

## QUEEN'S BENCH DIVISION

18 December 2002

RK

(Bringing representative proceedings on his own behalf

and on behalf of his wife AK)

and

MK

(A child by her Litigation Friend RK)

v

OLDHAM NHS TRUST

DR B

Before Mr Justice SIMON

**Preliminary Issues — Negligence, Human Rights Act Article 8 and European Convention on Human Rights and Freedoms — CPR 2.4 and 24 — Whether the Claimants could show a real prospect of success on any of three issues — First issue whether the patient of the Defendants, a minor, had suffered a recognisable injury for which a remedy would be provided — Second issue whether the parents of the minor were owed a duty of care — Were the parents sufficiently proximate and was it fair, just and reasonable to impose a duty — Third issue did any Claimant have a valid Convention claim justiciable in the English Jurisdiction.**

MK was the daughter of Mr and Mrs K. M was born on 24 July 1998. On 26 September 1998 M sustained a spiral fracture of her femur when she was picked up from the settee by her grandmother. On the same day M was taken by her parents to the First Defendant's hospital where she was seen and assessed by Dr B, the Second Defendant, an orthopaedic specialist.

M was admitted and the following day Dr B diagnosed the fracture as a "non-accidental injury". Police and Social Services were informed and a Child Protection Case Conference convened for 14 October. Prior to the conference Dr B wrote a report dated 8 October in which he concluded that "... the fracture was inflicted by a twisting movement of the lower limb. There is nothing to indicate any bone abnormality. As this is a violent, inflicted injury which has caused this child considerable pain, it is my opinion that M would be at great risk if she were returned to her parents."

The case conference was a multi-disciplinary meeting which included a solicitor from the legal department of Oldham Metropolitan Borough Council (OMBC) as well as social workers, health visitors, a police officer, members of the family etc. Dr B was not present but his report was put before the meeting and clearly influ-

enced the decision to put M on OMBC's Child Protection Register as being at risk of physical abuse. Following the meeting care proceedings were issued and an interim care order was granted giving OMBC parental responsibility for M. At a hearing on 23 December 1998 the Court decided that M's injuries were non-accidental and care was given to M's aunt KB.

Subsequently M sustained a further fracture and was diagnosed as suffering from osteogenesis imperfecta (brittle bone disease). It was accepted that the initial diagnosis of non-accidental injury (NAI) was wrong and, on 17 June 1999, nearly nine months after M's admission to hospital, she was returned to the care of her parents.

MK and Mr and Mrs K commenced proceedings in negligence, under the HRA 1998 and the Convention.

The allegations of negligence were that the Defendant's failed to take an accurate history from M, consider an alternative diagnosis to that of NAI and refer M to an expert in brittle bone disease. It was accepted for the purposes of the hearing that as a result of the mis-diagnosis the parents had suffered some recognisable psychiatric injury and that M, on the basis of a report from Mr Radcliffe, a consultant clinical child psychologist, had suffered significant disruption in her relationship with her parents. However the medical evidence did not support a formal Mental or Behavioural Disorder. It was argued on behalf of M that the Court should take into account the difficulties in identifying potential harm on the case of a very young child and recognise the disruption of the "attachment dynamic" as a recoverable injury.

The claims under the HRA and the Convention were based on infringement of the right to family life. It was assumed for the purposes of the hearing that the agreed facts were capable of amounting to a breach of Article 8 of the Convention.

The preliminary issues before the Court were: (1) does the medical evidence in relation to M disclose an injury for which the law recognises a remedy? (2) is a duty of care owed by either Defendant to M's parents assuming that the Defendant owed M a duty of care? (3) does any Claimant have a valid Convention claim justiciable in the English Jurisdiction?

In relation to the Convention claim the Claimants further argued for declaratory relief on the basis that: (1) there had been a breach of the Claimants human rights pursuant to Article 8 of the ECHR; (2) the issue of whether the Claimants

human rights had been breached was not justiciable in English Law; (3) the HRA was therefore incompatible with the Convention.

—Held, by SIMON J, giving judgment for the Defendants:

(1) M had suffered no injury for which the law recognised a remedy. No physical harm was alleged and no evidence of a psychiatric disorder had been found by the medical expert. Emotional responses of even the most serious type did not found a claim in damages and the Court should not infer an injury where experts in the field did not. Following *McLoughlin v O'Brien* [1983] AC 410 and *Reilly v Merseyside RHA* [1995] 6 Med LR 246 (see paras 20 and 21).

