications tower shall not exceed 150 metres, otherwise the approval of the commission must be obtained of it is satisfied that the increased height will not be detrimental to public health safety or general welfare; will not have negative effect on the neighbourhood; is in conformity with the plan of the particular area and the general plan of the community; and will not impair compliance with any other applicable laws or guidelines.96

90 Guidelines on Technical Specifications for the Installation of Masts and Towers, General Introduction.
91 *Ibid*, Guideline 3(1)
92 *Ibid*, Guideline 3 (2)
93 *Ibid*, Guideline 3 (4)
94 *Ibid*, Guidelines 3 (5) & (6)
95 *Ibid*, guidelines 9 (9)
96 *Ibid*, Guideline 9 (1)

Structural Certification and Infrastructure Sharing Collocation

Before the installation of a tower, mast or antenna support structure on any building or roof, the Commission must be provided with a structural engineer's certification that the structure will support and not be adversely affected by the proposed masts, tower, and antenna and associated equipment.97

In its responsibility to promote fair competition and encourage and promote infrastructure sharing among licensees, the NCC has developed and issued guidelines for collocation and infrastructure sharing. Collocation is the placement of transmission equipment owned by the interconnection demanding operator in the premises of the interconnection providing operator for interconnection to that operator's network.98Infrastructure sharing is the joint use of network facilities by two or more operators subject to agreement specifying relevant technical and commercial conditions.99 The guidelines on collocation and infrastructure sharing are designed and developed to encourage collocation and infrastructure sharing (C/IS) between operators within a predetermined framework to remove uncertainty and create an environment for better co-operation.100

Objectives of the Guidelines on Collocation and Infrastructure Sharing

The primary object of the guidelines is to establish a framework within which communications operators can negotiate collocation and infrastructure sharing arrangements. Specifically, the Guidelines are made:

- to ensure that incidence of unnecessary duplication of infrastructure is minimized or completely avoided;
- to protect the environment by reducing the proliferation of infrastructure and facilities installations;
- to promote fair competition through equal access being granted to the installations and facilities of operators on mutually agreed terms;
- to ensure that the economic advantage derivable from the sharing of facilities are harnessed for the overall benefit of all telecommunications stakeholders;
- To minimize operators' capital expenditure on supporting infrastructure and to free more funds for investment in core network equipment, and to encourage operators to pursue a cost-oriented policy with the added effect of a reduction in the tariffs chargeable to customer.101

The legal framework for environmental protection

Prior to the dumping of toxic waste in Koko Village in Delta State of Nigeria in 1987, Nigeria was ill-equipped in managing serious environmental issues as there were no institutional arrangements or mechanisms for environmental protection and enforcement of environmental laws and regulations in the country. Following this episode, the Federal Government promulgated the Harmful Waste Decree 42 of 1988, which facilitated the establishment of the Federal Environmental Protection Agency (FEPA) through Decree No.

97 *Ibid*, Guideline 12
98 See the Guidelines on Collocation and Infrastructure Sharing, Guideline 18
99 *Ibid.*
100 *Ibid*, Guideline 1 (3)
101 *Ibid*, Guideline 3 (1) (a)-(f)

58 of 1988.102 However, the establishment of FEPA lacked appropriate enabling enforcement issues,103 and in order to address the lack of enforceable law in the field of environmental law, the National Environmental Standards and Regulations Enforcement Agency (NESREA) was established as a parasternal of Federal Ministry of Environment, Housing and Urban Development.104 NESREA is charged with the responsibility for the protection and development of the environment, biodiversity conservation and suitable development in Nigeria's natural resources in general.105 The vision of the agency is to ensure a cleaner and healthier environment for all Nigerians while the mission is to inspire personal and collective responsibility in building an environmentally conscious society for the achievement of sustainable development in Nigeria.106

The agency has a wide range of powers. In the sphere of environmental protection, the agency can prohibit processes and use of equipment or technology that undermine environmental quality.107 It can also conduct field follow-up compliance with set standards and take procedures prescribed by law against any violator.108 The agency is also empowered to establish mobile courts to expeditiously dispense cases of environmental infringements,109 and can conduct public investigations and make proposals to the Minister for the review of existing guidelines, regulations and standards on environment.110 The agency can establish programmes for setting standards and regulations for the prevention, reduction and elimination of pollution and other forms of environmental degradation in the nation's air, land, oceans, seas and other water bodies and for restoration and enhancement of the nation's environment and natural resources.111
Specifically, the functions of NESREA are to:

(a) enforce compliance with laws, guidelines, polices and standards on environmental matters;
(b) coordinate and liaise with stakeholders, within and outside Nigeria, on matters of environmental standards, regulations and enforcement;
(c) enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate changes, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wide life, pollution, sanitation and such other environmental agreements as may from time to time come into force;

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102 See About NESREA the Establishment of the National Environmental Standards and Regulations Enforcement Agency (NESREA) accessed on 22 August 2010
103 *Ibid.*
104 NESREA was established by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No 25 of 2007. Its commencement date was 30th July 2007. By s.36 of NESREA Act, the FEPA Act has been repealed.
105 NESREA Act, s.2.
106 About NESREA the Establishment of the National Environmental Standards and Regulations Enforcement Agency (NESREA) <http://www.nesrea.org/about.pht> accessed on 22 August 2010.
107 *Ibid*, s.8 (d).
108 *Ibid*, s. 8 (e).
109 *Ibid*, s. 8 (f).
110 *Ibid*, s.8 (k).
111*Ibid*, s.8(o). See also generally, Ogbodo S. G., 'National Environmental Standards and Regulations Enforcement Agency (NESREA) Act – A Review' < http://www.nigerianlawguru/articles/environmental%20law/NATIONAL%20ENVIRONMENTAL%20STANDARDS%20REGULATIONS%20ENFORCEMENT%20AGENCY%28NESREA%29%ACT,%20A%REVIEW.pdf>accessed on 21 September 2010.

(d) enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement;
(e) enforce compliance with guidelines and legislation on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;
(f) enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages thereof;
(g) enforce compliance with regulations on the importations, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector;
(h) Enforce (through compliance monitoring) the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies other than in the oil and gas sector;
(i) ensure that environmental projects founded by donor organizations and external support agencies adhered to regulations in environmental safety and protection;
(j) enforce environmental control measures through registrations, licensing and permitting systems other than in the oil and gas sector;
(k) conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector;
(l) create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations other than in the oil and gas sector and publish general scientific or other data resulting from the performance of its functions;
(m) carry out such activities as are necessary or expedient for the performance of its functions.112

The right to quality telecommunication services versus the right to a healthy environment

Every consumer of telecommunications services is entitled to a minimum standard of quality service.113 Quality of service in this sense is a measure of the telephone service provided to a subscriber.114 Calls must be clear and easy to hear, must be loud enough and the longest time a consumer should wait after picking up the phone before receiving a dial tone must be adequately determined. The consumer should be able to enjoy required applications services such as emergency services, directory assistance services, operator assistance service and services for disabled customers.115 As part of the functions of NCC, the NCC shall protect and promote the interests of customers against unfair practices including matters relating to availability and quality of communications services, equipment and facilities.116

Operating companies must provide and list in their directory a 24 hour repair service number and consumers should have the right to access vendor's annual quality of service reports.117

112 Section 7 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No 25 of 2007.
113 Section 104 (a) of the Nigerian Communications Act. In *Nkwocha & 2 Ors v. MTN Nigeria Ltd & 4 Ors* (2004) 1 TLR, 1, 4 and *Njikonye Esq. v MTN Nig Communications Ltd (*2008) All FWLR (Pt 413) 1343, the plaintiffs approached the Court as a result of poor quality of service.
114 Harry Newton, *Newton's Telecom Dictionary* (Miller Freeman Inc, USA) 641
115 Section 107 (2) of the Nigerian Communications Act.
116 Section 4 (1) (b) of the Nigerian Communications Act.
117 See Engr Earnest Ndukwe, 'Consumer Rights in the Telecommunications Industry' (2008) (Paper Presented at the Annual Distinguished Lecture of the Justice Chambers, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria). Engr Earnest Ndukwe was the Executive Vice-Chairman/Chief Executive Officer of Nigerian Communications Commission.

Licensees must also comply and cause their agents to comply with the relevant fault repair standards set out in the NCC's Quality of Service Regulations. Licensees must also endeavour to give advance warning of anticipated service disruptions or planned outages, including details of the disruption or outage, the services and service area affected and any applicable compensation or other remedies118

The consumer has right to be protected against the marketing of goods that are hazardous to public health.119 In specific regard to emergency services, the NCC has the responsibility to promote and enhance public safety through the use of a particular number which shall be designated as the universal safety and emergency assistance number for telephony services generally.120

The need for a consumer right to safety is to provide goods and render services, the consumption of which will not be inimical or hazardous to the consumer's health and the social well-being at large.121 The crucial question is how an average consumer of telecommunications service is aware how much unhealthy radiation is being emitted from the hand-phone while making or receiving calls or charging the batteries. Can one assume that a consumer can know whether tasteless and odourless poisonous and harmful gasses or other objects are seeping into his mouth, ear and environment from the hand-phone or base stations? 122 The licensee is duty-bound under s.135 (3) (b) of the Nigerian Communications Act to take all reasonable care in connection with installation of network facilities to protect the safety of property.

Regulatory overlaps: the need for harmonisation?

Regulatory overlap has been a disturbing phenomenon in the legal regime of telecommunications installations. There is regulatory overlap in the functions of both the NCC and NESREA in relation to environmental implications in the installation of the telecommunications masts and towers.123 NESREA shut down base stations of some telecoms operators for failure to abide by environmental regulations, positing that the base stations were too close to residential buildings and posed great dangers to residents and buildings in the vicinity; thus claiming that it has regulatory powers over the installation of telecommunications masts and towers.124 On its own side, the NCC has maintained that there cannot be telecommunications without having telecommunications masts because there is no infrastructure in place in Nigeria as with other countries that have fibres.125 Yet it has

118 Code 13 (2) & (3) of the General Consumer Code of Practice under Nigerian Communications Act 2003 Quality of Service Regulations 2009.
119 Engr. Earnest Ndukwe, 'Consumer Rights in the Telecommunications Industry'.
120 Section 107 (3) (a) of the Nigerian Communications Act.
121Adewale, S.A and Bamise J.B., 'The Legal Protection of Consumers of Telecommunications Services' (Paper presented to 2005/2006 LL.M Class of Aviation and Communications Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria.
122 *Ibid.*
123 See Dayo Oketola, 'NCC, NESREA to set Regulatory Boundaries' The Punch Newspaper (Nigeria 05 July 2010) 36.
124 *Ibid*. The NESREA had shut down Globacom base station located at OAU Quarters, Maitama, Abuja. It also shut down a base station belonging to Etisalat in Abuja on the ground that no Environmental Impact was acquired by the company before erecting the mast. NESREA also shut down MTN base station in Abuja over environmental breaches at MTN base station located at 27, Ashiek Jarma Street, Jabi and No2, Oyo Street, Area 2, Garki, Abuja. See Emeka Ezekiel, 'FG Shuts MTN Base Stations on Environmental Breaches' the Punch Newspaper (Nigeria 24 August 2010) 17.
125 See Aminah Mohammed, 'Nigerian Communications Commission, NESREA Clash Over Regulation of Telecoms <> accessed on 20 July 2010.

been observed that there have been no proven cases of side effect emanating from exposure to base station or building base stations close to residential buildings.126 It has been observed that the absence of base stations in a vicinity means that subscribers cannot be connected, and that this underscores the need for the nearest of the installations for mobile connectivity.127

It is submitted that whatever the arguments and regulatory overlap, the codes, rules and regulations guiding the operations within the environment and set-up should be sustainable and environmentally-friendly. Both NCC and NESREA should work out harmonized laws to ensure that all interests are accommodated for a peaceful roll-on of quality communications services,128 without adversely affecting the health of the populace. This can be done by reaching a compromise and entering into a memorandum of understanding, just as the Consumer Protection Counsel and NCC did.129All concerned regulatory bodies should recognize the need for collaboration in the discharge of their functions as they affect consumers in the telecommunications sector.

