Trinity Term
[2014] UKSC 44
On appeal from: [2013] EWCA Civ 581

JUDGMENT

R (on the application of Sandiford) (Appellant) *v* The Secretary of State for Foreign and Commonwealth Affairs (Respondent)

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

16 July 2014

Heard on 4 June 2014

Appellant	*Respondent*
Aidan O'Neill QC Adam Straw (Instructed by Leigh Day & Co)	Martin Chamberlain QC Malcolm Birdling (Instructed by Treasury Solicitor)

LORD CARNWATH AND LORD MANCE (with whom Lord Clarke and Lord Toulson agree)

Introduction

1. The appellant, a British national now 57, is in prison in Bali, Indonesia, awaiting execution by firing squad, following her conviction for drug offences. That follows her arrest in May 2012 and her subsequent trial on 22 January 2013 in the District Court of Denpasar. She had admitted the offences, but claimed that she had been coerced by threats to her son's life. Following her arrest she had co-operated with the police, leading to the arrest of four others. The prosecutor had called for a sentence of 15 years' imprisonment, and supported her appeal to the Indonesian High Court. But that was unsuccessful, as was her further appeal to the Supreme Court on 29 August 2013. The only legal options now available to her to avoid execution are an application to the Supreme Court to reopen the case, and an application to the President for clemency. The time-limit for both expires on 29 August 2014. She needs legal help to prepare her case.

2. The UK government has provided substantial consular assistance since it was notified of her arrest, has made diplomatic representations to the Indonesian authorities, and submitted amicus briefs to the High Court and Supreme Court in support of her appeals. But it has declined to pay for legal help, relying on what was said to be a rigid policy, as stated in its publication *Support for British Nationals Abroad: a Guide* (first published in June 2007):

> "Although we cannot give legal advice, start legal proceedings, or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although *we cannot pay for either*." (emphasis added)

The central issue in this case is the legality of that approach, either under domestic law, or (if it applies to her case) the European Convention on Human Rights.

The course of the proceedings in UK and Indonesia

3. The present proceedings sought an order requiring the Secretary of State to make arrangements for an adequate lawyer to represent her in the Indonesian appeal.

They proceeded with remarkable and commendable urgency. They were lodged on 24 January 2013, only two days after her conviction. The urgency was dictated by the need for her notice of appeal to the Denpasar High Court to be lodged within seven days, and grounds 14 days thereafter. A "rolled-up" hearing took place on 31 January, when the Divisional Court (Gloster and Nicola Davies JJ) granted permission but refused the substantive application, for reasons given in a judgment on 4 February [2013] EWHC 168 (Admin).

4. The applicant's grounds had complained of inadequate legal assistance before and at the trial. She had been represented by a local lawyer, paid with funds (£5,000) raised by her sister, but who (according to her) spoke little English and had no experience of capital defence litigation. Following her conviction, and by the time of the judicial review application, the consulate had put her in touch with Mr Agus, a local lawyer. He was the British Ambassador's honorary legal adviser and was also a human rights specialist, who had acted in previous death penalty cases. He was willing to act for the appellant on a *pro bono* basis, subject to payment of his expenses, estimated at some £2,600. Accordingly, it was that seemingly modest sum which was initially the subject of the judicial review proceedings.

5. In the event, following the dismissal of her application by the Divisional Court, the necessary sum was raised by donations from the public. Her appeal to the High Court in Indonesia then proceeded with the assistance of Mr Agus. On the issue of sentence it was supported by the prosecutor, and by amicus briefs submitted by Lord Macdonald and by the UK Government. On 10 April, the High Court of Denpasar dismissed the appeal.

6. In this country her appeal against the order of the Divisional Court was heard by the Court of Appeal on 22 April and judgment was given on 22 May 2013 dismissing the appeal: [2013] 1 WLR 2938. By that time her request was for £8,000 to instruct Mr Agus in the appeal to the Supreme Court (again principally for his expenses). The Court of Appeal noted that some of the money had by that time been raised by donations. In the event, the full sum was raised and the appeal proceeded in the Supreme Court with Mr Agus' assistance, but unfortunately was again unsuccessful.

7. We have had the advantage of more detail than the lower courts about the course of proceedings in the lower courts. We were told that translations of the District Court and High Court judgments only became available in March 2014. As will be seen, even allowing for problems of translation, they make very disturbing reading.

8. We have also some further evidence on the appellant's side, including information as to the legal options now open to the appellant in Indonesia and their consequences, and also of the practice of other countries in providing funding in comparable cases. We have not seen evidence of any more recent consideration of the case by the Secretary of State. Nor is there before us any ground of challenge based on action or inaction since the Court of Appeal hearing. The appeal to this court has proceeded as one of principle, directed to the legality of the policy and its application in relation to the decision to refuse funding in January 2013. While however we are principally concerned with the legality of the decision made at that time, and the policy on which it was based, there is as we understand it no objection to us taking account of the new material in so far as it assists in resolving those questions.

The Indonesian proceedings in more detail

9. The District Court judgment recorded that she had been accompanied by a lawyer and a translator, and that she had been able to understand the proceedings and respond to questions put to her. It also summarised her statement to the court. She admitted her knowledge that she was carrying narcotics, but said that they belonged to a Julian Ponder (a member of a syndicate), who had threatened to kill her child if she did not comply, and that she felt "very bad and ashamed". The judgment noted that the prosecutor was seeking a sentence of 15 years imprisonment and a substantial fine, and that her lawyers had filed a plea "for the lightest sentence by reason that she committed the deeds not on her own accord but solely under the threats of the other party". The court, however, held that it was "just and fitting" that the maximum sentence be imposed. It rejected the prosecution's submission that there were no aggravating circumstances. Instead it found no mitigating circumstances. Rather it listed five "aggravating circumstances", including her making of "complicated statements" to the court, her lack of remorse, and her "resort to continued excuse for her ailing son, making herself subject to Julian's threat into committing the deeds".