(2) The Defendants did not owe M's parents a duty of care. The duty the doctor owed to M and his obligations within the multi-disciplinary process militated against the doctor owing any additional duty to the parents in relation to the diagnosis which commenced such a process. There was no special relationship between the doctor and parents which was not in conflict with the duty owed by the doctor to M and the OMBC and therefore there was insufficient proximity between the "parties". Following *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 and *Powell v Boladz* [1998] Lloyd's Rep Med 116 (see paras 24 to 29).

(3) In addition it would not be fair, just or reasonable to impose a duty of care between the Defendants and the parents. Such a duty of care would (1) cut across the statutory scheme set up for the protection of children at risk; (2) lead those charged with the task of investigating such cases to adopt a more cautious, defensive approach which could not only prejudice the child but increase the workload and reduce resources available to deal with other cases; (3) exacerbate conflict between parents and carers and increase the prospect of vexatious and costly litigation (see paras 32 and 33).

(4) There was no real prospect that an English Court would give practical effect to any Convention breach. The cause of action arose in September 1998 and June 1999. The HRA provided a domestic remedy with effect from 2 October 2000. It did not create a retrospective right of action and therefore the Claimant could not bring proceedings under the Act. The Claimants right under the Convention was to challenge the state of the law before the Commission and the Court in Strasbourg — *R v Lambert* [2001] UKHL 37 (see paras 39, 43 and 44).

(5) Furthermore the declarations sought were the reasons why there must be summary judgment on the issue for the Defendant. The Court

did not usually embody its reasons in a declaration and in this case, should the matter proceed to trial, was most unlikely to do so. Such a declaration would provide no advantage to the Claimants beyond what would be obtained in a reasoned judgment (see paras 50 and 51).

(6) In any event the Court would only make declarations in respect of matters justiciable in the English Court. The Convention was a treaty, treaties were not justiciable and the Court had no jurisdiction to make such a declaration *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 (see para 51).

The following cases were referred to in the judgment:

*Barrett v Enfield LBC* [2001] 2 AC 550;

*Caparo Industries Plc v Dickman & Others* [1990] 2 AC 605;

*McLoughlin v O'Brien* [1983] AC 410;

*Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344;

*Messier Dowty v Sabena SA* [2001] 1 WLR 2040;

*Powell v Boladz* [1998] Lloyd's Rep Med 116;

*R v Lambert* [2001] UKHL 37;

*Reilly v Merseyside RHA* [1995] 6 Med LR 246;

*Wainwright v Home Office* [2002] 3 WLR 405;

*X (Minors) v Bedfordshire CC* [1995] 2 AC 633;

*Z v United Kingdom (application 29392/95)* [2001] 2 FLR 612.

Miss Mary Ruck (instructed by Pannone & Partners) for the Claimant, Mr George Hugh-Jones (instructed by Messrs Hempsons) for the Defendant.

18 December 2002

## JUDGMENT

**Mr Justice SIMON:** 1. This is the trial of 3 preliminary issues ordered to be tried by His Honour Judge Holman by an order dated 30 September 2002.

### Background

2. The background to the Claimants' claim can be taken largely from the Statement of facts and an agreed Chronology.

3. M is the daughter of Mr and Mrs K. She was born on 24 July 1998. On 26 September 1998, she sustained a spiral fracture of her femur when she

was picked up from the settee by her grandmother. At 22.35 she was brought by her parents to the Royal Oldham Hospital which is administered by the first Defendant ("the Hospital Trust"). She was initially seen by a triage nurse and by a doctor in the Accident and Emergency Department. The doctor referred M to an Orthopaedic specialist, Dr B, the second Defendant. The following day Dr B made a diagnosis that the injury was a "non-accidental injury" and the Police and Social Services were informed. M was admitted to the Orthopaedic Ward for treatment. By 30 September, Social Services were actively involved and a decision was made to have a Child Protection Case Conference. This was eventually convened on 14 October.

4. On 8 October, Dr B wrote a Case Conference Report, which included the following observations:

I was called to the Casualty Department at the Royal Oldham Hospital on the 27.9.98 at 0.15 hours. I interviewed the father, the mother and the paternal grandmother. It should be pointed out that both the mother and the paternal grandmother had a poor understanding of English and the father acted as an interpreter.