Environmental impacts of telecommunications installations

The Nigerian telecommunications sector is the fastest growing sector of the economy in Africa; from about 450,000 telephone lines in 2001 to over 78,000,000 in 2010. However, this growth has resulted in the establishment of more telecommunications infrastructure such as installations of masts and base stations. This has raised serious environmental concerns, especially in the area of Environmental Impact Assessment. NESREA has clamped down on telecommunications operators and has even decommissioned some telecommunications masts for failure to comply with Environmental Impact Assessment.130

Telecommunications installations need to consider the environmental implications in the installations. Non-compliance with Environmental Impact Assessment may result in very high noise level, compared to what should be obtainable in a residential area. Quite often, installations made without Environmental Impact Assessment become curses instead of the blessings they were originally conceptualised to become. The failure of telecommunications operators and service providers to adhere to Environmental Impact Assessment regulations before installation of equipment and base stations may also be responsible for the worsening of ecological problems across the country.131

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126 See 'Experts Re-assure on Safety of Humans near Telecom Base Stations', IT & Telecom Digest (Nigeria September 2009) 66. To further allay the fear of the people, stakeholders in the ICT industry had met and concluded that there is no known conclusive scientific evidence at present to indicate that radiation from mobile phones and telecom masks could cause such dangerous disease such as cancer and others infections.

127*Ibid.*

128 See Patrick Osadebamwen, 'Telecoms Revolution and Environmental sustainability' Summit Newspaper (Nigeria 21 July 2010) 20.

129 On 19th December 2005 both Consumer Protection Council and Nigerian Communications Commission signed a Memorandum of Understanding to avoid regulatory overlaps and create regulatory certainty for the benefit of all stakeholders in the telecommunications sector. See Memorandum of Understanding between the Consumer Protection Council and Nigerian Communications Commission<http://www.ncc.gov.ng/RegulatorFramework/MOU BETWEEN NCC AND CPC.pdf> accessed on 18 August 2010.

130 Emeka Ezekiel, 'NESREA VS. NCC: Raging Battle over Regulation of Telecoms Masts<http://www.nigerianbestforum.com/generaltopic/?p=555638&cpage=1#comment.55623>accessed on 20 October 2010.

131 *Ibid.*

The need to have environmental regulation governing the telecommunications sector is as a result of petitions and the outcry of the Nigerian public on the activities of telecommunication operators, especially with regard to the setting of their masts. Noise from their base-stations, oil leakages, vibration, smoking pollution and oil to well pollution are the potential adverse effects of telecommunications installations if necessary assessment is not carried out. The health hazards of indiscriminate installation of masts and base stations are also associated with Electro Magnetic Fields (EMF) emissions from base stations and telecoms masts. There have been growing concerns about the adverse effects on the general public from exposure to radiofrequency energy, and concerns have also been expressed about the siting of Radio Frequency (RF) base stations close to residential buildings.132

The Environmental Impact Assessment Act: the need for compliance in telecommunications installations

Quite apart from compliance with the provisions of the Technical Specifications for the Installation of Telecommunications Masts and Towers made by NCC in 2009 and other regulatory frameworks, telecommunications operators and installers have the abiding responsibility to comply with the provisions of the Environmental Impact Assessment (EIA) legislation. The EIA is a systematic process for identifying, predicting and evaluating potential impacts associated with a development project. The EIA process must proffer mitigation measures to avoid, reduce or minimize negative impacts on the environment, public health and property. It must also enhance positive impacts. The mitigation measures entail identifying possible alternative sites, projects, process design, including not proceeding with the project. It also deals with monitoring the construction and operational phases, and acting on the results of such monitoring until final abandonment or closure. The post-closure care is also an integral part of the EIA process.133

EIA legislation and the required procedural guidelines for carrying out the EIA process became effective since the 1970s in developed countries. Nigeria took a giant step when she promulgated her main EIA legislation (EIA Act No. 86) in 1992.134 The current principal legislation for the Environmental Impact Assessment (EIA) in Nigeria is the Environmental Impact Assessment Act,135 which made EIA mandatory for both public and private sectors for all development projects. This is the core legislation that governs environmental impact assessment in respect of proposed projects in Nigeria.136 It has three main objectives. First, before any person or authority takes a decision to undertake or authorize the undertaking of any activity that may significantly affect the environment, prior consideration of its environmental effects should first be taken. Secondly, to promote the implementation of appropriate procedures to realize the above goal, and thirdly, to seek the encouragement of the development of reciprocal procedures for notification, information exchange and

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132 Kolawole Daniel, 'Indiscriminate Siting of Telecoms Masts, Base Station: Any End in Sight?http://www.tribune.com.ng/index.php/features/7142-indiscriminate-siting-of-telecoms-masts-base-stations-any-end-in-sightaccessed on 22 October 2010.

133 Tayo Akeem Yusuf**, '**The Environmental Impact Assessment Practice in Nigeria: The Journey So Far' <http://www.nigeriansinamerica.com/articles/3105/1/The-Environmental-Impact-Assessment-Practice-In-Nigeria-The-Journey-So-Far-Page1.html>accessed on 29 July 2011.

134 *Ibid.*

135 *Cap E12 Laws of the Federation of Nigeria 2004.*

136 Ifeanyi Anago, 'Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience'<http://www.fig.net/pub/fig_2002/Ts10_3_anago.pdf> accessed on 29 July 2011.

consultation in activities likely to have significant trans-state (boundary) environmental effects.137

Under the Act, no public or private sector of the economy can undertake or embark on or authorise any project or activities without first considering their environmental effects at the early stage. Where, therefore, the extent nature or location of a proposed project or activity is such that it is likely to have a significant effect on the environment, its environmental impact assessment must be undertaken in accordance with the provision of the Environmental Impact Assessment Act.138
An environmental impact assessment shall include at least the following:

- a description of the proposed activities;
- a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
- a description of the practical activities, as appropriate;
- an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and tong-term effects:
- an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;
- an indication of gaps in knowledge and uncertainly which may be encountered in computing the required information;
- an indication of whether the environment of any other State, Local Government Area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives;
- a brief and non-technical summary of the information provided under any of the above matters.139

The procedure for EIA in Nigeria involves the submission of a project proposal to the Federal Ministry of Environment for screening to determine the need or otherwise for EIA, and the vetting of Terms of Reference (TOR) for the EIA studies to ensure that only significant issues (impacts) are studied in the EIA. A Site Verification exercise may be required to aid this process; submission of draft EIA report for review; review of draft EIA report; submission of a final EIA report , which addresses all the issues raised from review exercise; decision-making by the Federal Ministry of Environment's technical committee and the Hon. Minister; Certification (issuance of Environmental Impact Statement (EIS) and certification) and Mitigation and Compliance monitoring to ensure compliance with all stipulated mitigation measures and project specifications in the projects EIA report.140

137Environmental Impact Assessment Act, Section 1. See also Nerry Echefu and .E Akpofure, 'Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework'<http:www.iaia.org/publicdocuments/EIA/CasesStudies/EIANigeria.pdf> accessed on 29 July 2011.

138 Environmental Impact Assessment Act, Section 2.

139 Environmental Impact Assessment Act, Section 4

140 Oluwole Ameyan, 'Environmental Impact Assessment : Insight Into the Environmental Impact Regulatory Process And Implementation for Qualifying Projects' (2008) (Paper presented at a one day seminar: Preparing Business in Nigeria for Environmental Challenges and Opportunities, organised by the Manufacturing Association of Nigeria, (MAN), MAN House, Ikeja, Lagos, 4th November, 2008). Also available at <http://www.man-greencourse.com/papers/paper6b.pdf >accessed on 20 July 2011.

Although the telecommunications operators and installers must comply with EIA Act, the regulatory authorities must also ensure that the procedure for the assessment is followed.

Conclusions

This article has examined the legal regulation of telecommunications installations within the Nigerian regulatory framework. The health and environmental implications of telecommunications installations have also been articulated. The lingering face-off between NCC and NESREA, whose responsibility it is to regulate telecommunications installation, is adversely affecting investment and the economy. Regulatory bodies should work out harmonized strategies in their regulatory powers and functions by entering into a memorandum of understanding or sponsoring a bill to that effect. The telecommunications operators and service providers should also cooperate with one another to avoid complexity in the installation of telecommunications equipment and prevent multiple and indiscriminate erection of masts. People must imbibe the desirable process of Environmental Impact Assessment as the surest means of ensuring the enduring benefits and sustainability of development projects. There should be regular or periodic review of relevant regulations and guidelines. Although the evolution of the telecommunications sector has been of a great benefit to everyone, even with the benefit derived therefrom, care has to be taken against its health hazards.

There is also a need for the telecommunications operators and installers to comply with the provisions of the Environmental Impact Assessment Act. It is therefore hoped that all those who engage in the telecommunications installations will adhere strictly to the Environmental Impact Assessment Act for sustainable development.

HUMAN RIGHTS

Hounga v Allen: the position of illegal migrant workers and the legal process

Vincent Umeukeje[*]

Introduction

In *Hounga v Allen*[141] the Supreme Court was faced with deciding whether an illegal immigrant can succeed in a claim for race discrimination against an employer. Before *Hounga* an illegal migrant worker bringing a claim for breaches of his employment rights would most likely see the claim fail for the defence of illegality.[142] The defence, also known as "*ex turpi causa non oritur actio*" is "a principle of public policy where the courts will not

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[141] [2014] UKSC 47

[142] See *Vakante v Addey & Stanhope School Governing Body* [2004] EWCA Civ 1065, as an instance where the court upheld the defence of illegality. Remarkably, the application of the illegality defence in cases of tortious discrimination is far from straightforward; see *Hounga v Allen* [2014] UKSC 47 for Lord Wilson's observation on this, at paragraph 26

assist a claimant who has been guilty of illegal (or immoral) conduct."[143] In employment law the application of the *ex turpi causa* defence would often bar an employee's claim solely as a result of the fact that an employee's right to make a claim for a breach of his employment right is founded on his employment contract. Hence by virtue of immigration status the employment contract of an illegal migrant worker would be deemed illegal so that such an individual is thereof barred from the enjoyment of the basic statutory protection and entitlements associated with employment.

