

Festschrift

for Richard Drabble KC



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FOREWORD

Baroness Hale of Richmond, former President of the Supreme Court of the United Kingdom

There may be more famous or more flamboyant advocates than Richard Drabble, but there are few, if any, who are more committed, more diligent, more knowledgeable, or more gently persuasive. Anyone who cared about the interests of the poor, the vulnerable, the disadvantaged and the marginalised was glad to see him in court standing up for their rights. Even if he could not always succeed, he always put up a good case. And there were so many of them. He appeared in no less than 40 cases in the Supreme Court of the United Kingdom, from its opening in October 2009 until his retirement in 2024. I was on the bench in 27 out of the 33 cases in which he appeared before my own retirement in 2020, so I know whereof I speak.

It is worth listing them all. They include some very famous names. His range was enormous – from travellers (*Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47); to housing (*Austin v Southwark London Borough Council* [2010] UKSC 28, *Manchester City Council v Pinnock* [2010] UKSC 45 and [2011] UKSC 6, *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3); to EU law (*Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, *St Prix v Secretary of State for Work and Pensions* [2012] UKSC 49, *Secretary of State for Work and Pensions v Tolley* [2015] UKSC 55, *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, *Patel v Secretary of State*

for the Home Department [2019] UKSC 59, *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, *R (AAA(Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42); to immigration (*R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, *R (Abassi) v Secretary of State for the Home Department* [2012] UKSC 32, *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, *R (MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, *R (Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, *Secretary of State for the Home Department v AM (Belarus)* [2024] UKSC 13); to asylum and protection (*MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, *R (ST (Eritrea) v Secretary of State for the Home Department* [2012] UKSC 12, *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, *R (O (a child)) v Secretary of State for the Home Department* [2022] UKSC 3, *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10); to welfare benefits and tax credits (*R (CPAG) v Secretary of State for Work and Pensions* [2010] UKSC 54, *R (Payne) v Secretary of State for Work and Pensions* [2011] UKSC 60, *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 22, *Secretary of State for Work and Pensions v MM* [2019] UKSC 34, *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26), to access to justice issues (*R (Cart) v Upper Tribunal* [2011] UKSC 28, *R (G) v X School Governors* [2011] UKSC 30); to access to children's services (*R (A) v Croydon London Borough Council* [2009] UKSC 8); and - perhaps improbably - to whether cash machines in supermarkets are

separate hereditaments for rating purposes (*Cardtronics UK Ltd v Sykes* [2020] UKSC 21). Whatever the subject matter of the claim, the theme was (almost) always the rights of the most disadvantaged and marginalised people in society.

Sometimes he was for an intervener – the Children’s Commissioner, the AIRE Centre, the Joint Council for the Welfare of Immigrants, the Migrants’ Rights Network, the Child Poverty Action Group, or MIND; occasionally he was for a defendant local housing authority; but mostly he was for the claimant. He scored some spectacular successes, for example: whether or not a person is a child is a question of fact for the court, not the local authority, to decide; raising the age for sponsoring a foreign spouse to come here in order to deter forced marriages was a disproportionate interference with the rights of perfectly genuine young couples; it was unlawfully discriminatory to impose the ‘bedroom tax’ on couples who could not share a bedroom because one of them was severely disabled or on families looking after a severely disabled child who needed an overnight carer; tribunals did not have to wait until the unlawful regulations were changed before awarding claimants the full amount of benefit to which they were entitled (this last is an example of the blindingly obvious which ought not to have to reach the Supreme Court for it to be acknowledged). He also scored some partial successes which are often just as important as the spectacular ones.

But I’d like to single out two cases where he lost – rightly (in my view) in one of them and wrongly (in my view) in the other. The case which he rightly lost – although he might reasonably have expected to win – was one of those rare cases in which he was appearing for a defendant local housing authority: *Yemshaw v Hounslow London Borough Council*. A person is not intentionally homeless if she leaves her home because of the probability of ‘domestic or other violence’ if she stays. The Court of Appeal had twice held that ‘violence’ meant physical violence – hitting

or threatening to hit. Mrs Yemshaw had never been hit but she had been terrorised in other ways. In valiantly defending the Court of Appeal's view Richard was up against, not only the powerful advocacy of Nathalie Lieven QC (as she then was), for Mrs Yemshaw, and the late Stephen Knafler QC, for the Women's Aid Federation of England, but also the comprehensive researches of James Maurici for the Secretary of State (who intervenes against local housing authorities surprisingly often). These revealed that a much wider concept of violence was now being used across government (including the London Borough of Hounslow itself) as well as in the courts. The Supreme Court was able to adopt that wider concept - anticipating a powerful story line in *The Archers* (the BBC's long-running saga of country folk) in which the listeners could hear how Rob was, bit by bit, depriving his wife Helen of all agency and sense of self but her family and friends could not. The criminal law has now reflected the same concept in the offence of coercive control. Somehow, I feel that Richard's sympathies may well have been with Mrs Yemshaw, but he stood up for the other view in the finest traditions of the Bar.