The letter continues with a description of what Dr B was told about the circumstances of the injury and continues:

It would appear that before 10 pm that evening M had been perfectly well. None of the three adults who were present during my interview could provide an explanation for the injury. They were asked the question directly.

The letter then deals with Dr B's examination of B before concluding:

The fracture was inflicted by a twisting movement of the lower limb. There is nothing to indicate any bone abnormality. As this is a violent, inflicted injury which has caused this child considerable pain, it is my opinion that M would be at great risk if she were returned to her parents.

5. The Case Conference was a multi-disciplinary meeting attended by Social Workers, a police officer from the Family Support Unit, a health visitor and Child Protection nurse employed by the Hospital Trust, a solicitor from the legal department of the Oldham Metropolitan Borough Council ("OMBC") and members of M's family (including Mr and Mrs K). Dr B and the family GP sent their apologies. The Minutes of the Case Conference show that Dr B's report was put before the meeting and clearly influenced the decision to put M on OMBC's Child Protection Register as being at risk of physical abuse and the decision by OMBC to initiate Care Proceedings with a view to obtaining an Interim Care order.

6. On 16 October an Interim Care Order was made granting OMBC parental responsibility for M; and on 23 October, M was discharged from hospital into the care of her aunt, KB. At a hearing of on 23 December, the Court decided that M's injuries were non-accidental and care was given to KB.

7. After M sustained a further fracture and, as a result of further tests, the expert opinion available to the Court was that M was suffering from Osteogenesis Imperfecta. On 17 June 1999, nearly 9 months after she had been admitted to hospital, M was returned to the care of her parents.

8. It is now accepted that the initial diagnosis of Non Accidental Injury was erroneous; and it is clear that the erroneous diagnosis led to a chain of events which must have been highly distressing to Mr and Mrs K. For present purposes it is to be assumed that they have suffered some recognisable psychiatric injury as a consequence of what occurred.

#### *The Claims against the Defendants*

9. On 24 September 2001 proceedings were commenced which are to be regarded as claims by M and by Mr and Mrs K against the Hospital Trust and Dr B. The claims are claims both in negligence and under the Human Rights Act 1998 ("the HRA") and the European Convention on Human Rights and Freedoms ("the Convention").

10. So far as relevant the negligence relied on by the Claimants can be summarised (from paragraph 20 of the Amended Particulars of Claim) as follows:

- (i) A failure to take an accurate history on admission of M.
- (ii) A failure to investigate an alternative diagnosis to that of NAI as part of the differential diagnosis.
- (iii) A failure to refer to other expertise, in particular, expertise in brittle bone disease.
- (iv) A failure to consider an alternative diagnosis during the course of treatment.

As can be seen, (i) ("the A & E claim") refers to the very earliest stage of recording the admission, whereas (ii)-(iv) ("the misdiagnosis claim") relate to the diagnosis itself and the contention that it was maintained too rigorously.

11. The claims under the HRA and the Convention are based on infringement of the right to family life under Article 8 of the Convention by reason of what occurred, including the matters summarised above.

#### *The Preliminary Issues*

12. The issues in their present form are as follows:

(i) Does the medical evidence of Mr Radcliffe dated 27 July 2002 in relation to M disclose an injury for which the law recognises a remedy?

(ii) Is a duty of care owed by either Defendant to Mr and Mrs K? It being assumed, for present purposes, that the Defendant owed a duty of care to M.

(iii) Does any Claimant have a valid Convention claim justiciable in the English Jurisdiction?

13. The parties agree that the preliminary issues are to be approached by reference to the tests set out in CPR Part 3.4 and Part 24. The test is whether the Claimants can show a real prospect of succeeding on the claim on the basis of facts which are not or cannot properly be in issue.

*Issue 1. Does the medical evidence of Mr Radcliffe in relation to Monique Khan (dated 20/7/02) disclose an injury for which the law recognises a remedy?*

14. Mr Radcliffe is currently a Consultant Clinical Child Psychologist with the Shropshire Mental Health NHS Trust. He was instructed by the Claimants' solicitors to provide a report on "the impact on M of being removed from her parents' care" into the care of her aunt. M was 3 months when she was placed in her aunt's care and 11 months when she was returned to the care of her parents. During this period of 8 months (from October 1998 until June 1999) her parents had daily supervised contact. Each day, her mother spent all day sharing her care and her father visited in the evening after work.