This article will examine what the decision in *Hounga* in the Supreme Court means for an illegal migrant worker bringing a claim for discrimination suffered in the workplace. First, in order to be accorded a court ruling for a discrimination claim against an employer, an illegal migrant worker must first be able to get to the court. There are several factors which could be characterised as barriers to an illegal migrant worker's access to justice. These factors include the introduction of the tribunal fee system, the existence of a time limit when bringing a discrimination claim and the requirement of a mandatory consultation with the Advisory, Conciliation and Arbitration Service (ACAS). These legal process issues and their impacts will be considered in this article alongside several government policies in relation to immigration law and the Modern Slavery Act 2015.

The facts and decision in *Hounga*

The appellant (Miss Hounga) was of Nigerian nationality and was aged 14 at the time she came from Nigeria to the UK. When in Nigeria, Miss Hounga was made a proposal by the respondent's mother and brother to go to England where she would study and work for £50 per month as a home help for the respondent (Mrs Allen). Mrs Allen being of joint Nigerian and British nationality resided in England with her children. Miss Hounga accepted this proposal solely as a result of the prospect of education in England. Mrs Allen's family then hatched an illegal plan involving the falsification of Miss Hounga's surname and her date of birth as a means to secure Miss Hounga's entry into the UK. Miss Hounga swore an affidavit to these falsifications and with it she was granted a Nigerian passport. She secured entry clearance at the British High Commission in Lagos where Mrs Allen's mother claimed Miss Hounga was her granddaughter and was being invited to stay in England with her. A document was produced to this effect. Miss Hounga arrived at Heathrow on 27 January 2007 and was granted a visitor's visa for six months. During the six months period and for a continued period of up to 18 months Miss Hounga lived with Mrs Allen in her home where she was employed to look after her children, although Miss Hounga had no right to remain in the UK, nor a right to work.

Miss Hounga was mistreated; she was entirely confined to the house and was never enrolled in any school nor paid any wages with Mrs Allen inflicting serious physical and verbal abuse on her. Miss Hounga was often told by Mrs Allen that her presence in the UK was illegal and as such she would go to prison if ever found by the police. On 17 July 2008 Mrs Allen arrived home from work and discovered that her children had not eaten supper. As a result Mrs Allen attacked and beat Miss Hounga and ejected her from the family home and poured water over her. Miss Hounga slept in the garden in her wet clothes. Making her way later to a supermarket car park she was found and taken into the care by the Social Services.
Miss Hounga brought a number of claims against Mrs Allen and her husband, including a claim for discrimination on racial grounds (nationality), an unfair dismissal claim, a breach of

[143] *Euro-Diam Ltd v Bathurst* [1990] 1 Q.B. 1, per Kerr L.J

contract claim and a claim for unpaid wages In the Employment Tribunal, in relation to Miss Hounga's claims, Mrs. Allen invoked the defence of illegality, and the Employment Tribunal dismissed Miss Hounga's contractual claim. The Tribunal ruled that Miss Hounga had knowingly participated in the illegal plans to secure her entry to the UK. Also she had known it was illegal for her to take up employment in the UK and as such her contract of employment was tainted by illegality. The Tribunal however upheld Miss Hounga's claim for discrimination in relation to her dismissal. Applying the test of illegality in discrimination cases as set out by Peter Gibson L.J. in *Hall v Woolston Hall Leisure Ltd*,[144] the Employment Tribunal ruled that Miss Hounga's claim for discrimination was not inextricably linked or bound up by illegality. Mrs Allen was ordered to pay the sum of £6,187 as compensation to Miss Hounga for injury to feelings. On appeal to the Employment Appeal Tribunal Mrs Allen cross-appealed against the order. The Employment Appeal Tribunal apportioned blame between both parties and upheld the tribunal's decisions; dismissing Miss Hounga's appeal and Mrs Allen's cross-appeal.[145]

There was a further appeal to the Court of Appeal by Miss Hounga and a cross-appeal by Mrs Allen. At the Court of Appeal Mrs Allen's counsel submitted that as Miss Hounga's claim for unfair dismissal was barred by the public policy defence of illegality, (as were all other claims based directly on the employment contract), the discrimination claim should also be barred.[146] In light of this submission, the Court of Appeal found no basis to allow Miss Hounga's claim to succeed. Rimer LJ who delivered the court's judgment criticised the fact that the Employment Appeal Tribunal had provided no justification for allowing Miss Hounga's discrimination claim while rejecting her unfair dismissal claim on public policy grounds.[147] Rimer LJ also criticised the Employment Appeal Tribunal for apportioning blame between both parties and stated that "[w]hichever party bore the greater responsibility for making of the illegal contract, [Miss Hounga] was a willing participant in it".[148] To this end, the court held that Miss Hounga's contract of employment was tainted by illegality at its inception; as a result her claim for discrimination was barred, being positively linked to her status as an illegal immigrant. Criticising the Court of Appeal's judgment, Bogg and Novitz argued that the court's decision perpetuates "the draconian treatment of irregular migrant workers by their employers and that condoning the said act had the effect of bringing the English legal system into disrepute."[149] It is submitted that the Court of Appeal decision could be viewed as advocating that an employer can employ an illegal immigrant and discriminate against such individual without attracting any legal sanction.[150]

This issue of the integrity of the English legal system was addressed on appeal to the Supreme Court when Lord Wilson keen to preserve the integrity of the English legal system, criticised the Court of Appeal's approach in apportioning blame to both parties.[151] Being of

[144] [2001] ICR 99 The test is "to consider whether the applicant's claim arises out of or is so closely connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct"

[145] *Allen v Hounga* [2011] Eq. L.R. 569

[146] *Hounga v Allen & Anor* [2012] EWCA Civ 609, at 32

[147] *Ibid*, at 37

[148] *Ibid*, at 62

[149] Bogg and Novitz T, 'Race discrimination and the doctrine of illegality'(2013) 129 L.Q.R. 12, at page 17

[150] Indeed Mrs Allen and the family were not prosecuted. Note however that under s.15 of the Immigration, Asylum and Nationality Act 2006 an employer could face a civil penalty of up to £20,000 for employing an illegal immigrant.

[151] *Hounga v Allen* [2014] UKSC 47, at 39

the view that an application of the defence of illegality on the facts of the case would compromise the integrity of the legal system, his Lordship's assessment was that 'the law would appear to assure employers in Mrs Allen's position into believing that they could employ illegal immigrant and discriminate against them with impunity.'[152] While acknowledging that there is no inextricable link between Miss Hounga's illegal conduct and the claim, Lord Wilson went further and took the view that 'the illegality defence being a principle of public policy would have to be balanced with any other possible countervailing public policy'. The countervailing public policy here was the protection of victims of trafficking. His Lordship considered the six indicative criteria for forced labour according to the International Labour Organization and was of the opinion that three of the indicators were present – 'the presence of physical violence or threats of it, withholding of wages and threats of exposure to the immigration authorities.'[153] Lord Wilson then drew a conclusion from this stating that 'if Miss Hounga's situation was not one of trafficking it was sufficiently close to trafficking that the distinction will not matter'.[154] Taking a balancing approach, Lord Wilson concluded that even if Miss Hounga's illegal status was inextricably linked to the discrimination she suffered, 'public policy in support of the application of that defence of illegality should give way to the public policy of the protection of trafficked victims'.

A more restrictive approach was taken by Lord Hughes. Although applying the inextricably linked test Lord Hughes concluded that there was no close connection between Miss Hounga's illegal status in the UK and the discrimination she suffered. His Lordship however failed to identify with Lord Wilson on the view that the illegality defence should give way to the public policy of protection of trafficked victims even if the appellant's illegal status was inextricably linked to the discrimination she suffered. On this issue, Lord Hughes was adamant that being a victim of trafficking was not sufficient to absolve Miss Hounga from criminal liability.[155] Regardless of the different opinions, the Supreme Court held by a unanimous vote that Miss Hounga's racial discrimination claim was not defeated by the defence of illegality.

After *Hounga*: the significance of protection from discrimination

Illegal migrant workers could often easily be discriminated against in the workplace on grounds of race (nationality). The question after *Hounga v Allen* is therefore whether the Supreme Court judgment serves to afford illegal migrant workers the possibility of protection from discrimination in the workplace. Protection from discrimination is considered significant on many fronts. According to Lord Bingham, it is one of the principles of the rule of law that "[t]he law must afford adequate protection of fundamental human rights".[156] On a similar front, Professor Pitt notably argues that "[e]quality is accepted as a fundamental human right, because it is recognised in all the major international treaties and conventions on human rights".[157]

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[152] *Ibid*, at 44
[153] [2014] UKSC 47, at 49
[154] *Ibid*
[155] *Ibid*, at 64
[156] Bingham T, *The Rule of Law*, (London: Penguin Books, 2011), Ch 7, page 66. This argument as promulgated by Lord Bingham and shared by other academics relates to the substantive conception of rule of law. Other academics such as Raz had proposed the formal conception of rule of law and it is their view that rule of law is separate from concepts of equality, justice and democracy – see Raz J, *The Authority of Law: Essays on Law and Morality*, (New York : OUP 2009) at Chapter 11, page 211
[157] Pitt G, *Employment Law*, 9th edition, (London: Sweet & Maxwell, 2014) Chapter 2, page 34

In line with her argument, the Universal Declaration of Human Rights (UDHR) 1948 in Art. 2 states:

> "Everyone is entitled to all the rights and freedom set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status".

Equality is also echoed by Article 14 of the European Convention of Human rights (ECHR) 1950 in the form of prohibition from discrimination. However, under the ECHR this right is not free-standing; as an individual cannot just make a discrimination claim, instead he must show that his ability to enjoy one or more of the convention rights was affected by the discrimination. The Human Rights Act (HRA) 1998 gave further effect to the rights under the convention, including prohibition from discrimination. The Equality Act 2010 codified the existing legislation on discrimination and offers protection for those in "employment" as defined under s.83 of the Act. Under the Act the various grounds (known as the protected characteristics) on which discrimination must not take place in the workplace are listed under s.4.