10. A fully reasoned notice of appeal to the High Court was prepared by Mr Agus. This repeated her claim that she had been forced to commit the crime because of threats to her son by a narcotics syndicate. It also relied, by way of mitigation, on the facts that she had no previous criminal record and suffered from mental illness; that following her arrest she had co-operated with the police in a "sting operation" which had led to the arrest of four members of the syndicate (including Mr Ponder); that they had been convicted and sentenced only to terms of imprisonment of between one and six years; and that her attempts at trial to read a full statement of apology had been interrupted by flash photography at short distance from photographers in court. The district court had failed to consider her mitigating factors, especially her role as a collaborator with the police, and the sentence was unjust and disproportionate.

11. The appeal was supported by a substantial amicus brief (14 pages) on behalf of the UK government. This relied on a decision of the Indonesian Constitutional Court (Decision No. 2-3/PUU-V/2007), which had upheld the permissibility of the death penalty for drug offences, but only "in special or exceptional cases", and taking account of any mitigating circumstances. The appellant's case came "nowhere near" that category. The mitigating circumstances included her co-operation with the police, her previous good character, her remorse, and the circumstances in which she came to be involved. A further substantial amicus brief (20 pages) was submitted by Lord Macdonald QC (formerly Director of Public Prosecutions) in his own name. He gave particular emphasis to the appellant's "status as a cooperating witness", having regard to the vital role of such witnesses in combating the drug trade, and the need for leniency in sentencing as an incentive to such co-operation.

12. The court dismissed the appeal and confirmed the death penalty. With respect to the court, their treatment of the defendant's case seems cursory in the extreme. The judgment noted, without further discussion, that the prosecutor had objected to the death penalty, and that a brief had been submitted by Lord Macdonald QC, but there was no mention of submissions of the UK Government. The court described the appellant's action as "highly systematic and organised as a criminal organisation network with an international scale… with the involvement of many individuals who are all foreign nationals…" Narcotics crimes were categorised as "extraordinary crimes", for which the State of Indonesia had established a "state of emergency to eradicate narcotic crimes…" The death penalty to the appellant would give "the positive response to the society to not commit narcotic crimes". Of the case of the appellant and her supporters, it said simply:

> "…based on the above consideration the defendant's appeal brief, the appeal brief of the Public Prosecutor… as well as the Amicus Curiae brief of Lord Macdonald are groundless and must be put aside."

13. We have been given limited information about the subsequent appeal to the Supreme Court, and events thereafter. As we have said, the appellant was represented by Mr Agus before the Supreme Court, again with funds raised from public donations. We have been told that an amicus brief was submitted by the UK government to the Supreme Court. We assume it was in terms similar to that submitted to the High Court. In a witness statement dated 19 March 2014, Zoe Bedford, casework lawyer for Reprieve, indicated that the full judgment of the Supreme Court was still awaited. We understand that is still the position. In the absence of the judgment, and since the sentence was confirmed, there seems little reason to hope that the arguments on her side were given any more weight than in the lower courts.

14. According to Ms Bedford, the only two avenues now open to her to avoid execution are a *Peninjuan Kembali* (PK) application to the Supreme Court and a clemency petition to the President. We were told that they are normally filed at the same time, with the clemency petition being held over to await the decision on the PK. According to Ms Bedford, the PK application enables the court to review a decision on the grounds of new evidence, a fundamental error or misapplication of the law; and "unlike at the appeal stages, there will be the opportunity for oral argument…" She asserts that a lawyer is essential for this stage, and that legal advice is also needed on the implications of "the complex new clemency laws and their interpretation, which remain the subject of much debate within the legal community in Indonesia".

15. This documentation apparently needs to be lodged within one year of the Supreme Court decision, that is by 29 August 2014. Unfortunately, Mr Agus suffered a severe stroke in October 2013 and is unable to represent her. Attempts to find other lawyers prepared to work on a *pro bono* basis have failed, and Reprieve itself has no Indonesian lawyers qualified to undertake the task. A suitable lawyer has been identified but only if his fees (said to be US$ 35,000, excluding expenses) can be provided for. (We assume, although this is not entirely clear, that this fee would cover both the clemency petition and the linked application to the Supreme Court.) A statement from Mr Agus himself gives his view that the failings in this case are not unique, and that if the death penalty were reversed by the Supreme Court it would be "a persuasive decision" for future cases "highlighting the flaws in the system which make the death penalty such a dangerous sentence to impose".

The issues

16. Three issues are identified in the agreed statement:

The Convention issues

i) Whether the appellant is within the jurisdiction of the UK for the purpose of article 1 of the European Convention on Human Rights.

ii) If so, whether the respondent was and is obliged by the Convention to provide funds for the appellant's legal representation in capital proceedings against her in Indonesia, or alternatively to consider her claim for funding.

The common law issue

iii) Whether the UK government's blanket policy to refuse to consider providing such funding in any case, including the appellant's, is unlawful and/or irrational and/or (if material) disproportionate.

The Convention issues

17. We say at once that on issue (i) we are in substantial agreement with the courts below. This will make it unnecessary to consider in issue (ii).

18. We note at the outset the Convention right on which Mr O'Neill QC relies on behalf of Mrs Sandiford. The death sentence under which she suffers might have suggested article 2 or 3. But it is actually article 6, enshrining the right to a fair trial, on which alone reliance is placed. The case advanced is that the United Kingdom can and should secure to Mrs Sandiford free legal assistance under article 6(3)(c), in circumstances where she cannot afford to fund herself and no such assistance is available to her in Indonesia.

19. Lord Dyson MR (para 35ff) reviewed the relevant case law of the European Court of Human Rights, culminating in the authoritative restatement of the principles by the Grand Chamber in *Al-Skeini v United Kingdom* (2011) 53 EHRR 589. As was confirmed in that judgment (para 131ff), jurisdiction under article 1 is "primarily territorial", but there are certain recognised exceptions one of which is in relation to the acts of diplomatic and consular agents which may amount to an exercise of jurisdiction "when these agents exert authority and control over others" (para 134). Having discussed in detail the other Strasbourg cases relied on by the appellants, he concluded that the test was not satisfied in the present case. He adopted a passage from of the judgment of Gloster J in the Divisional Court (para 40):

> "In my judgment it is manifestly clear on the facts of this case, that, at all relevant times, from the moment she was arrested, throughout the time she was in custody, throughout the trial process, and after her conviction when held in prison, the claimant was and remains under the authority and control of the Indonesian state and relevant criminal authorities. The mere fact that the consular officials provided her with advice and support, and that the [Foreign and Commonwealth Office] engaged in diplomatic representations, cannot be regarded as any kind of exertion of authority or control by agents of the United Kingdom so as to engage its responsibilities under the Convention."