15. Mr Radcliffe's views can be summarised as follows:

(i) The separation undoubtedly caused disruption in her developing relation with her parents.

(ii) The capacity of an individual to develop safe and secure attachments (described by Mr Radcliffe as "the attachment dynamic") usually begins to develop between the age of 6 to 12 months.

(iii) The parents' ability to be available to the child is crucial in this developmental process.

(iv) The physical separation, especially at night-time, impaired the development of appropriate attachment behaviour.

16. Mr Radcliffe's conclusions are that:

(i) M suffered a significant disruption in her relationship with her parents and her ability to begin to form secure attachments. However, the disruption was kept to a minimum due to the sharing of care.

(ii) There was nothing to suggest that M suffers from a Reactive Attachment Disorder as

specified in the International Classification of Mental and Behavioural Disorders (ICD 10).

(iii) The separation had and continues to have significant impact on the parent-child relationship primarily through the anxiety and uncertainty it has caused.

17. It should be noted that the last conclusion focuses on the relationship between M and her parents rather than on the psychological assessment of M.

18. On the basis of the findings in this report, Miss Ruck (for the Claimants) submitted that M suffered "an injurious interference with her well-being as a result of the physical separation from her parents". She recognised that Mr Radcliffe had not diagnosed a psychological injury caused by the separation; but submitted that the Court should recognise the difficulties in identifying potential harm in the case of a very young children who may not be able to vocalise their feelings as adults and older children can.

19. She also submitted that an abnormal period of development and, in particular, the disruption of "the attachment dynamic" amounted to an injury recognisable by law.

20. The difficulty with these submissions is that they are directly contrary to the law established by numerous authorities over many years. In English Law no damages are awarded unless either there is physical harm or there is a recognisable psychiatric disorder. No physical harm is alleged in this case; and Mr Radcliffe found no evidence of a psychiatric disorder. In these circumstances it is not open to a Court to find that there is an injury of sufficient severity to entitle a Claimant to damages, see for example *Reilly v Merseyside RHA* [1995] 6 Med LR 246. Emotional responses to unpleasant experiences of even the most serious type do not found a claim for damages, see also *McLoughlin v O'Brian* [1983] AC 410, Lord Bridge at page 431 G-H. Nor, in my view, is this an area of law in which the Court should infer that there has been an injury where experts in the field do not.

21. Miss Ruck, acknowledging the authorities against her, submitted that the law in this field should develop as a matter of "logical necessity" so as to give effect to the overriding principle that loss caused by actionable wrong is the subject of compensation. She relied in support of this proposition on passages in the speeches of Lord Wilberforce and Lord Scarman in *McLoughlin* at pages 419C-E and 430B-D. I do not, however, read those passages as justifying an extension of the law so as to permit the recovery of damages for injurious interference in the development of, what Miss Ruck described at one stage of her argument as, the "bonding" between parent and child, in the absence of any

recognisable psychiatric harm or injury. The bar on recovery in such cases cannot properly be described as unreasonable; and, even if it were, removing the bar cannot properly be described as a matter of logical necessity.

*Issue 2. Is a Duty Owed by Either Defendant to Mr and Mrs K?*

22. The starting point is the three-fold test formulated by Lord Bridge in *Caparo Industries Plc v Dickman & others* [1990] 2 AC 605 at 617H-618B. The need to establish (1) foreseeability of damage, (2) a relationship between Claimant and Defendant characterised by the law as one of "proximity" or "neighbourhood", and (3) a situation in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon a Defendant for the benefit of the Claimant.

*Was There Foreseeability of the Kind of Injury which Occurred?*

23. The Defendants accept that psychiatric damage was arguably foreseeable if there was a misdiagnosis of M's injuries as non-accidental. They contend however, that in relation to the A & E Claim, it was not foreseeable that errors in taking the history would lead to psychiatric damage to the parents. I am not persuaded this is right; at least not to the extent that I would be prepared to decide the preliminary issue on the A & E claim on different basis to the rest of the claim. It seems to me that if a triage nurse negligently notes something which bears directly on a subsequent diagnosis, it is at least arguable that the errors would cause the same damage as the diagnosis. I do not think that this factor is a matter which at this stage precludes a finding of a duty of care.