Pursuing related claims

The Supreme Court's decision offers illegal migrant workers an avenue of success in relation to discrimination in employment. Yet, it could also be said that the decision is fact specific to the extent that not all illegal migrant workers are protected. As Lord Wilson's focus was on a trafficked victim or such person sufficiently close to a victim of trafficking, it is arguable that a clear line was drawn; so that where an illegal migrant worker who has been discriminated against in the workplace brings a claim whence he is not a trafficked victim or sufficiently close to a trafficked victim, the outcome would arguably differ. As an instance, where an individual lawfully in the UK overstays his leave to remain and finds a job in the light of his illegal status, he would not be rightly regarded a victim of trafficking or sufficiently close to a victim of trafficking. In this instance, clearly the defence of illegality would be likely to trump any claim he brings in relation to the employment, and possibly any claim for discrimination.

An application of this approach is seen in the Court of Appeal's decision in *Vakante v Addey & Stanhope School Governing Body*.[158] Here the claimant whose leave to remain in the UK expired had applied for asylum. While his application was being processed he was precluded from working. However, he lied about his right to work and obtained employment. He was dismissed eight months later (not on the grounds of his immigration status). He brought a claim for discrimination arising out of the employment and the court held that he was solely responsible for his illegal conduct; hence, his claim was barred for illegality. The approach in *Vakante* was taken on in *Hounga v Allen* by the Court of Appeal. Although the Supreme Court in *Hounga* overruled the preceding Court of Appeal's decision, it did not overrule *Vakante*. Certainly their Lordships by holding the view that *Vakante* was rightly decided,[159] rather than overruling it at the earliest opportunity, appears to be advocating the difference in approach between these two cases. *Vakante* and *Hounga* may share a similar issue, but there exists however a considerable difference on the facts between the two cases. In *Vakante*, the illegal migrant worker had lied and obtained employment and the employer had no

[158] [2004] EWCA Civ 1065
[159] *Hounga v Allen* [2014] UKSC 47, at [35] for Lord Wilson and [58] for Lord Hughes.

knowledge of the fact that he had no right to work. In *Hounga* the employer and the illegal immigrant engineered the employment. One could say that this difference on the facts accounts for the difference in the outcome of the two cases. Thus it could be argued that where an illegal migrant worker is the sole instigator of the illegal employment *Vakante* would be adopted. Where the illegal immigrant is not the sole instigator *Hounga v Allen* should apply.

Meanwhile Bogg and Green rejected the idea that *Hounga v Allen* in the Supreme Court has an exclusionary effect on a non-trafficked illegal migrant worker.[160] They argued instead that *Hounga v Allen* ensures that 'the courts would identify the fundamental right occupying the centre stage in any given case and conduct a balancing exercise.'[161] It is their view that protection of fundamental rights attracted public policy consideration and that in *Hounga v Allen* "prohibition of forced labour was the fundamental right that occupied the centre stage in the public policy test".[162] Hence other cases involving non-trafficked illegal migrant workers might engage different fundamental rights so as to trigger public policy consideration and a balancing exercise.[163] It is submitted that the above projections by Bogg and Green are correct. Clearly as a result of *Hounga* a lower court when dealing with a case of an illegal immigrant (trafficked or non-trafficked) and engaging the defence of illegality, is bound to balance the public policy in favour of the illegality defence with any other possible countervailing public policy; the protection of fundamental rights being such a countervailing public policy. We should recall that protection from discrimination was argued as being a fundamental right. Hence in the above sense a non-trafficked illegal migrant worker could arguably succeed in a claim for discrimination against his employer who invokes the defence of illegality. On this it remains to be seen how future courts approach a non-trafficked illegal immigrant's claim for discrimination bearing in mind that *Vakante* could be adopted as it is not overruled.

Facing the legal process issues

The present danger after *Hounga v Allen* is that there still exist ways in which illegal migrant workers are rendered precarious. To be able to access the courts and be granted a ruling, an illegal migrant worker would first face the legal process issues. Certainly some of these issues are faced by every employee; however this article focuses on illegal migrant workers as they are the most vulnerable of potential claimants.

The Employment Tribunal and the Tribunal Fee System

The government introduced the concept of fees under the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.[164] The application of fees applies to any claim made to the Employment Tribunal; with "claim" meaning "any proceedings brought before an employment tribunal and including an appeal, application, complaint, reference or question".[165] A claim will be rejected by the tribunal where the fees are not met or paid in full.[166] It has been contended that the real motive for introducing the fee system was the

[160] Bogg A and Green S, 'Rights are not Just for the Virtuous: What Hounga means for the Illegality Defence in the Discrimination torts' (2015) 44 (1) ILJ 101, at 115
[161] *Ibid*
[162] *Ibid*
[163] *Ibid*
[164] Article 3, Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893)
[165] Article 2 of the Order (SI 2013/1893)
[166] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rules 11(1) and 11(2).

usual floodgate argument to deter claimants from bringing claims. Evidence of this is to be found in the Secretary of State for Business's call for the radical reform of the employment system in 2012, because it was too easy for employees to make what he called "unmerited claims".[167] Whether meritorious or unmeritorious, the ratio of claims made to the Employment Tribunal has fallen significantly by 73 per cent since the introduction of the fee system according to research conducted by the Citizens Advice Bureau.[168]
The introduction of the tribunal fee system was and is still being criticised on two major grounds: firstly on the basis that the fees themselves are substantial, to sums such as £1200; the other that the fees are paid only by the claimant, who at this point of bringing a claim may have lost his job. The question then becomes how would an illegal migrant worker afford to bring a claim in the Employment Tribunal in order to be accorded a ruling for discrimination suffered in the workplace bearing in mind that such individuals may have no income at all following a dismissal?

It is true that employees can get free legal advice and/or representation on their employment issues at several Pro Bono centres. Indeed *Hounga v Allen* at the Employment Tribunal and the Employment Appeal Tribunal was a case of free representation. The problem however with free legal advice and/or representation is that a further reform of the law has seen funding to legal aid providers dramatically cut by 10 per cent under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.[169] The outcome of this reform is that several legal advice and representation centres have promptly closed down being unable to continue as a result of lack of funds.[170] An added issue with accessing free legal advice is the fact that under LASPO the eligibility criteria for "legal aid"[171] was tightened and many areas of the law were removed from eligibility for legal aid – these include some aspects of family law, immigration and employment.

The legal aid reforms came into effect on 1 April 2013. The upshot was to save £350 million, from the usual £2.2 billion legal aid scheme. As a result of reforms such as this, justified on the backdrop of saving cost for the government, Mangan argued that "emphasis is on the use of the law as a tool for economic stimulation rather than a source of rights protection."[172]
Taking a similar stance Lord Neuberger, the President of the Supreme Court, voiced his concern regarding the changes to legal aid. He stated that "cutting the cost of legal aid deprives the vulnerable of the protection of the courts as they are unable to get legal advice and representation".[173] Where an illegal migrant worker with a potential claim cannot get legal aid, the individual is likely to drop the claim. Thus, there is clearly "a rank denial of justice and a blot on the rule of law".[174]
While some areas of employment law were removed from the eligibility criteria for legal aid,[175] claims for discrimination arising in the workplace were in fact not part of the affected

[167] Reforming employment law relations, https://www.gov.uk/government/speeches/reforming-employment-relations accessed on 26/03/2015
[168] The price of employment rights, https://blogs.citizensadvice.org.uk/blog/the-price-of-employment-rights/ used on 18/03/2015
[169] House of Commons Committee of Public Accounts, 'Implementing reforms to civil legal aid', thirty-sixth report of session 2014 – 2015, HC 808, at page 4.
[170] Barnet Law Service is one of such centres that had to close as a direct consequence of LASPO 2012.
[171] Legal aid also known as public funding is state assistance with legal cost. For more information see http://uk.practicallaw.com/2-535-4448?q=civil+legal+aid accessed on 29/03/2015
[172] Mangan D, 'Employment Tribunal Reforms to Boost the Economy' (2013) 42 (4) I.L.J 409
[173] http://ukscblog.com/lord-neuberger-rule-law-access-justice-choice-excerpts/ used on 29/03/2015
[174] Ibid
[175] Unfair dismissal as an instance is among the areas of the law removed from the legal aid eligibility.

areas. This is because discrimination in the workplace is a contravention of the Equality Act 2010 and employment cases involving a contravention of this Act and of human trafficking are outside the scope of the legal aid cuts.[176] Here it is to be seen that an illegal migrant worker bringing a claim for discrimination can access legal aid. Following this, such individuals would undoubtedly be able to successfully deal with this legal process obstacle to the tribunal fee system.

Time limits in bringing discrimination claims

A claim for discrimination must be made within three months (minus one day) of the act or acts of discrimination complained of – s.123 of the Equality Act 2010. This time limit is strictly enforced, with extensions given only in exceptional circumstances. The power to grant an extension is provided under s.111 of the Employment Rights Act (ERA) 1996. However, the employee must show it was not reasonably practical to present the claim on time. The problem here is that an illegal migrant worker may not know the law and as a result a strict enforcement of the time limit would be unfair. In certain other cases such an individual may also not know within three months of the discriminatory act occurring that he has a potential claim to make.[177] Hence, bringing a claim for discrimination is not a straightforward process for the illegal migrant worker who may be unable to meet the deadline. Where he misses the deadline, added to the fact that the time limit is strictly enforced, he also bears the burden of proving it was not reasonably practical to bring the claim on time. This race against time arguably impairs access to justice for an illegal migrant worker who has suffered discrimination in the workplace.

The Advisory, Conciliation and Arbitration Service (ACAS)

The Advisory, Conciliation and Arbitration Service (ACAS) was first established in 1974 and was placed on a statutory footing by s.1 of the Employment Protection Act (EPA) 1975. Following various reforms it now plays a role as a means of alternative dispute resolution.[178] Consequently ACAS would attempt early conciliation between the employer and the employee. However, until 6 May 2014, consultation with ACAS was entirely voluntary, but was made mandatory under s.7 of Enterprise and Regulatory Reform Act (ERRA) 2013. Mandatory consultation was justified on the basis of cost reduction, emphasis being placed on the fact that disputes would be resolved at the outset so that claims reaching the Employment Tribunal would potentially reduce and in effect tribunal resources reduced. Further, it was argued that the voluntariness of ACAS meant a lack of commitment to dispute resolution between the parties.

Consultation with ACAS is free; however it may arguably have proved less effective. While arbitration itself is not an easy process, it is submitted that ACAS is a blunt instrument which adds to the complexities of employment law.[179] If ACAS is ineffective, it can only stand as an

[176] See LASPO 2012 Sch 1, Part 1, para 43(2) for the Equality Act; and 32(4), 32(5) for victims of human trafficking.

[177] This conclusion was arrived at following the author's experience undertaking Pro Bono work in a Legal Advice Centre. During the period of the engagement vulnerable employees that have been discriminated against come in without knowledge of whether they have any basis for their claim. They are given advice and are asked to act promptly, at which point the deadline is only a few days away.