20. Since the Court of Appeal's decision in this case, the issue of jurisdiction under article 1, and in particular of the exceptions to the principle of territoriality, has been considered by the Supreme Court in *Smith v The Ministry of Defence (JUSTICE intervening)* [2013] UKSC 41, [2014] AC 52. It is unnecessary to look in detail at Lord Hope of Craighead's leading judgment on this issue, since it confirms that it is to the Strasbourg authorities, in particular *Al Skeini*, that we must look for detailed guidance. It is enough to say that there is nothing inconsistent with the Court of Appeal's approach.

21. Mr O'Neill challenged this approach as too narrow. It was wrong to limit the scope of "authority and control" to situations in which a state is exercising *physical* control over a person. Physical power and control, in his submission, were not relevant to the separate category, recognised in *Al-Skeini*, of acts of diplomatic and consular agents. In that context the correct approach was to focus on the activity of the member state, even if its authority was only partial. So in this case, the fact that the appellant is in custody in Indonesia does not prevent the UK exercising its authority, under the Vienna Convention, to arrange for her legal representation. The focus is on whether the state had jurisdiction over the act or omission complained about, not whether she is under its authority and control in other ways.

22. In our view, however, the Strasbourg authorities on which he relies do not support such an extension. In *Al-Skeini* the court identified the consular exception in these terms (para 134):

> "First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others".

The Court footnoted this head with a number of references. The main reference was to *Banković v Belgium* (2001) 11 BHRC 435, para 73, where the court said that customary international law and treaty provisions had recognised "extra-territorial exercise of jurisdiction by a state" in cases including those "involving the activities of its diplomatic or consular agents abroad". The court added:

> "see also *X v Federal Republic of Germany*, (1965) 8 Yearbook of the European Convention on Human Rights 158, 169; *X v United Kingdom* (1977) 12 DR 73; *M v Denmark* (1992) 73 DR 193; 15 EHRR CD 28 (sub nom *V v Denmark*)).

23. The United Kingdom has no territorial jurisdiction over Mrs Sandiford in prison in Indonesia. But the United Kingdom could, in one way or another, provide her with funds for her legal proceedings in Indonesia. It could on the face of it do so without using any diplomatic or consular agents, by providing funds here which could then be remitted to Indonesia. However, there is no general Convention principle that the United Kingdom should take steps within the jurisdiction to avoid exposing persons, even United Kingdom citizens, to injury to rights which they would have if the Convention applied abroad. The principle recognised in cases like *Soering v United Kingdom* (1989) 11 EHRR 439 only applies where the United Kingdom is proposing a step such as the surrender or removal from the jurisdiction of a person which may lead to infringement of that person's Convention rights abroad.

24. The exceptional extra-territorial jurisdiction described in *Al-Skeini* 53 EHRR 589, para 134 was expressed as depending on "acts of diplomatic or consular agents" abroad where such agents "exert authority and control over others". It is common ground that the United Kingdom could use its diplomatic or consular agents to fund the defence in Indonesia of a United Kingdom citizen. The Vienna Convention on Consular Relations of 24 April 1963 provides that the consular functions exercisable by consular posts or diplomatic missions consist in inter alia -

> "[Article 5] (i) …. representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state ….. where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests. ….
>
> (m) performing any other functions entrusted to a consular post by the sending state that are not prohibited by the laws and regulations of the receiving state or to which no objection is taken by the receiving state ….."

25. The Convention on Consular Relations permits, but it is not suggested that it obliges, the exercise of any such functions. In the present case, the United Kingdom has decided not to use its agents to arrange or fund representation of Mrs Sandiford for this purpose. In these circumstances, it is not possible, in our opinion, to identify any relevant acts of diplomatic or consular agents or therefore any relevant exercise of authority or control by such agents over Mrs Sandiford, which could bring the first extra-territorial exception into play.

26. The United Kingdom's diplomatic and consular agents in Indonesia have of course been active in relation to Mrs Sandiford's predicament, particularly making

representations and filing an amicus brief. But their support for her and their activity in this regard have hitherto excluded any involvement in instructing or funding lawyers on her behalf. A deliberate refusal to instruct or fund lawyers on behalf of Mrs Sandiford cannot constitute an exercise of authority or control over her. It is the opposite - a decision not to undertake or exercise any relevant authority or control.

27. The authorities footnoted in *Al-Skeini* para 134 do not lead to any different conclusion. In *X v Germany* the allegation was that the German Consul had asked the Moroccan authorities to expel him. The case failed on the facts, with the Commission merely remarking that "diplomatic and consular representatives …. perform certain duties with regard to [nationals of a contracting state abroad] which may, in certain circumstances, make that country liable in respect of the Convention" ((1965) 8 Yearbook of the European Convention on Human Rights 158, 168). The potential liability referred to was therefore based on duties undertaken and performed. *M [or V] v Denmark* involved the positive act of the Danish Ambassador to East Germany in inviting the East German police to enter the Danish Embassy in East Berlin where a group of East Germans had taken refuge and been promised immunity. Not surprisingly, the Commission held that he had thereby exercised authority over the group, although again the claim failed on the facts, because the group had by then left voluntarily.

28. The high point of Mr O'Neill's argument is perhaps the Commission decision in *X v United Kingdom* (1977) 12 DR 73. The British court had ordered a Jordanian father to return his daughter to England. According to the summary, the English mother "got in touch with the British consulate in Amman asking it to obtain the custody of her daughter from the Jordanian Court" and the Consulate reported on the child's well-being, and provided the mother with a list of lawyers practising in Jordan and registered her daughter in her passport, but with no result. The mother complained that the Consul had failed "to intervene in her domestic dispute and help reunite mother and child", so allegedly violating articles 8 and/or 13, and that the Consul refused to ask its legal adviser to answer questions about Jordanian law in order to help her prepare her case for court in Jordan, so violating article 6.