*Was there a Sufficient Relationship of Proximity Between the Claimant and the Defendants?*

24. There was a dispute between the parties as to the extent to which it was open to the Defendants to argue that Dr B owed no duty of care because the nature of his retainer was inconsistent with a duty to the parents. It seems to me that, to at least some extent, the Court must have regard to the undisputed facts when considering the issue of proximity. For the present purposes it is clear that Dr B was brought in to give a diagnosis of M. His diagnosis was that the injury was non-accidental; and he immediately informed the police and the social services and thereby set in train the multi-disciplinary process of investigation, as required by law. From this very early stage (on 27 September 1998)

Dr B was acting (and sometimes apparently failing to act) at the request of and behalf of OMBC and as part of the multi-disciplinary process.

25. Miss Ruck submitted that the parent/child relationship was sufficiently proximate for the duty to arise and that the parents were physically involved since they were potentially under suspicion. However, in my view, the relevant relationship for the purpose of establishing proximity is not the child/parent relationship, but the relationship between doctor and parent, and the extent to which this can exist alongside the other duties that the doctor owes: to his patient and as part of the multi-disciplinary process.

26. It was this latter duty that was referred to in the speech of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire CC* ("the Newham case") [1995] 2 AC 633 at page 752 G-H. with which the majority of the House of Lords agreed:

The social workers and the psychiatrists were retained by the local authority to advise the local authority, not the Plaintiffs (a child and its mother). The subject matter of the advice and the activities of the professionals is the child. Moreover the tendering of any advice will in many cases involve interviewing and, in the case of doctors, examining the child. But the fact that the carrying out of the retainer involves contact with and relationship with the child cannot alter the extent of the duty under the retainer from the local authority.

27. Miss Ruck submitted that there is a distinction between criticisms of a decision to refer on the basis of clinical negligence and criticisms made of clinical judgments in the course of child protection investigations. She submitted that the present action included a criticism of the first type: namely, that Dr B had failed to consider an alternative diagnosis of metabolic bone disease in addition to the differential diagnosis (see paragraph 20(2) of the Amended Particulars of Claim). Her argument, as I understood it, was that the duty of which this was alleged to be a breach occurred at or before any question of retainer could have arisen, and therefore the argument based on the duty owed to the OMBC could not apply.

28. In my view this approach is unrealistic since inevitably the initial diagnosis will be refined as further information becomes available. Indeed, the Claimants themselves allege that there was an obligation to refine and develop an initial diagnosis. Furthermore, the diagnosis that was reached necessarily involved an obligation owed to the child and to the OMBC and there is no room for an additional duty owed to the parents, see *Powell v Boladz* [1998] Lloyd's Rep Med 116 at 123r, and *X v*

*Bedfordshire* ("the *Newham* case"): the observations of Sir Thomas Bingham MR at 665G:

... the mother was not in any meaningful sense the psychiatrist's patient. The psychiatrist's duty was to act in the interests of the child, and that may very well mean acting in a way that that would be adverse to the interests of the mother

Once there is material on which the doctor can properly initiate the multi-disciplinary investigation, the doctor cannot owe a duty to the parents in relation to the diagnosis which commences the process. In the present case the Claimants do not contend that there was no material upon which the doctor could act; and there is no point which they can identify when a special relationship with the parents can be said to exist, which is not in conflict with the duty to the child and the OMBC.

29. By setting in motion the multi-disciplinary process, the doctor acts in the interests of his patient, and begins a process, which is designed to ensure that recognition is given to a number of conflicting factors, including the interests of the parents, and which is ultimately resolved by the Court.

*Whether it is Fair, Just and Reasonable that There be a Duty of Care?*

30. In *X v Bedfordshire* at pages 749–751 Lord Browne-Wilkinson, identified a number of reasons why a duty of care should not be imposed in the field of sexual abuse. The law is now conveniently summarised in the judgment May LJ in *S v Gloucestershire CC*, currently reported at [2001] 2 WLR 909 at 924.

31. Although the present case concerns an investigation of potential physical abuse of a child, there is no reason of principle why the approach of the Court to the existence of a duty should be different to that where the relevant investigation is in relation to potential sexual abuse. In each case the investigation will have serious implications for the child and those who care for the child.