[178] See Lockton D, *Employment Law*, 10th edition, (Hampshire: Palgrave Macmillan, 2011), at Ch 1, page 13 for history of the reform process

[179] None of the vulnerable employees encountered at a time when the author undertook Pro Bono work had much success with ACAS early conciliation. None of these employees were illegal immigrants.

impediment to an illegal migrant worker's access to justice. Indeed at a time when ACAS was still voluntary, a study research carried out by Busby and McDermont found that "the mediating role played by ACAS produces barriers to justice for vulnerable employees."[180]

The main reason for this is the fact that ACAS "treats both the employer and employee as if they have the same capital – social, cultural and economic."[181] It was also found that many employees who have attended ACAS early conciliation have no clear understanding of what ACAS was or its role.[182] More criticism of ACAS followed in the form of the prescribed period for ACAS early conciliation - one calendar month starting on the day ACAS was notified.[183] Although this period of time can be extended further to a maximum of 14 days,[184] the contrary view is that the early conciliation period is not a long enough period to settle more complex cases.[185] In truth discrimination is a complex case; it is hard to prove as evidence of the discrimination is hard to obtain. Where the illegal migrant worker is discriminated against in the workplace, employees who are witnesses may be unwilling to come forward for fear of losing their jobs. In addition, management may be unwilling to admit that a discriminatory act has occurred for fear of bad publicity. Following this unwillingness to admit the occurrence of a discriminatory act - as is often the case - ACAS conciliation would clearly be unsuccessful. Where ACAS conciliation is unsuccessful the claim would then proceed to the Employment Tribunal. Here, as a consequence of time wasted on ACAS conciliation it is argued that ACAS stands as an obstacle to the illegal migrant worker's ability to access the courts without obstacles.

Government Policies

Government policy believes that "illegal working encourages illegal immigration"[186] (Mark Harper Immigration Minister). Some government policies have made it increasingly difficult for illegal immigrants to survive within the state. Consequently, an illegal immigrant's protection from discrimination in the workplace and the likelihood of bringing a claim for the discrimination are weakened.[187] Government policy is to prosecute illegal immigrants, and afraid of the prospect of prosecution, it is arguable that an illegal migrant worker would be unlikely to report any discriminatory acts within employment.[188] This is true of the case of *Hounga*, where the claimant failed to report to the authorities the on-going abuse for over 18 months, until she was eventually ejected from the house with nowhere to go. With the passing of the Modern Slavery Act 2015 it could be argued that there is hope for illegal immigrants. At a point when the Act was still a Bill before Parliament, the Home Secretary proposed immunity from prosecution of vulnerable individuals'.[189] The essence was that there would be no prosecution of illegal immigrants by the Department of Public Prosecutions "when it is not in the public interest."[190] The relevant provision incorporating

[180] Busby N and McDermont M, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings', (2012) 41(2) ILJ 166
[181] *Ibid*, at 183
[182] *Ibid*, at 179
[183] Regulation 6 of The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations (SI 2014/254)
[184] *Ibid*
[185] http://www.theguardian.com/money/blog/2014/apr/07/how-employment-rules-affect-you-acas used on 27/03/2015
[186] Immigration Bill Factsheet: Work (clauses 39-40) (2013)
[187] See part 3 of the Immigration Act 2014 for the increased difficulty faced by illegal immigrants in relation to access to services.
[188] Indeed the same is true of other vulnerable employees' in the workplace.
[189] Home Office, 'Draft Modern Slavery Bill' Cm 8770 (2013)
[190] *Ibid*, at page 12

the Home Secretary's proposal is now part 5, s.45 of the Modern Slavery Act.[191] While many would agree with the idea of not prosecuting illegal immigrants, the problem is that the Act places emphasis on an illegal immigrant being a "victim of human trafficking" (see s.45(5) of the Act). The existence of this section leaves a non-trafficked illegal immigrant open to prosecution by the Department of Public Prosecutions and confirms that UK legislation is inadequate in terms of providing a route of redress for illegal immigrants.[192]

Conclusions

An illegal immigrant seeking redress for discrimination suffered in the workplace would have to launch a claim in the Employment Tribunal. As a result of several legal process issues, accessing the court is not a straightforward and easy undertaking; with the introduction of the tribunal fee system producing the toughest of challenges for illegal migrant workers looking to bring potential discrimination claims. Where a claim is initiated, it is impossible to predict the outcome of the claim. However, the balance has been tipped in favour of the illegal immigrant's due to the Supreme Court's ruling in *Hounga* and by the Modern Slavery Act 2015. The Modern Slavery Act should ensure that the threat of prosecution often used on an illegal immigrant by the respective employer is eliminated. This arguably will encourage the illegal immigrant to take the necessary step and bring a claim if there is any on-going abuse. Where a claim is successfully brought, Lord Wilson's broader approach in *Hounga* - that the court should consider countervailing public policy – will be given considerable weight. Many believe there is here an opportunity to bring international human rights law into the English common law public policy arguments.[193] While *Hounga* did not provide the ultimate answer it is a step in the right direction. It is suggested that the ultimate answer in the bid to prevent a lack of consideration being accorded to a non-trafficked illegal immigrant would be to reform the law. This could be achieved by inserting a possible amendment clause into the Equality Act 2010 for the general protection of all employees. Such a clause could expressly say that "a person can bring a claim for discrimination arising out of the workplace regardless of immigration status". Since a literal interpretation is the courts' first and foremost approach when construing legislation, the existence of such clause would go a long way towards producing an even layering of the law in discrimination cases by illegal migrant workers' - thereby ensuring their access to justice.

[191] Note that before Royal Assent was given the policy that illegal immigrants should not be prosecuted when it is not in the public interest was applied in the case of *R v L and Others (The Children's Commissioner for England and Equality and Human Rights Commission intervening)* [2013] EWCA Crim 991; when the Court of Appeal insisted on policy grounds that illegal workers judged "victims of human trafficking" should not be prosecuted.

[192] This view is equally shared by Mantouvalou V in 'Servitude and Forced Labour in the 21st Century: The Human Right of Domestic Workers', (2006), 35(4) I.L.J 395, at 414

[193] See Bogg A and Green S, 'Rights are not Just for the Virtuous: What Hounga means for the Illegality Defence in the Discrimination torts' (2015) 44 (1) ILJ 101, at 115

RECENT DEVELOPMENTS

PRISONERS' RIGHTS

Convicted prisoners, private and family life

O'Neill and Lauchlan **v** *Scottish Ministers* [2015] CSOH 93

Dr Steve Foster and Rona Epstein [*]

Introduction

The extent to which prisoners enjoy their human rights during incarceration is a constant matter of public, political and legal debate. Despite judicial recognition that prisoners enjoy those rights apart from those taken away by necessary implication,[194] most obviously the right to liberty, the extent and the grounds on which they can be restricted remains complex. In particular, is it possible to restrict the prisoner's rights on the basis of public opinion or outrage, or are those rights immune from such reaction? A recent case involving two convicted sex offenders who wished to visit each other so as to maintain their same sex relationship raised the above issues; requiring the courts to decide whether the right to private life can be recognised in such cases, and whether there was sufficient reason to restrict any such right.

The facts

The joint petitioners Charles O'Neill, age 52, and William Lauchlan, age 39, are imprisoned for life, having been convicted of crimes 'of extreme depravity.' They were ordered to serve minimum terms of 30 and 26 years respectively and are incarcerated in different prisons. The pair had murdered the mother of a boy whom they were sexually abusing after she threatened to report them to the authorities. Her body was dumped in the Firth of Clyde. Both were also serving concurrent sentences for a number of sexual offences. They claim to be a gay couple and their complaint is that their 'right to respect for family life' under article 8 of the European Convention on Human Rights (ECHR), has been violated, and that they are victims of discrimination (under article 14) because the Scottish Prison Service refuses to arrange inter-prison visits for them. Consequently, both claim compensation under Articles 8 and 14 ECHR, as given effect to in the UK under the Human Rights Act 1998.

Since 2010, when they were sentenced to life imprisonment, O'Neill and Lauchlan had made various requests to visit each other. Until very recently, the Prison Service had refused these requests. Under Rule 63(8) of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 there is an entitlement to visit a prisoner in another prison but only in 'exceptional

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[194] *Raymond v Honey* [1980] AC 1; *Golder v United Kingdom* (1975) 1 EHRR 524

circumstances.' The petitioners (or applicants) argued that as they were in a relationship the refusal to allow visits violated their right to respect for family life under article 8, and that they had suffered discrimination on the basis of their sexual orientation. In fact the Prison Service had told the court that it did not accept that the petitioners have been in a same-sex relationship since they were taken into custody in 2008; and that since November 2014 one inter-prison visit had already been facilitated for the petitioners. Nevertheless, the petitioners complained with respect to the previous attitude of the Prison Service to their requests for visits, and as regards the inter-prison visiting regime.

The decision

Dealing first with the claim under article 8, Lord Stewart decided that the Prison Service had not failed to respect the petitioners' family life in terms of article 8, and had not discriminated against the petitioners under article 14. He thus refused the joint petition. However, his Lordship stated that he did accept that 'the prison rule about inter-prison visits, rule 63(8) although, not in itself unlawful, was part of an unlawful regime because, in the absence of explanatory context, the rule alone does not satisfy the requirements of legality or lawfulness; and – a related point – that the reasons given by the Prison Service for refusing the petitioners' requests to date have tended towards inadequacy.' The decisive issue under article 8, however, was whether the petitioners' life together was of sufficient quality to engage the protection of the article. If not, any decision by the Prison Service to refuse inter-prison visits could not violate their right to respect for their family life.

The judge was clear that despite the horrendous crimes committed by the petitioners it was not permissible under the ECHR to deprive prisoners of their human rights. Like everyone else, prisoners enjoy the protection of article 8 and there is no justification for denying inter-prison visits as part of their punishment. In terms of the ECHR, it was no proper part of punishment to deprive imprisoned offenders of their human rights except insofar as such deprivation was necessarily incidental to incarceration.[195] In terms of article 8 ECHR the petitioners like everyone else have 'a right to respect for their private and family life.'[196] However, it was for the petitioners to demonstrate that they were in a relationship of sufficient 'quality' to engage article 8. In this respect the court found that the evidence was equivocal, suggesting that the motivation for seeking more contact with one another was to assist with preparations for various legal proceedings. There were also contradictions in the evidence as to whether the two had a sexual relationship. Moreover, since September 1997, O'Neill and Lauchlan had been simultaneously at liberty for only 32 months which, it was argued for the respondents, was scarcely enough time to constitute a 'life partnership'.

These were relevant factors for the judge, but not determinative, and the key consideration for the judge was that during their brief spells of liberty the most powerful evidence of the petitioners' togetherness was their involvement in sexual offending against young males. Referring to the comments of the sentencing court in 2010, the judge found that for many years the petitioners' whole lives had been focussed on finding victims to groom and sexually abuse. The quality (or otherwise) of their life together was demonstrated by the depraved offences of which they were convicted; the criminal record showed that the petitioners were 'partners in crime' rather than 'partners in love'.

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[195] *Hirst v United Kingdom (No 2)* 42 EHRR 41, at para 69 – 71

[196] *McCotter v United Kingdom* (18632/91) (1993) 15 EHRR CD 98].