29. The complaint failed again on the facts, with the Commission reciting what had been done and concluding that "the consular authorities had done all that could be reasonably expected of them". But first the Commission made what appears to have been a statement of legal principle in relation to jurisdiction:

> "authorized agents of a state, including diplomatic or consular agents bring other persons or property within the jurisdiction of that state to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the state is engaged … Therefore, in

> the present case the Commission is satisfied that even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still 'within the jurisdiction', within the meaning of article 1 of the Convention." (p 74)

30. The statement refers to responsibility for acts "or omissions" and treats "the alleged failure of the consular authorities to do all in their power" as bringing the case within article 1. So it lends a superficial support to Mrs Sandiford's case that a mere unexercised consular power suffices for the purposes of establishing jurisdiction under article 1. But, read literally, that would appear to imply that any omission to exercise any power which could be exercised by diplomatic or consular means would bring the circumstances within the jurisdiction under article 1. On that basis, jurisdiction under article 1 would depend not on activities undertaken or duties performed, but simply on powers possessed. That would be contrary to the later statements of principle in *Banković* and *Al-Skeini*. (Logically, it would also mean that *Banković* itself must be wrong, since, if a mere unexercised power suffices, then an actual exercise of a power affecting a person abroad must surely also suffice.)

31. In our opinion, Commission dicta made in passing in 1977 cannot and do not determine the scope of article 1 today. To the extent that they are inconsistent with later statements, they must be regarded as too extensively phrased. But it is not uninteresting to note that, even though they were so widely expressed, their application on the facts in no way favours Mrs Sandiford's current case. If states have any duty to arrange and fund representation on behalf of their citizens abroad, the result in *X v United Kingdom* ought on the face of it to have been the opposite at least in respect of the complaint made under article 6.

32. Looking at the matter more broadly, the position is that Mrs Sandiford has been apprehended, convicted and tried for drug smuggling in Indonesia. If one asks, by reference to any common-sense formulation, under whose authority or control she is, the answer is: that of the Indonesian authorities. It is they who ought to be ensuring her fair trial. If they were party to the Convention, it would be their duty to do so, and to provide appropriate legal assistance in a case of impecuniosity, under article 6. Since *Al-Skeini*, it is possible in certain respects to divide and tailor the Convention rights relevant to the situation of a particular individual: see para 137 in that case. But to divide and tailor the rights under article 6, so as to isolate the duty to fund from the remaining package of rights involved in fair trial, and to treat it as applying to the United Kingdom and as putting Mrs Sandiford to that extent under the authority or control of the United Kingdom, is in our opinion impossible in circumstances where the United Kingdom has deliberately not assumed or performed any role in relation to funding.

33. Before leaving the Convention position, it is also worth considering the full implications of the appellant's case that the Convention applies. Logically, article 6 would be engaged in respect of every criminal charge, however serious or minor, brought against a British citizen in any overseas country in the world. Article 6 would become a compulsory world-wide legal aid scheme for impecunious British citizens abroad, presumably even for those who had decided to live permanently abroad.

34. For reasons we have given, however, in our opinion Mrs Sandiford was not and is not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention, so that no part of article 6 is capable of imposing any obligation on the United Kingdom in respect of the criminal proceedings and capital penalty to which she is now subject in Indonesia.

The common law issue

The "blanket" policy – history and practice

35. Before considering the legal issues, it is convenient to refer to the evidence as to how the policy has evolved and how it has worked in practice. Although the policy itself is not in dispute, evidence of the sources of that policy and of the reasoning behind it has proved somewhat elusive.

36. The best evidence now available is contained in two statements (approved we are told by Foreign Office ministers), submitted by Louise Proudlove (Head of Consular Assistance, Consular Directorate, of the FCO). The first was available to the Divisional Court and was necessarily prepared in great haste. The second was submitted to the Court of Appeal in April 2013, partly in response to evidence from Reprieve of a case in 2003 where funding had been provided for a British citizen (Mr Maharaj) facing the death penalty in Florida. It was said to be based on a search of all relevant sources (including documentary and electronic files and interviews with former FCO employees), which was "as comprehensive as possible" in the time available. It is safe to assume that, if there were further material, it would have come to light in the time that has elapsed since then.

37. There is no doubt as to the longstanding policy of the UK government to oppose the death penalty as a matter of principle. Its current strategy (published in revised form in 2011) is set out in *HMG Strategy for Abolition of the Death Penalty 2010-2015*. This has the appearance of a formal policy statement, approved by Ministers, and appears as such on the FCO website. According to the Executive Summary it "sets out the UK's policy on the death penalty, and offers guidance to

FCO overseas missions on how they can take forward our objectives". Appendix 1 identifies Indonesia as one of a "second tier of priority countries" where consular posts should be "working towards one or more of our goals". We were told, for example, the FCO has recently funded a project in Indonesia for training lawyers in handling death penalty cases, in particular by improving understanding of human and constitutional rights. Appendix 2 notes that the FCO is funding three multi-country projects (not currently including Indonesia), two of which provide free legal representation for prisoners facing the death penalty.

38. The stated objectives include increasing the number of abolitionist countries, seeking further restrictions in countries where it is used, and ensuring that EU minimum standards are applied. Those standards (as recorded in appendix 4 of the strategy) include the requirement that capital punishment must only be carried out pursuant to a final judgment by an independent and impartial court after legal proceedings complying with international standards -

> "including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative."

The methods for achieving these goals include "bilateral initiatives" including raising individual cases of British nationals: "HMG policy is to use *all appropriate influence* to prevent the execution of any British national" (emphasis added; as will be seen "appropriate influence" is a phrase which is regularly repeated in ministerial statements on the subject). "Delivery" methods include "lobbying on individual cases of British Nationals who have been sentenced to the death penalty or are facing death penalty charges", the strategy being "specifically tailored to each case".

39. The strategy says nothing in terms about the funding of legal representation for individual cases, but equally there appears to be nothing which rules it out. Appendix 6, which lists further recommendations of possible actions by consular posts, does not exclude legal action as such. The list includes:

> "Legal challenges to the constitutionality of the imposition and application of the death penalty are a good tool to use, eg to the mandatory nature of the death penalty, delay on death row or the mercy process…"

Such legal challenges are also suggested as possible actions under the heading "adherence to international standards".