32. So far as relevant to the duty alleged in this case, the reasons can be conveniently summarised as follows:

(i) A common law duty of care would cut across the whole statutory scheme set up for the protection of children at risk. The scheme is interdisciplinary and involves the participation of number of bodies, see "Working Together under the Children Act 1989". The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Registry. The minutes of the Case Conference in the present

case shows the difficulties in disentangling the respective liability if each body is liable. To impose a liability on one body only would be manifestly unfair.

(ii) The task of those dealing with children at risk is already extraordinarily delicate. There can be criticisms of acting too quickly or too slowly.

(iii) If there were a liability for damages, it might well mean that those charged with the task would adopt a more cautious and defensive approach to their duties. There would be a temptation to postpone decisions while evidence was gathered. This not only prejudices the child, it increases the workload and reduces the time and resources available to deal with other cases.

(iv) The relationship between those charged with the task of protecting children and the children's parents is often one of actual as well as potential conflict. The prospect of vexatious and costly litigation is a real risk which cannot be ignored when deciding whether to impose a legal duty.

33. Whether or not these criteria continue to apply in cases where children are already in care, see *Barrett v Enfield LBC* [2001] 2 AC 550, they plainly apply in respect of acts or omissions occurring in the course of, and as part of, an investigation into physical abuse.

34. Accordingly I find that it is not fair, just and reasonable that the law should impose the duty contended for upon Defendants for the benefit of the parent Claimants.

35. I therefore conclude that no duty was owed by either Defendant to Mr and Mrs K.

36. I would also add that, even if the Defendants owed a duty of care in relation to the initial diagnosis, it is difficult to see how the parents have suffered any psychiatric injury that can be attributable to this rather than the multi-disciplinary investigations which led to the Court Order. This factor is not relevant to the existence of the duty of care; but reinforces my view that there is no prospect of these Claimants succeeding in their claim.

*Issue 3. If the Prior Preliminary Questions are Decided in the Defendants' Favour, do the Claimants have a Valid and Effective Convention Claim Justiciable in the English Jurisdiction?*

37. The Court proceeds for the purpose of this issue on the basis that the facts outlined above are capable of amounting to a breach of Article 8 of the Convention. It is common ground that such a breach is potentially justiciable before the European Commission on Human Rights ("the Commission") and the European Court of Human Rights

("the Court"). The issue for determination in the present proceedings is whether the Claimants' arguments that the English Courts can give practical effect to the breach has a real prospect of success.

38. As already set out above, the claim arises in respect of events occurring between September 1998 and June 1999.

39. The present state of the law in relation to such a claim is as follows:

(i) The Claimants cannot bring proceedings in England under the HRA because the breach of Article 8 that is relied on occurred before the HRA came into force on 2 October 2000; and the HRA does not create a retrospective right of action, see sections 7(1)(b) and 22(4) of the HRA and *Wainwright v Home Office* [2002] 3 WLR 405. However,

(ii) The Claimants are not without a remedy. They have the remedy which they had before the passing of the HRA: they can argue before the Commission and the Court in Strasbourg that they lack a domestic remedy (under Article 13) and claim just satisfaction against the UK Government under Article 41, see for example, *Z v United Kingdom (application 29392/95)* [2001] 2 FLR 612.

40. This summary of the law is accepted by Miss Ruck. Indeed it is relied on; because her argument depends on there being no effective remedy available to the Claimants in the domestic jurisdiction despite the fact that, as is accepted for present purposes, their human rights have been breached.

41. She submits that this is unsatisfactory since the intention of the HRA was to "bring home" human rights. In support of this proposition she has made reference to a report of some of the speeches during the course of the passage of the Bill in Parliament. The speeches, as one might expect, expressed a number of views; in particular over the manner in which human rights were to be conferred and the omission of Article 13 of the Convention from the scope of the English legislation.

42. Miss Ruck makes two broad points. First, she submits that, if the intention of Parliament was to "bring home" human rights, then that intention is defeated if there is no substantive cause of action in English Law simply because the breach occurred before the coming into force of the Act.

43. It seems to me that Mr Hugh-Jones (Counsel for the Defendants) is correct in his answer to this point. The purpose of the legislation was to give direct effect to the Convention; but this was to be done by the means prescribed by the HRA. The HRA did not give effect to those rights in respect of breaches occurring before 2 October 2000, see the analysis of Lord Hope in *R v Lambert* [2001] UKHL 37 at paragraphs 99 and 111. The Claim-

ants' rights under the Convention are now, as they have always been, to challenge the state of the law before the Commission and the Court in Strasbourg.