Although the judge accepted that it was dangerous to pass judgement on the value of someone's family life, in this case it had to be done. He concluded that on the evidence the life which the petitioners had together was 'so negative that it cannot be '*family life*' as that concept should be understood.' Their relations with one another did not engage, did not attract the support of, and did not merit the protection of the 'family life' provisions of article 8 ECHR. Thus the petitioners had failed to show that they had a life together of a type and quality which engaged article 8. Finally, the judge emphasised the need to maintain respect for the ECHR as a source of law, stating that to extend protection for qualified rights such as article 8 to "egregious conduct far beyond European norms would undermine respect for the Convention and the rule of law. Thus, whilst the Prison Service was free to arrange inter-prison visits for the petitioners, the Convention could not oblige it to do so. The judge then dealt with the allegation of discrimination under article 14 very briefly: as the Prison Service had not failed to secure the petitioners' rights under Article 8, it followed that there had been no violation of Article 14.[197]

Commentary

The European Court has always stressed that prisoners do not forgo their Convention rights on incarceration,[198] but that the enjoyment of the right to private and family life is subject to the normal and reasonable requirements of prison administration.[199] Thus, it is permissible to impose restrictions on the enjoyment of the prisoner's family and private life not only to secure good order and discipline and to prevent crime, but also to accommodate the operation of the prison regime. This was neatly illustrated in the recent High Court decision in *R (on the application of Stevenson) v Governor of Wakefield Prison and Secretary of State for Justice*,[200] where it was held that a prisoner's allocation to a prison in the north of England whilst his family and friends lived in the south of England was not in violation of his right to respect for private and family life as visits from his family were neither very difficult nor impossible. The prisoner submitted that his allocation to the new prison violated his right to family life under article 8, as he was unable to receive visits from family and friends as the prison was too far away. Specifically he argued that his mother had a poor memory, panicked during journeys and thus had to be accompanied, and that the location of the prison had contributed to his divorce. It was held that in judging the case, the context of incarceration could not be ignored, and that the obvious course flowing from incarceration could not be overstated. The issue, in the court's view, was one of justification, and whether it was necessary in pursuit of a legitimate aim and in accordance with the law. Proportionality had to be considered in all cases, and the issue was whether the article 8 threshold had been transcended. The legal test was whether visits were very difficult or impossible so that family life had been violated.[201] The claimant's case was finely balanced and the court had to focus on whether distance made visits difficult. The overall conclusion was that the claimant had failed to demonstrate a breach of article 8 and had not demonstrated a legal flaw in the decision-making process that needed to be corrected.

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[197] See Thomas Raine, UK Human rights blog, 29 October 2015, accessible at: http://ukhumanrightsblog.com/2015/10/29/court-of-session-partners-in-crime-have-no-family-life/)

[198] *Golder v United Kingdom*, note 1 above

[199] *Boyle and Rice v United Kingdom* (1998) 10 EHRR 425

[200] [2015] EWHC 1014 (Admin)

[201] *Vintman v Ukraine* (Application No. 28403/05)

The prisoner's right to private and sexual life whilst in prison has also been the subject of judicial debate. Most famously, in *Dickson v United Kingdom*,[202] the Grand Chamber of the European Court of Human Rights had to consider whether the failure to allow a convicted murderer access to artificial insemination facilities so that he could start a family with his partner was in violation of his Convention rights. Although the Grand Chamber decided that the Secretary's policy was disproportionate, because it failed to give sufficient weight to the partner's rights, it held that it was permissible to take into account the public reaction to the granting of the facility. Thus, the argument with respect to the undermining of public confidence in the prison system and the circumvention of the punitive and deterrent element of the sentence were partially accepted by the Grand Chamber. Although there was no place for restrictions on the basis that the enjoyment of rights might offend public opinion, it was accepted that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. In addition, the recent decision of the Court of Appeal in *Bright and Keeley v Secretary of State for Justice* [203] displays a hands-off approach with respect to prison regulations which restrict same sex relationships in prison. In that case the Court of Appeal held that decisions to separate prisoners who were in long-term same sex relationships with fellow prisoners had not breached their article 8 rights; and that the Secretary's failure to publish a policy explaining whether homosexual relationships were to be facilitated or restricted did not mean that decisions to separate prisoners who had been caught having sex in their cells were unlawful; it being unrealistic and unnecessary to expect him to detail the kind of physical contact between prisoners that was regarded as indecent or otherwise unacceptable.

Conclusions

Although both the European and domestic courts accept that prisoners do not lose their right to private and family life on incarceration, it is clear that they are prepared to offer the state and the prison authorities a wide margin of discretion in restricting those rights. The doctrines of legality and necessity must be satisfied if the restriction is to be compatible with the ECHR and the Human Rights Act 1998; although it is quite clear that most restrictions that are introduced to meet the smooth running of the prison system are likely to be approved by the courts in the absence of *Wednesbury* unreasonableness. In addition, the decisions in *O'Neill*, and *Bright and Keely*, show a reluctance to afford prisoners the right to a private sexual life; the court in *O'Neill* showing a deep reluctance to accept the petitioners' claim under article 8 when that relationship had been based on criminal and collusive behaviour, and the court in *Bright* showing scant regard to the possibility that prisoners might have a right to form a sexual relationship whilst in prison so as to engage article 8. These rights should not be lost totally by necessary implication, although the case law suggests that restrictions on these rights will, in general, be upheld when challenged by prisoners.

[202] (2009) EHRR
[203] [2014] EWCA Civ 1628

CASE NOTES

Police investigations – duty of care – article 3 ECHR – effective remedies

Commissioner of Police of the Metropolis v DSS and NBV [2015] EWCA Civ 646

The facts and decision

The Commissioner appealed against a decision of the High Court ([2014] EWHC 436 (QB)) that he had breached the rights of the respondent women under art. 3 ECHR by failing to conduct effective investigations into sexual assaults committed against them. (In a conjoined appeal, a man appealed against a decision dismissing his claim for breach of art.3 against the Chief Constable of the Greater Manchester police, and that appeal was dismissed).

The women (D and N) had sought declarations and damages against the Commissioner for an alleged failure to conduct an effective investigation into their allegations of sexual assault: they were among the victims of the so called "black cab rapist" (W), who over a six year period between 2002 and 2008 had committed more than 100 drug and alcohol assisted rapes and sexual assaults on women whom he had been carrying in his cab. D and N complained to the police, who commenced investigations, but failed to bring W to justice until 2009. The High Court held that art. 3 imposed a duty upon the police to investigate, and the investigation had to be independent, impartial and subject to individual scrutiny (*Osman v United Kingdom* (1998) 29 EHRR 245, *Z v United Kingdom* (2001) 34 EHRR 3). Furthermore, the duty was one of means, and not results and the breach could occur regardless of whether the investigation led to an arrest, charge and conviction. The court also stated that allegations of crime that were "grave" or "serious" amounted to torture or degrading or inhuman treatment; and that rape and serious sexual assault fell within that category. Hence, where a credible allegation of a grave or serious crime was made, the police had to investigate in a manner, which was capable of leading to the perpetrator's identification and punishment On the facts they found that the Commissioner was liable to the claimants for a breach which arose in relation to the period between 2003, which coincided with the complaint to the police, and 2009 when W was tried. In the court’s view, there had been a series of systemic failings which went to the heart of the failure to apprehend W and to cut short his five to six year spree of violent attacks. Subsequently, the High Court awarded sums of £22,250 and £19,000 to D and N respectively ([2014] EWHC 2493 (QB)).

In the present appeal the police argued, firstly, that the art.3 investigative duty arose from the obligation imposed under art. 1 ECHR – imposing a duty on states to secure the rights and freedoms in the Convention, but that art. 1 formed no part of UK law under the 1998 Act and so could not be relied upon. Secondly, it was claimed that a duty to investigate under art.3 only arose where the State was complicit in the alleged substantive breach of art.3, which not shown in the present case, as there was no allegation that the attacks themselves were a result of any breach of duty by the police. Thirdly, it was argued that the judge had placed the

degree of rigour required of the police investigation too high on the scale of liability under art.3.

The Court of Appeal held, firstly, that the omission of art.1 from the catalogue of Convention rights contained in Sched. 1 of the 1998 Act was readily explained and not fatal to the women's claim. In the Court's view, art.1 was the provision by which Member States were obliged to secure the rights stipulated in the Convention. Further, the scheme of the Act was clear in that those Convention measures which stated *substantive* rights were named as the Convention rights to be included in Sched, 1, and other measures (such as article 1 and article 13 – right to effective remedies) that gave the Convention effect but did not state its substance, were not. The appellants' submission failed to appreciate that distinction and the Court thus dismissed that ground of the appeal.

Secondly, the Court confirmed that European Court case law established that the duty to conduct an official investigation into alleged ill-treatment by private individuals in order to identify those responsible was inherent in art.3. In the Court's view, the English cases did not require a different approach to art.3 when it functioned as a Convention right under the 1998 Act; it being important to keep in mind art.3's overall, strategic, safeguarding purpose. The Court also stated that it was misleading to regard investigative processes as always "ancillary" or "adjectival" to the "substantive" right guaranteed by art.3. In its view, there was perhaps a sliding scale: from deliberate torture by State officials to the consequences of negligence by non-State agents, and the energy required of the State to combat or redress those ills was no doubt variable. However, the same protective principle was at its root, although, the margin of appreciation enjoyed by the State as to the compliance with art.3 widened at the bottom of the scale but narrowed at the top - serious violent crime by non-State agents, as in the women's case, being higher up the scale and thus requiring a proper criminal investigation.

Thirdly, the Court considered the difference between a civil claim and a claim made on human rights grounds. In the Court's view, the process in both cases was quite different; one difference being that a negligence claim involved a claim for damages as of right, but in the human rights' claim compensation was discretionary. Another difference related to the standard in ascertaining whether there has been a breach of the art.3 investigative duty, as compared with what might constitute breach of a common law duty of care. In the Court's view, because the focus of the human rights claim was not on loss to the individual, but on the maintenance of a proper standard of protection, the court was in principle concerned with the State's overall approach to the relevant Convention obligation. Thus, the enquiry into compliance with the art.3 duty was first and foremost concerned, not with the effect on the claimant, but with the overall nature of investigative steps taken by the State.

On the facts, the Court of Appeal held that the judge's conclusion on liability had been inevitable and thus the appeal should be dismissed. (In the conjoined appeal, although the judge's approach – to ask whether the police investigation had been reasonable – was loose, it was in line with the scope and nature of the art.3 duty: appeal dismissed)

Analysis

At common law the general principle is that police authorities are not liable in negligence with respect to their acts, or failure to act, in the investigation of crime (*Hill v Chief Constable of West Yorkshire* [1989] AC 53. This is due, in the vast majority of cases, TO the lack of proximate relationship between the police and the victim, but there are also policy reasons for not restricting the police's discretion in this area and establishing liability. Although this may leave the victims of police negligence without a civil remedy in the domestic courts, other human rights remedies may be available if the individual can engage and prove a violation of a European Convention right presently contained in the Human Rights Act 1998.