40. By contrast with this strategy, there appears to be no comparable published statement covering the current policy for funding legal representation. Ms Proudlove explains her own understanding of the practice in individual cases, following notification of an arrest by the host country (as required by the Vienna Convention on Consular Relations 1963). In that connection, she refers to an internal guidance note, the precise date and status of which are unclear, which sets out a "checklist" of actions. The note starts by affirming the government's policy to use "all appropriate influence to prevent the execution of any British national". It includes advice on working with the subject's local lawyer, preparing representations which can be made "before, during and after the trial… right up to execution", and considering the possibility of "a legal brief to court, if admissible under local law" but in respect of which, it is said, "there are strict HMG criteria". There is special advice about involving Reprieve.

41. For the current policy on funding legal representation, as already noted, she relies on the 2007 guide (and subsequent revisions), and its statement that "we cannot pay" for local lawyers. That does not purport itself to be a policy-making document, nor does it explain the reasons for the prohibition. We were given no direct evidence as to how, or under whose authority, it came to be published in that form.

42. Ms Proudlove's researches, going back to 1987, have shown that the previous policy, though strict, was not inflexible. Thus she refers to a Consular Department Circular dated July 1987 which recommends that if there is "no possibility of obtaining funds for the defence" a report should be submitted with an estimate of costs, to Consular Department for decision "whether public funds can be used against a UTR (undertaking to repay)". According to the writer: "this facility is rarely used (I cannot recall a single case in the last four years) but should remain an option". This position did not change in the ensuing decade. (A letter from the head of the consular division dated January 1997 to Phillip Sapsford QC is to similar effect.)

43. Ms Proudlove also explains the circumstances in which in 1997 it was agreed to offer funding of up to £20,000 for expert evidence (against an undertaking to repay) to Mr Maharaj who was facing capital charges in the USA. Apart from that and one other similar case (Mr Elliott), also from the USA and relating to expert evidence, no record has been found of any case in which funds were made available for legal representation pursuant to the previous policy.

44. She has attempted to discover in the FCO records the circumstances of a change of policy in 2006-7 to a blanket policy allowing no exceptions. She refers to the decision to refuse assistance in another case from the USA (Ms Carty) in 2004. The Minister was at that time recorded as confirming the existing policy that loans

should not in general be provided for death penalty cases, although it was recognised that there be would be exceptions which would continue to be considered "on a case by case basis". She infers that the change of policy occurred at some time between that decision and the first publication of the guide in 2007. But she frankly admits that in spite of her extensive searches she has been unable to find any documentation recording such a change of policy. She also notes that shortly thereafter the decision was made to provide annual funding to Reprieve, in amounts rising from £20,000 in 2005/6 to £60,000 in 2012/3. According to the terms of reference, Reprieve is to provide a range of services including helping to ensure the best available legal representation, and securing pro bono services from experts and lawyers where possible.

45. The next formal record of a review of the policy (and the last of which we have evidence before the present case) was in May 2010 when there was a detailed submission to the Foreign Secretary. This was triggered, it was said, by two cases "at a critical stage", in which the department was in consultation with lawyers and Reprieve, and a "steer from Ministers" would be welcomed. The scope of the submission is apparent from the introductory passage, under the heading "Options":

> "We recommend that Ministers agree we should, as a matter of general policy, continue to seek to use all appropriate influence to prevent the execution of any British national, beginning that effort from the time the death penalty becomes a possibility'.
>
> 4. Alternatives would include:
>
> A) to limit our action to cases clearly in breach of international standards;
>
> B) to limit out action to cases where we judged there was a strong chance of success;
>
> C) to consider providing direct legal assistance."

The paper reviewed the merits and disadvantages of the three alternatives and concluded:

> "Overall we judge that the risks of a more selective approach (in particular defending judgements not to raise cases) outweigh the

> benefits. So we recommend that we retain our strong advocacy on behalf of all British nationals facing the death penalty abroad."

A minute dated 8 June 2010 recorded (without further comment on the three alternatives) that the Secretary of State accepted "your recommendation that the UK should seek to use all appropriate influence to prevent the execution of any British National".

46. There appears to be no record of what action was taken in relation to the two cases which triggered the submission. On the other hand we have been shown no specific case where assistance has in practice been refused on the basis simply of the blanket policy, without any consideration of the individual circumstances.

47. We note from this evidence that, while the FCO has resisted requests to fund legal representation as such, it has been willing on occasions to spend relatively substantial sums on legal advice in connection with the preparation of amicus briefs. For example, in the Maharaj case two briefs were prepared in 2003 and 2005, at a cost of over US$25,000. A similar amount was spent in 2010 in another American case (Kenneth Gay). In Indonesia in 2012 Mr Agus on the instructions of the FCO had prepared an amicus brief for another British citizen faced with a possible death penalty (Gareth Cashmore) for a fee equivalent to some £17,000. This was the template used for the preparation of the amicus brief in the appellant's case.

48. Finally, although the evidence explains the practical difficulties in operating a fair and consistent scheme for funding legal representation, it is not suggested that it would be impossible. There is no challenge in principle to the evidence more recently submitted on behalf of Reprieve, which shows that many comparable governments do provide such funding for their nationals facing capital charges abroad, although (as Mr Chamberlain fairly points out) the court has no material to judge what practical difficulties may have arisen in the countries concerned.

The Secretary of State's powers and the role of the courts

49. There was no material dispute as to the existence or source of the power of the Secretary of State to provide assistance, including legal funding, for British citizens facing capital charges abroad. It is immaterial for the present purposes to consider whether this is properly described as a common law or a prerogative power (see eg *Wade and Forsyth Administrative Law* 10th ed (2009), pp 181-183). The significant point is that it is not derived from statute, and accordingly any legal constraints on its exercise must be found elsewhere.

50. Assistance in this respect can be found in the judgment of the Court of Appeal in *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76, which concerned the possible responsibility of the UK government to make representations to the USA government or take other action on behalf of British citizens detained in Guantanamo bay. The court noted that, subject to issues arising under the European Convention on Human Rights, international law had not yet recognised any general duty for a state to intervene by diplomatic means (para 69). Enforceable rights could however arise in domestic law based on established government policy statements or practices, underpinned by the law of legitimate expectation and justiciable in accordance with the principles established in the *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374): (paras 81ff). The Court of Appeal held that, although the Foreign Office's discretion as to exercise its prerogative powers in such a case was "a very wide one" and although "the court cannot enter the forbidden areas, including decisions affecting foreign policy", there was "no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation" (para 106). Neither party in the present case sought to question that analysis.