44. Miss Ruck's second point is that the requirement to litigate in Strasbourg invoking Article 13 (the right to a domestic remedy) and Article 41 (the provision of just satisfaction) is an unnecessarily and undesirably cumbersome way of proceeding to enforce a remedy.

45. That may or may not be so. The fact remains that Parliament concluded that there was no need to incorporate Article 13, because the HRA provided the domestic remedy in so far as a domestic remedy was to be provided. The HRA was intended to confer directly enforceable rights with effect from 2 October 2000. The means of enforcing rights arising before that date was to be the same as existed before the passing of the HRA: the right to seek a remedy before the Commission and the Court in Strasbourg.

46. If, contrary to the conclusions I have reached, this Court was to find that the breach of the Claimants' Article 8 rights required to be vindicated by action in the English Courts, the Claimants submit that there are three ways in which this could be done.

47. By an amendment made on the second date of the hearing, the Claimants amended the relief claimed in the Particulars of Claim as follows:

(ii) ... alternatively, declaratory relief:

(a) a declaration pursuant to Part 40.20 CPR 1998 that there has been a breach of the Claimant's human rights pursuant to Article 8 of the ECHR; and/or

(b) a declaration pursuant to Part 40.20 CPR 1998 that the issue of whether the Claimant's human rights have been breached is not justiciable in English Law; and/or

(c) a declaration pursuant to section 4 of the Human Rights Act 1998 that section 7 of the HRA is incompatible with the Convention.

48. The issue with which I am concerned is whether there is a realistic prospect that the Court would grant the relief claimed at a trial of the action.

49. The declarations sought under subparagraphs (a) and (b) can conveniently be taken together. They amount to a declaration that the (assumed) breaches of the Claimants' Article 8 rights are not justiciable in English law.

50. This is the conclusion I have already reached on the basis of the analysis set out above and which is accepted by the Claimants. It is the reason why, in my view, there must be summary judgment for the Defendant on this issue. However, the Court

does not usually embody its reasons for deciding a case in a declaration and in this case it would be highly unlikely to do so if the case proceeded to trial. In *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 the Plaintiff sought declarations similar to declaration (a) and (b) in the present case.

(4) that interceptions and monitoring of the Plaintiff's telephone lines violates Article 8 of the Convention

(5) that the Plaintiff has no effective remedy before a national authority within the UK for the alleged violation of his right to respect for his private and family life, home and correspondence guaranteed by Article 8 of the Convention, see page 351B–C

51. In that case, Sir Robert Megarry V-C concluded: that the Court only make declarations in respect of matters which are justiciable in the English Courts, that the Convention was a treaty and that treaties are not justiciable in English Courts. It followed from that that he had no jurisdiction to make declaration (4), see *Malone* at page 354 D–E. So far as declaration (5) was concerned, he refused the remedy as a matter of discretion since it provided no advantage to the Plaintiff beyond what could be obtained in a reasoned judgment: rather the contrary. As the Vice-Chancellor observed:

Even if I have jurisdiction to make them (and I very much doubt this as to paragraph 5), I do not think that the Court should make useless declarations, especially when the object in seeking them seems to be to support some contention under a

treaty over which the Court has no jurisdiction. (See *Malone* at page 355D)

52. I should perhaps add that the case relied on by the Claimants in support of the power to grant declarations in respect of treaty obligations is not support for the proposition. *Messier Dowty v Sabena SA* [2001] 1 WLR 2040 was not a case in which an individual was seeking to enforce a treaty obligation for his own benefit.

53. The declarations claimed seem to me to be designed to state the reasons why the claim cannot succeed in the English Courts and why they should therefore be subject to a summary judgment in the Defendants' favour.

54. Declaration (c) does not directly affect the Defendants. The declaration seeks to rely on the mechanism of the HRA to declare that the HRA is itself incompatible with a Convention right. Mr Hugh-Jones described this declaration as ambitious. It is sufficient to say that in my judgment there is no real prospect of the Court making such a declaration.

#### Conclusions

55. For these reasons I have concluded that the Claimants have no realistic prospect of success on the claims which are the subject of these preliminary issues; and it follows that a judgment on the preliminary issues in the Defendants' favour should be entered.

REPORTED BY RICHARD PARTRIDGE, BARRISTER