Thus, it is possible in these cases to allege that the victim's right to life has not been protected by the State (under article 2 ECHR); that they have been subjected to inhuman or degrading treatment by a criminal act (article 3 ECHR), or had their private and family life interfered with (article 8). In these cases the state will be under a positive duty to protect the victim and remedy any breach of their Convention rights, irrespective of whether a civil claim is available or has been broken. In addition, the police may be under a procedural duty to investigate a criminal act if that act has impacted on the above rights. This procedural, investigative, duty is inherent in both article 2 and 3 and can be engaged and broken even if the substantive claim of the victim were to fail on the facts.

These remedies obviously cause a conflict between domestic civil law and the law of the European Convention, as given effect to under the Human Rights Act 1998 (HRA), and this conflict obviously informs the current debate as to whether the HRA should be repealed and replaced by a British Bill of Rights (and Responsibilities). The recent decision of the Court of Appeal in *Commissioner of Police of the Metropolis v DSS and NBV* ([2015] EWCA Civ 646), which confirms the liability of the police to conduct an investigation in compliance with article 3, raises a number of human rights issues with respect to the appropriate liability of public authorities in crime investigation cases, and the rights of victims of crime to effective remedies. It also adds clarity with respect to the scope of such duties and the appropriate approach of the courts when dealing with human rights claims rather than traditional civil claims.

The exclusionary rule in *Hill* with respect to civil claims does not violate the right to a fair trial under article 6 ECHR because the European Court have found that the rule is based on *substantive law*, whereas article 6 gives substantive protection (*Z v United Kingdom* (2002 34 EHRR 3). However, for domestic law to remain consistent with the Convention and the UK's responsibilities under that Treaty (articles 1 and 13), it must provide some remedy where other Convention rights are being claimed (in the present case art.3). On this point it was argued that the investigate duty arose because of art. 1 ECHR and as that article is not given effect to under the HRA it could not form the basis of the women's claim that art.3 included an investigative duty (so as to supply protection to them in securing their Convention rights in domestic law). The reason why articles 1 and 13 were not included in the HRA was because it was felt that the passing of the Act and the giving effect to Convention rights in domestic law and proceedings satisfied the UK's obligations under those articles, making their inclusion unnecessary.

As the Court of Appeal noted, the purpose of the 1998 Act was to list the substantive rights (articles 2-12, 14 and additional Protocols), but not to include other provisions which assisted

the enjoyment of those rights, such as article 1. Thus, the investigative duty arises from article 3, as given effect to by Sched. 1, and article 1's non-inclusion in the Act is irrelevant.

This issue may become complex if the HRA is repealed. Art. 1 ECHR imposes an obligation on the UK *in international law*, but does not have direct effect in national law, unless 'incorporated' in some way. At present the Convention rights are given effect to by the HRA and that allows the courts to adjudicate on Convention rights disputes, and in a way which is compliant with ECHR law, including the case law of the European Court (s.2 HRA). Article 1 is thus brought into domestic law and can apply as long as the Act is in force; for example to impose liability for human rights violations committed outside the UK but within its 'jurisdiction' as defined in article 1. If the 1998 is repealed and Convention rights are replaced by 'British' rights', the UK will certainly continue to owe an obligation in international law to comply with article 1, unless, of course, we take the drastic step of withdrawing from the Convention. However, unless the new legislation makes it clear that art. 1 will apply it is doubtful whether that article will have direct effect in domestic law.

This may present a problem where the 'new' rights are not as extensive or protective as the Convention rights, and the problem will be greater if the new law, as is likely, states that domestic courts do not have to take into account the case law of the European Court but must follow decisions of the Supreme Court. If the domestic courts continue to offer at least equivalent protection to victims as is available under the ECHR and HRA, then no problem arises; a state does not have to incorporate the ECHR or call them Convention rights. But, turning to the present dispute, let us imagine that our courts were to apply domestic law rather than Convention law to the issue of police liability. That would mean the case being struck out on policy grounds, and although the new Bill of Rights will include similar rights to arts. 2, 3 and 8, the domestic courts might – either of their own volition or because of a provision in the Bill excluding or restricting liability in these cases – revert back to the exclusionary principle in *Hill*.

The judgment of the Court of Appeal is also useful in explaining the purpose of article 3 claims in this area, and distinguishing such claims from those made in civil law. Thus, the Court stresses that article 3 is principally concerned with imposing liability on the state and defining the scope of that duty; whereas a civil claim is principally about compensating individuals. That distinction is not clear cut and the purposes overlap in both claims – civil law being informed by public policy, and effective compensation being available (and indeed required by art. 13) in human rights cases. Nevertheless, it has already been established that the basis of liability in either case is different and perhaps more onerous in the human rights claim. For example, in article 2 claims the test of liability - real and immediate risk to life - is more stringent than the test in negligence - reasonable foreseeability – making article 2 cases more difficult to establish (*Chief Constable of Hertfordshire* v *Van Colle* ([2009] UKHL 11; *Mitchell v Glasgow City Council* [2008] UKHL 50).

The decision in the present case is a welcome reminder that human rights claims are often a vehicle for imposing standards on the state and the actions of public authorities, and are not just a means of individuals being compensated for breach of their rights. That can often be forgotten in cases where the claimant is labelled unworthy of protection under human rights legislation. Such is obviously not the situation in the present case, where innocent victims have been compensated for breach of their rights, and for the state's neglect of their obligations. Reversion to the exclusionary rule would represent not only a breach of the government's obligations in international law, but a failure of the legal system to protect and

compensate individuals for breach of their human rights and dignity. Those considering the repeal of the HRA may wish to consider this point, before throwing the baby out with the bathwater.

Dr. Steve Foster Coventry Law School

Prisoners' rights – right to vote – European elections – European Court of Justice (ECJ)

Thierry Delvigne v Commune de Lesparrre-Medoc and Prefet de la Gironde (Case C-650/13)

Court of Justice of the European Union 6 October 2015

Facts and decision

In 1998 Delvigne was convicted by the French courts of a serious criminal offence. Under the law at that time those convicted of such a crime were automatically and permanently deprived of their civic rights: the right to vote and stand for election. In 1994 the law was changed and under the Criminal Code the ban ceased to be automatic and had to be imposed by a court for a period not exceeding 10 years. As the new rule does not apply to convictions delivered before the new Code entered into force, Delvigne remains banned under the previous law. He challenged the ban and the tribunal d'instance de Bordeaux asked the ECJ whether, taking into account the right of EU citizens to vote in elections to the European Parliament, a Member State can make provision for a general, indefinite and automatic ban on the exercise of civil and political rights.
The ECJ first held that the deprivation of the right to vote to which Delvigne was subject represented a limitation of the exercise of the right of EU citizens to vote in elections to the European Parliament, as guaranteed under the Charter of Fundamental Rights of the European Union. However, the ECJ held that limitations to that right may be imposed on the exercise of such fundamental rights provided they are proportionate. On this issue, the ECJ ruled that the ban in question was proportionate in so far as it took into account the nature and gravity of the criminal offence committed and the duration of the penalty. The ban in question applied (at the time) only to persons convicted of a criminal offence punishable by at least 5 years' imprisonment, and in any case allowed the prisoner to apply for and obtain reinstatement of the civic rights which they have lost under the law. Accordingly, the ECJ felt that it is, under EU law, possible to maintain a ban which precludes persons convicted of a serious crime from voting in elections to the European Parliament.

The ECJ also found that the decision of the Court was not called into question by the rule of retroactive effect of a more lenient criminal law, under which any lighter penalty provided by law after the commission of a criminal offence must be applied. In the ECJ's view, reform of the Criminal Code does not affect Delvigne's position, since he had already been finally convicted before the reform came into force.

Commentary

The battle for prisoners' voting rights in the UK has been active now for nearly 15 years. Following the domestic courts' refusal to declare s.3 of the Representation of the Peoples Act 1983 as incompatible with the right to vote under Article 3 of the First Protocol to the European Convention, the European Court of Human Rights, and then the Grand Chamber of the European Court confirmed that the 'blanket' ban on convicted prisoners voting in national and European elections was in violation of the 'right to vote' under article 3 of the First Protocol to the European Convention on Human Rights (1950): *Hirst v United Kingdom (No. 2)* (2006 42 EHRR 41). Despite that finding, and subsequent findings of the European Court, which confirm that the UK continues to breach its Convention obligations in this area, prisoners are still left without a remedy because the European Court of Human Rights and the Council of Europe are powerless to change the relevant law, and must wait for the government to initiate legislation which will comply with the rulings.

However, this recent decision of the European Court of Justice has accepted that the deprivation of the right to vote as a prisoner represents a limitation of the exercise of the right of EU citizens to vote in elections to the *European* Parliament. This means that UK law must comply with relevant EU law as far as European elections are concerned, and that if it is in conflict, including any ruling of the ECJ, then EU law will automatically apply and will prevail, irrespective of the government's strict legal power to ignore the rulings and directions of the European Court of Human Rights and the Council of Europe. The decision does not clear up all of the issues surrounding the UK law in this area, as the decision was made with respect to a ban in another country, which is different than the one operating in the UK. Nevertheless, it gives some renewed hope to disenfranchised prisoners that the current ban may be inconsistent with right under EU law.

Despite the ECJ's acceptance that EU law applies to this area with respect to elections to the European Parliament, it is questionable whether the decision resolves the question whether UK law is compatible with the European Convention and the EU Charter. At the very least the ECJ recognise that EU law and rights are engaged, in comparison with the domestic courts who felt that it had little impact. Thus in *Chester and McGeough* [2013] UKSC 63 the Supreme Court held that even if EU law had recognised a right to vote, it would not have gone further than Strasbourg jurisprudence as the ECJ very rarely declined to follow that case law. The only relief that the domestic courts could consider would be to declare relevant legislation inconsistent with EU law; it could not simply disapply the legal prohibition on prisoner voting. Nor, in the Court's view, could the courts read the provisions compatibly with EU law: the legislation was clear, and it would contradict the UK's intention in enacting it to allow some prisoners to vote under unspecified conditions; the Supreme Court could not devise an alternative scheme to Parliament.

Now that it is accepted that EU rights might be engaged, with respect to legality, looking at the tenor of the recent judgment it would appear that any restriction on disenfranchisement needs to be proportionate taking into account the nature and gravity of the offence and the duration of the penalty. Taking that into account the ECJ were satisfied that the French law (at the time of Delvigne's conviction, and certainly after the reform of the Code) was proportionate because it only applied to serious criminal offences (in this case those involving at least 5 years' imprisonment). This reflects the quite broad margin of appreciation given to states by the European Court of Human Rights in this area. Thus in *Scoppola v Italy*

(2013) 56 EHRR 19 the Grand Chamber not only hinted that each state had a broad discretion to determine the rules on prisoner disenfranchisement, but also held that judicial involvement in the decision to ban prisoners from voting was not necessary. The ECJ's ruling displays a similar reluctance to interfere where the domestic law only applies to certain and serious crimes.