51. Relevant also in the present context is the court's discussion of *Butt's* case (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Ferhut Butt* (1999) 116 ILR 607), in which the applicant had sought an order that the FCO should make representations to the President of the Yemen relating to a criminal trial in progress in the Yemen. Henry LJ recorded the concession by the respondent Secretary of State that he was under "a common law duty to protect its citizens abroad", but that "the extent and the limits of that duty (were) set out in a leaflet that is available for those who travel abroad". As the court noted in *Abbasi*, the leaflets in question "expressly excluded intervention in a criminal trial, which was fatal to the application". Rather than "a common law duty" as such, as suggested by Henry LJ, the *Abbasi* court preferred to characterise it as a legitimate expectation "that such assistance as was proffered in the leaflets would be provided" (paras 93-4).

52. The court's role is dependent on the nature and the subject matter of the power or its exercise, particularly on whether the subject matter is justiciable: *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374, 417-418 per Lord Roskill, *R v Secretary of State for the Home Department, Ex p Bentley* [1994] QB 349. In the former case, at p 418B-C, Lord Roskill suggested as prerogative powers which would not be justiciable those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers. Even so, it has been held that a decision to refuse to issue any pardon based on a failure to identify the possibility in law of a conditional pardon may be reviewable (see *Ex p Bentley*); and it has also been held that a decision to refuse to issue a passport is reviewable (*R v Secretary of State for the Foreign Office, ex p Everett* [1989] 1 QB 81)

53. In the present case, there has been no dispute that the Secretary of State, in accordance with his published policies and established practice, has some responsibility for British citizens facing capital charges abroad, nor that his exercise of that responsibility is subject to review by the courts in accordance with the principles outlined in *Abbasi.* On the other hand it is also common ground that he has a wide discretion in the formulation and application of that policy. The issues turn on the restrictions on which he is entitled to place on that policy and on its application to the appellant's case.

Fettering discretion – the issues

54. In the courts below, as in this court, the argument has turned principally on his right to adopt a blanket policy not permitting of any exceptions, having regard to the well-known rule that a public body may not fetter the exercise of a discretionary statutory power (exemplified by *British Oxygen Co Ltd v Board of Trade* [1971] AC 610). As recorded in the agreed statement of facts, the existence of such a policy, since about 2007, has not been in dispute. The Court of Appeal decided (following its decision in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213) that that rule had no application to the exercise of a prerogative or common law power as in this case (para 53, per Lord Dyson MR), and that the decision to adopt such a rule was not irrational (para 60).

55. The reasoning of the Court of Appeal is encapsulated in a short passage in the judgment of the Master of the Rolls:

> "53. It is clearly established that a public body may not unlawfully fetter the exercise of a discretionary statutory power: see, for example, *British Oxygen Co Ltd v Board of Trade* [1971] AC 610. But where a policy is made in the exercise of prerogative or common law powers (rather than a statutory discretion), there is no rule of law which requires the decision-maker to consider the facts of every case with a view to deciding whether, exceptionally, to depart from the policy in a particular case. This is because 'it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be': *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, para 191."

The Court of Appeal in *Elias* had in turn adopted the reasoning of Girvan J in *In re W's Application* [1998] NI 19, in a passage approved by the Northern Ireland Court of Appeal [1998] NI 219.

56. Mr O'Neill argues that this is too narrow an approach. He challenges the distinction between statutory and common law powers as inconsistent with modern principles of judicial review as it has developed since *GCHQ*:

> "… judicial review is as applicable to decisions taken under prerogative powers as to decisions taken under statutory powers save to the extent that the legality of the exercise of certain prerogative powers (eg treaty-making) may not be justiciable.": *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 553C-D, per Lord Browne-Wilkinson)

Further, at least where human rights are at stake, the rule against fettering discretion is a general principle of the rule of law (see eg *Gillan v United Kingdom* (2010) 50 EHRR 1105, para 77).

57. Furthermore he submits, in the context of the present case such a rigid policy is inconsistent with the objects and purpose of the government's adopted strategy on the death penalty and as such is irrational. A more flexible policy would allow exceptional cases to be dealt with on their own merits in accordance with the strategy, but need not be open-ended. Mr O'Neill accepts for example that it would be open to the Secretary of State to adopt a total cap on fees (say £20,000) in an individual case, or even to refuse funding altogether if he had reached the limit of resources allocated for a particular year. What he cannot do is to exclude consideration altogether.

58. Mr Chamberlain adopts the reasoning of the Court of Appeal. As he points out, the leading cases on the no-fettering principle are directed in terms to the exercise of "statutory" discretions (see eg *British Oxygen* [1971] AC 610, 625D per Lord Reid). The principle has been explained as founded on the Parliamentary intention that a power exercisable by statute from time to time must reflect the circumstances at the time: it cannot be exercised "nunc pro tunc" (*R v Secretary of State for the Home Department ex parte Venables* [1998] AC 407, 496-497 per Lord Browne-Wilkinson). The same rationale cannot be applied to non-statutory governmental powers

59. However his case does not rest on that legal proposition alone. While he asserts the right of ministers exercising a common law power to formulate a "bright line" policy, not subject to exceptions, he submits:

> "In any event, even in relation to statutory discretions, decision-makers are entitled to adopt policies admitting of no exceptions, provided that they are prepared to consider, by reference to the facts of an individual case, whether to change the policy. That is what happened here." (Secretary of State's printed case, paragraph 6)

A review of the evidence, he says, shows that the department did in fact consider the points put forward as justifying exceptional treatment for Mrs Sandiford, but decided for good reasons not to accept them.

Discussion

60. The issue which divides the parties is, in short, whether there exists in relation to prerogative powers any principle paralleling that which, in relation to statutory powers, precludes the holder of the statutory power from deciding that he will only ever exercise the power in one sense.

61. The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances. But prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion.