The insistence that the law takes into account the gravity and nature of the ban would appear to leave the ban imposed on UK prisoners as still incompatible with both the European Convention and the recent decision of the ECJ. This is because of the blanket nature of the ban, which in *Firth v United Kingdom* (App. No 47784/09) the European Court recently confirmed as incompatible with article 1 of the first protocol; the ban not taking into consideration the nature and seriousness of the offence. In *Firth* the Court recognised that despite the recent steps taken in the United Kingdom with the publication of a draft Bill and the report of the Parliamentary Joint Committee appointed to examine the Bill, that the legislation remained unamended.

However, one dissenting judge in *Firth* – Judge Wojtycek – believed that the decision in *Scoppola* affords governments a much wider discretion, and one which could clearly cover the present UK law. In his view the law in the UK does not amount to a blanket ban, because it only applies to those in detention, as opposed to other jurisdictions which allow the ban to continue beyond incarceration. Accordingly the judge called for a review by the Grand Chamber of the situation regarding prisoner voting rights. If this is true, then it is possible for the government to argue, - both before the European Court of Human Rights and the ECJ - that the ban is indeed proportionate given that it only applies during the prisoner's incarceration and that, unlike other jurisdictions, prisoners resume their civic rights on release.

It is clear from the recent ECJ case that proportionality is at the heart of the legality and compatibility of any ban, and the wording of the ECJ's judgment appears to reflect, no more and no less, the standards already laid down by the Strasbourg Court. Those standards are, however, flexible and changing: both Courts have suggested that there will be some margin left to the state, but it is unclear at what point either Court would regard the ban as disproportionate. More specifically, it is not certain whether the ECJ would accept a ban such as the UK's, which is blanket in one sense (it applies to all incarcerated prisoners), but perhaps, not in another (in the sense that it does not apply beyond incarceration). It is suggested that the present UK ban is blanket and disproportionate: at best a lazy solution to the question of whether prisoners should be able to vote; at worst an illogical and disproportionate interference with a fundamental democratic right.

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Private and family life – celebrities – photographs – press freedom - damages

Weller v Associated Newspapers [2015] EWCA Civ. 1176

Court of Appeal

Facts

A newspaper publisher appealed against a decision of the High Court ([2014] EWHC 1163 (QB)) that it had misused private information by publishing paparazzi photographs of the respondents, the three children of the well-known British musician Paul Weller. It also appealed against the grant of an injunction restraining it from further publication of the photographs ([2014] EWHC 2127 (QB)). The photographs showed the musician on a day out in Los Angeles with his 16-year-old daughter and twin 10-month-old sons, displaying the family out in public, shopping and visiting a cafe. The photographs had been taken without consent and the children's faces were clearly shown and captions identified them by surname. The musician had asked the photographer to stop and had been told that the children's faces would be pixelated.

The musician, who regarded himself as a private person when not performing, had previously mentioned his family in interviews but had not given in-depth interviews about his private life, and his daughter had done some modelling, including a photo-shoot for a magazine, although the judge at first instance found that she was genuinely embarrassed by the paparazzi photographs. The judge held that the photographs had been published in circumstances where the children had a reasonable expectation of privacy; that although publication would have been lawful in California, that did not prevent a reasonable expectation of privacy in relation to their publication in England; and that the children's rights under article 8 of the European Convention on Human Rights outweighed the publisher's right to freedom of expression under article 10. The newspapers appealed on the basis that the judge had erred in his conclusions.

Decision

The Court of Appeal held that the starting point for determining whether there had been a misuse of private information was the two-stage test laid down in *Campbell v Mirror News Group Newspapers* ([2004] UKHL 32). First, the court had to ask whether the person had a reasonable expectation of privacy and, if it concluded that he did, it had to balance his article 8 right against the publisher's article 10 rights to freedom of expression. Those, in the Court’s view, were questions of fact and the appellate court would not interfere with the first-stage decision unless satisfied that the lower court's findings were unsupported by the evidence or its decision was one that it could not reasonably have made. The second-stage balancing exercise was analogous to the exercise of discretion and the appellate court would not interfere unless the court below had erred in principle or reached a conclusion which was plainly wrong or outside the ambit of reasonable conclusions. The judge had been right to conclude that the children had a reasonable expectation of privacy in respect of the photographs.

Applying those principles to the present case, the Court of Appeal held that there were some matters about which a person could have a reasonable expectation of privacy notwithstanding that they occurred in public; The photographs depicted a family activity belonging to that part of life that was protected by the broader right of personal autonomy that was recognised by Strasbourg jurisprudence. The children's father had not consented to the taking or publishing of the photographs, which, critically, identified the children by name, and two of the children were less than a year old. Accordingly, they had not laid themselves open to the possibility of being photographed in the context of an activity that was likely to be reported, and nor had their parents courted publicity for them. The fact that a child had a celebrity parent did not necessarily mean that they should have less of a reasonable expectation of privacy; indeed, it might make them particularly vulnerable. On the facts, in considering the impact of publication, the judge had properly considered the best interests of the children, who were to be protected from the risk of embarrassment, bullying, and more serious threats to their safety.

The Court of Appeal continued by stating that the weight to be given to the lawfulness of the taking and publication of the photographs under Californian law was a matter for the judge, and he had been entitled to give it little weight. He had heard little argument about the impact of the children's connection with California and, on any view, the fact that publication would have been lawful in California was not determinative of the issue. Further, in balancing the children's aricle.8 rights against the publisher's rights, the lower court had considered the criteria in *Von Hannover v Germany* ([2012] E.M.L.R. 16) and had been entitled to find that the balance came down in favour of the children's rights. Further, the publication of the photographs did not contribute to a current debate of general interest; the children had little or no public profile and were only of interest to the publisher because of their father; the photographs related exclusively to their private lives and had the sole purpose of satisfying public curiosity; the mere fact that their father had mentioned them in interviews could not justify publication; images of the younger children's faces had not previously been published; and the father had genuine security concerns.

Finally, the Court of Appeal noted that the judge at first instance had granted the injunction because, although there was no evidence that the publisher would publish the photographs again, there were "grounds for concern" that there might be future publication. While there was force in the publisher's argument that the identified grounds for concern were insufficient to justify the grant of an injunction, the decision was an exercise of discretion and it could not be said that the judge had reached a decision that was not reasonably open to him. Accordingly the appeals were dismissed.

Commentary

The decision of the Court of Appeal confirms that decisions on the two-stage inquiry are for the judge to determine by examining all the relevant facts and considering factors such as the status of the claimant, their age, any previous publicity and whether the information was related to any aspect of public interest which might outweigh the claimant’s expectation of privacy. Thus, only in cases where judges have misdirected themselves in respect of those issues or given insufficient weight to them will the appellate court interfere.

This decision has caused concern among the press who feel that it has created unnecessary image rights with respect to photographs taken in a public place, but the domestic courts have long accepted that the taking and publication of a person's photograph can amount to a breach of confidentiality/misuse of private information, and that the claimant can, in appropriate cases, rely, on article 8 ECHR. The question for the courts now is whether the circumstances surrounding the taking of the photograph give rise to a reasonable expectation of privacy and, if so, whether any breach could be justified on grounds of the public interest in publication (*Theakston* v *MGN Ltd* [2002] EMLR 22 and *Campbell v MGN Ltd* [2004] UKHL 32). It is clear that the taking of an individual's photograph without their consent will not provide an automatic right in confidentiality in the absence of other circumstances (*Sir Elton John* v *Associated Newspapers* (Unreported, decision of the High Court 23 June 2006), but in *Murray v Express Newspapers* ([2007 EMLR 22), the Court of Appeal held that whether there was a reasonable expectation of privacy depended on all the circumstances of the specific case, including the attributes of the claimant and the activity in which they were engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which, the information reached the hands of the publisher. In particular, the Court of Appeal noted that the fact that the photographed appellant was a child was relevant and of great significance to the issue of whether there was a reasonable expectation of privacy, even where the photograph captures what might be described as a routine event, such as someone shopping.

Although the age of the claimants may be decisive, a recent decision of the Supreme Court, albeit decided in a very different context, confirms that the general test is one of reasonable expectation of privacy, there being no special rule to cover minors. In *In the Matter of an application by JR38 for Judicial Review* [2015] UKSC 42, the Court found that the publication by the police of images of a 14-year-old boy apparently committing public order offences did not violate his rights under article 8 ECHR as the boy could not have had a reasonable expectation that photographs of him committing the offences, taken for the limited purpose of identifying him, would not be published. Thus, it found that in those circumstances article 8 was not engaged.

The majority of the Court in *JR38* found that the fact that the person was a child was no reason for departing from that test, though it conceded that it was a potentially relevant factor in its application. According to the majority, in considering whether somebody had a reasonable expectation of privacy, the court had to look at the circumstances and the underlying values that article 8 was designed to protect, and that the test did not exclude from consideration factors such as the age of the person involved, the presence or absence of consent to publication, the context of the activity, or the use to which the published material was to be put. Applying those factors the majority then held that public riot was not the kind of activity that article 8 existed to protect, and the criminal nature of the boy's activities was not an aspect of his life that he was entitled to keep private. Dissenting on that issue, Lords Kerr and Wilson JJSC felt that article 8 was engaged and that the concept of a reasonable expectation of privacy had to be approached with caution, particularly in the case of children. In their view, the question was whether the nature of the activity being engaged in when the photograph was taken would remove it from the ambit of article 8, and the fact that the activity was criminal would not of itself be sufficient. The dissenting judges stressed that the fact that the photograph was of a child was an important factor, with the criminal justice system being geared to protecting the identity of young offenders and that a child's need for protection could go beyond that which an adult could reasonably expect. In any case, all their

Lordships felt that if there had been an interference with the boy's article 8 rights, that interference was justified. The photograph and its use did not breach data protection legislation and was in accordance with the law and necessary in a democratic society to prevent crime, prosecute offenders and divert young people from criminal activity.

The decision in *Weller* confirms that the age of the target of press photographs is highly relevant to whether there is a reasonable expectation of privacy in keeping any photographic image out of the public domain. Although many celebrities and public figures would fail to prove such an expectation of privacy because of their status and previous publicity, their children appear not to lose that expectation; indeed because of their vulnerability they appear to have an enhanced expectation of privacy. The decision in *JR 38* is controversial in that it refuses to lay down special rules for minors and photographs and insists that the general test of reasonable expectation applies in all cases, albeit that the courts can consider age as a relevant factor. Whether the majority decision in *JR 38* is consistent with article 8, or the general protection given to young offenders with respect to anonymity, is debatable, but the decision in *Weller* it is suggested is a sensible an unobjectionable application of the principle to the particular facts.

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