62. In our opinion, in agreement with the Court of Appeal, this does have the consequence that prerogative powers have to be approached on a different basis from statutory powers. There is no necessary implication, from their mere existence, that the State as their holder must keep open the possibility of their exercise in more than one sense. There is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power. In so far as reliance is placed on legitimate expectation derived from established published policy or established practice, it is to the policy or practice that one must look for the limits, rigid or flexible, of the commitment so made, and of any enforceable rights derived from it.

63. The point is well illustrated by the case on which the Court of Appeal relied. *Elias* [2006] 1 WLR 3213 concerned a non-statutory compensation scheme set up by the government in November 2000 "to repay the debt of honour" owed by the UK to "British civilians" interned by the Japanese during the Second World War. In July 2001, following some uncertainty about the scope of the scheme, and further discussion within the department, more detailed "eligibility criteria" were announced to Parliament. This order of events was subject to critical comment in the Court of Appeal. As Mummery LJ observed:

> "It does not require much foresight to appreciate the importance of giving proper consideration to establishing lawful eligibility criteria *before* starting to make ex gratia payments to claimants. Astonishing though it may seem, very many payments were made under the Compensation Scheme (though not to Mrs Elias), even before the eligibility criteria had been settled and announced and without giving proper consideration to whether there was potential discrimination on racial grounds." (para 19)

64. Mrs Elias' challenge was based on a number of grounds, including direct and indirect racial discrimination, as well as fettering of discretion. Under the latter head, she argued that the Secretary of State should have been willing to consider any exceptional circumstances, in which payment might be paid to those owed "a debt of honour", even though they fell outside the scope of the eligibility criteria. The court rejected this submission in the words cited by the Master of the Rolls in the present case. It is of interest to note also the terms in which the court refused permission to amend the claim to include a ground based on the failure to review the policy. Mummery LJ observed that the duty to keep the scheme under review in the light of developments was not disputed, but said:

> "There was, however, no such duty here. The criteria had been laid down with full knowledge of the facts and a decision was made as to who should be excluded from the Scheme. In the *ABCIFER* case this court had decided that this was a rational and lawful decision. There was no duty to reconsider the criteria on the grounds suggested by Mrs Elias…" (para 189: the reference is to *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397)

In other words, in circumstances where the Secretary of State had laid down a detailed scheme, recently reviewed, covering those to be included or excluded, there could be no legitimate expectation that he would consider further categories of exception outside those specifically provided for.

65. As we have already made clear, this does not mean that the formulation or exercise of a prerogative power may not be susceptible to review on other grounds. In particular there is no reason why a prerogative refusal to fund foreign litigation should be immune from all judicial review. It does not raise any real issues of foreign policy. As we understand it, the Government's current blanket policy is motivated largely by domestic policy and funding considerations. In particular, as *Abbasi* made clear, there is no reason why action or inaction in the exercise of such a power should not be reviewable on the grounds of irrationality or breach of other judicial review principles.

66. "Irrationality" is a high threshold, but it may be easier than otherwise to surmount in a case involving an imminent risk of death by execution of a British citizen deprived of financial support abroad. The court's role is given added weight in a context where the right to life is at stake (see *R (Bugdaycay) v Secretary of State for the Home Department* [1987] AC 514). A keen scrutiny of the policy and its application must on any view be required in such circumstances. There may be scope in an appropriate case to test the legitimacy of the blanket policy that the Foreign Office currently advances, by reference to a broader framework of proportionality discussed in a non-Convention context in *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2014] UKSC 20, [2014] 2 WLR 808. Issues of consistency may also arise when the blanket policy is compared with the strong and apparently flexible approach to the exercise of "appropriate influence" advocated by the FCO's published strategy for abolition of the death penalty. However, for reasons which will become apparent, these questions are not critical to the outcome of this particular appeal.

Policy as applied to the appellant

67. In the event, the legality or otherwise of the blanket policy is not determinative, because, regardless of the strict limits of the policy as described in the evidence, Mr Chamberlain is right in our view to submit that the department did not treat its existence as the end of the matter, but was on the evidence prepared to consider whether it should be modified in the face of the particular circumstances disclosed by the appellant's case.

68. Ms Proudlove explains the steps taken by her department following letters before action from the appellant's solicitors in October 2012. Consideration, she says, was given to the policy issues:

> "Consular Directorate officials came to the view, having considered our policy in general and the circumstances in Mrs Sandiford's case, that if we were to pay for the provision of her legal representation, this

> would inevitably result in having to change our policy of not paying for legal representation on the basis that there were a number of analogous death penalty cases.
>
> Consideration was then given to whether or not the policy ought to be changed. However, having considered the serious points of principle and practicability that I have outlined above, we came to the view that we should not change our policy. Of course, as is the case with policies in general in the Consular Directorate, they are under regular review with a view to providing the best consular service that we can provide to British nationals abroad."

69. She also explains the Department's view of the special factors put forward in the judicial review proceedings as justifying an exception in the case of the appellant. These were, first, that legal representation was available (through Mr Agus) at relatively low cost, and, secondly, that she had no other means of payment. Ms Proudlove's response, in short, was, first, that there was no fair way of distinguishing between cases on the basis of cost, nor of limiting the costs of appeals; secondly, there was some evidence that the appellant's family were able to raise sums of the order required, but in any event their financial circumstances were in no way exceptional as compared to others facing the death penalty abroad.

70. It may be said (as Gloster J suggested: para 78) that there is a difference between formulating or reformulating policy, and considering exceptions to policy once made. In many contexts, no doubt, that may be a significant difference, where for example the making of policy is itself subject to a formal process, perhaps including consultation, distinct from its application in individual cases. However, in the present context that seems a distinction without a difference. Our review of the development of policy shows that, on the one hand, policy submissions were made to ministers without any formal procedure, and generally in response to issues raised by individual cases. On the other, it was sensibly recognised that if an exception were to be approved it would be taken as setting a precedent, and to that extent would be tantamount to a variation of the policy.

71. In his written case to this court, Mr O'Neill maintains his challenge to the rationality of the actions and decisions of the Secretary of State in January 2013. However, we see nothing arguably irrational in the reasons given by Ms Proudlove for not making an exception to the policy in this case, at least as matters stood in January 2013. The challenge is all the more difficult to sustain in the light of what followed.

72. The department seems to have responded with appropriate urgency to the wholly unexpected death sentence. They were able to put the appellant in contact with an experienced local lawyer who was willing to conduct the appeal on an expenses-only basis. Although it is argued that the small amount involved was a reason for making an exception to their policy, it could equally point in the other direction. It was hardly irrational to think that it was a sum which the family should be able to raise for themselves, as indeed turned out to be the case. In the event the problem at the appeal was not the lack of competent legal representation, but the apparent unwillingness of the court to take any notice of it. This cannot be laid at the door of the Secretary of State.

73. It follows that the challenge to the decision made in January 2013, and the policy on which it was based, must fail.

The present position

74. While this is enough to dispose of the appeal, we cannot leave the matter there. Mrs Sandiford remains in jeopardy and urgently in need of legal help. Since January 2013, as a result of the surprising course of the Indonesian proceedings, circumstances have radically developed in respects which appear to have been quite unforeseeable. However, we have no up to date information as to the department's consideration of those matters. As has been seen, those responsible have been willing to consider whether the policy should be departed from or qualified in her case, but that has been on information which is now out of date. Logic and consistency, if nothing else, call for an urgent review of the policy as it applies to her in the light of the current information.

75. The evidence now available as to the course of the Indonesian proceedings appears to raise the most serious issues as to the functioning of the local judicial system and its ability to deal justly with the appellant's case. In particular, on the material we have been shown, the local courts seem to have ignored the substantial mitigating factors in her case, including her age and mental problems, her lack of any previous record, her co-operation with the police, and not least the remarkable disparity of her sentence with those of the members of the syndicate whom she helped to bring to justice. On the face of it, there is substantial material to support her application to the Supreme Court or the President. She needs a competent lawyer to present it. It is through no fault of her own that Mr Agus' illness has deprived her of his expert support, and with it her only opportunity of pro bono representation. Nor is this simply a matter of justice to her. If Mr Agus' view is accepted, an application to the Supreme Court, supported by appropriate oral submissions and new evidence, may offer the prospect of a lasting improvement to the approach of the local courts to comparable cases in the future.

76. It is not, of course, for this Court now to express any view as to what the outcome might be of such a review. But we note that, even under the old pre-2007 policy, it appears that the Foreign Office did not experience real difficulty in controlling and limiting the financial exposure which it incurred in a very few exceptional cases. It is not clear to us that the creation or recognition of an exception for a case as extreme as the present would risk opening a floodgate to future demands for financial support. However that may be, the further review needs to be undertaken and the outcome to be supported by a clear justification of the rationality and/or proportionality of maintaining an absolutely blanket policy covering even the present circumstances.

77. Without prejudice to that review, but for the reasons given above, the present appeal must be dismissed.

LORD SUMPTION

78. I agree with the order proposed by Lord Carnwath and Lord Mance, for the reasons given in their joint judgment. I wish only to add some observations of my own on the rule against the fettering of discretions in the context of the exercise of a common law power.

79. The rule is of long standing. It was articulated by Bankes LJ in more or less its modern form in *R v Port of London Authority Ex p Kynoch Ltd* [1919] 1 KB 176, 184:

> " There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

80. Commenting on Bankes LJ's statement of principle, Lord Reid observed in *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625,

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' (to adapt from Bankes LJ on p 183). I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing. In the present case the respondent's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so. The respondent might at any time change his mind and therefore I think that the appellants are entitled to have a decision whether these cylinders are eligible for grant."

81. The basis of the rule against the fettering of discretions, as Bankes LJ and Lord Reid pointed out, is that a discretion conferred on a decision-maker is to be exercised. Within the limits of that discretion, which will normally be derived from terms in which it was conferred, members of the class of potential beneficiaries have a right to be considered, even if they have no right to any particular outcome. The effect of the decision-maker adopting a self-imposed rule that he will exercise his discretion in only some of the ways permitted by the terms in which it was conferred, is to deny that right to those who are thereby excluded. It also leads to the arbitrary exclusion of information relevant to the discretion conferred, and thereby to inconsistent, capricious and potentially irrational decisions.

82. Since the decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, the principles of public law applicable to the exercise of common law and statutory powers have in many respects been assimilated. But there remain inevitable differences arising from the distinct origins of these powers. One of them relates to the rule which precludes a decision-maker from fettering his own discretion. In *Elias v Secretary of State for Defence* [2006] 1 WLR 3213, the Court of Appeal held that the rule had no application to the exercise of common law powers. The decision concerned the rules of a scheme for compensating certain categories of British subject who had been interned by the Japanese during the Second World War. The scheme had no statutory basis. It was created under the common law powers of the Crown. Mummery LJ, at para 191 said:

> "The analogy with statutory discretion… is a false one. It is lawful to formulate a policy for the exercise of a discretionary power conferred by statute, but the person who falls within the statute cannot be

> completely debarred, as he continues to have a statutory right to be considered by the person entrusted with the discretion. No such consideration arises in the case of an ordinary common law power, as it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be. If there are no exceptions the decision-maker is under no duty to make payments outside the parameters of the scheme."

83. The Court of Appeal in the present case were guided by this decision, which was plainly correct. A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power: see *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76.

84. The problem in this case is that neither the practice nor the public statements of the Foreign Office can be said to give rise to a legitimate expectation that the legal fees of British subjects in difficulty abroad will be paid. On the contrary, it has been clear for some years that the policy of the Secretary of State is not to pay them. The result is that there is no basis for any criticism of the self-imposed limitations of the Secretary of State's policy, other than the fact that he could have made it broader had he wished to. The limitations are certainly not irrational.

85. In common with Lord Mance and Lord Carnwath I consider that the Secretary of State ought now to revisit the question whether the policy should be broadened or an exception made in order to accommodate the particular case of Mrs Sandiford in the light of the fresh information about the course of the proceedings in Indonesia. But that is not because the Secretary of State has a duty to broaden his policy or

make an exception. It is because he has already undertaken a review of that policy on the information available to him at the time, and because consistency and rationality require him not to treat that review as closed at a time when relevant further information is still becoming available which might alter his assessment.