The case which, in my view, he should not have lost - although he may well have been surprised at how narrowly he did so - was the first of the 'benefit cap' cases: *R (JS) v Secretary of State for Work and Pensions*. Technically, of course, he was appearing for an intervenor - the Child Poverty Action Group - and so was neither a winner or a loser. But it was their work which proved conclusively that people with jobs were always better off than people depending wholly on benefits - the government's focus on their earnings ignored all the other benefits they were entitled to. The government admitted that the benefit cap was indirectly discriminatory against women but claimed that one of the justifications for depriving families with enough to live on was to maintain fairness between people in work and people out of work. Richard and CPAG comprehensively demolished that claim and with it the need to impose the cap in order

to incentivise work. But the claimants almost won because of the impact of the cap upon the children involved. The government had initially accepted that the UK's international obligations under the United Nations Convention on the Rights of the Child – to make the best interests of the child a primary consideration in all actions concerning them – were relevant to whether the discrimination against their mothers could be justified. Three of the Justices originally thought that the best interests of the children involved could not have been a primary consideration and that the discrimination was not justified. But the impact of the Convention had not been argued before us. The government changed its view on its relevance to the case and the argument was reopened on this point. One of the Justices changed his mind. So what would have been a narrow victory for the claimants and CPAG became a narrow defeat. And it set the scene for much solidier defeats in later cases. The climate has now changed. The arguments of Richard and others like him are falling on stonier ground.

But the poor, the vulnerable, the disadvantaged and the marginalised, women, children, travellers, claimants, and migrants, still have much reason to thank advocates like Richard. Standing up for their rights requires a comprehensive knowledge of some complicated and rapidly changing law, an understanding of how it impacts upon their situation, and a calm and patient approach to putting their cases before the court. The best advocates make the court want to find for them – which is why it was always a delight to walk into court and find Richard Drabble waiting for us on the other side of the notional table – we always wanted to find for him even if we couldn't. And that is why he deserves a Festschrift like this – full of contributions from many of his colleagues and friends who want to celebrate him and his work.

Andrew Arden KC, formerly of Arden Chambers

Others will write about Richard's remarkable career; much of it took place at the highest levels of the law at which important issues of principle are decided, affecting the greatest number of people, but where those who are most in need of the best representation do not always – perhaps, especially in the earlier days of his practice in the 1970s and 1980s, do not often – find it until a rare Drabble comes along. A champion of the poor, the underprivileged, the oppressed, the victims of discrimination, Richard has been in a class of his own since the commencement of his practice and his retirement will leave a hole in the ranks of what I might call the “protective Bar”. My own practice, however, was narrow – housing, some local government – and while Richard ventured into it occasionally and with great success, my experiences of him do not do justice to the sheer breadth of his career. I accordingly confine myself to a few personal recollections of cases we did together, an idiosyncratic tribute to the barrister I wish I had been more like.

Richard and I are – approximately – contemporaries at the Bar but there the similarities end. From his earliest days, he stood out as that relatively rare creature, someone who was both a brilliant advocate and a brilliant lawyer (using the word “brilliant” in its conventional, perhaps old-fashioned sense of – as I mean it - someone whose abilities outshone not only his colleagues and opponents but, above all, expectations). I do not know if I was the first to say it, but during a Chambers & Partners “interview”, I described Richard as the best advocate of his generation, and I was pleased to see it quoted and repeated at any rate for a few years.

Richard worked at the Child Poverty Action Group before practice, then became its best known and most effective advocate, breaking the mould

on standing (*R. v Secretary of State for Social Services Ex p. Greater London Council* Divisional Court [1984] 1 WLUK 601) but also fully conversant as so few barristers have ever been or yet are with the operation of social security law, a specialism which brings as negligible an income to an advocate as it brings sustenance to those dependent on it, which explains the paucity of practitioners experienced in it. He has been in so many cases that it is invidious to focus on only one or two, but – from my perspective – he scores highest in *Manchester CC v. Pinnock* [2011] UKSC 6, when a 9-member Supreme Court overturned two earlier House of Lords decisions which had held that (to summarise) Art.8 could not give rise to a defence to possession proceedings brought by a public authority as the balance had already been struck by domestic statutory law (*L.B.Harrow v. Qazi* [2003] UKHL 43; *Kay v. Lambeth LBC* [2006] UKHL 10).

I was for the local authority in all three of these – winning in the earlier two and defeated by Richard in the last. I listened to his submissions in awe as he described the law as having taken a wrong turn in the previous cases and laid out how and why they were mistaken through a skilfully deployed analysis of the caselaw of the ECtHR. It was a masterclass in advocacy (and my own contribution a masterclass in how to lose without grace!) but, more than this, in courage – non-advocates are not necessarily aware of what inner resources one has to call upon in order to stand up and explain to the leading legal luminaries of one's generation just how badly wrong they had managed to get it over the previous decade. We both subsequently attended a conference at University College London discussing Supreme Court practice; audience contributions were invited and he remarked on how terrifying it had been to face so many judges at one time – you would not have known it had you been present during the case.

I don't recollect the county court cases we may have been in early on, though I have a distant memory that there were one or two. Had I not the degree of respect that I have for him I would probably have to describe him as my nemesis: I lost to him (albeit a majority verdict that allowed me to save a wee bit of face) in *R (Weaver) v. London & Quadrant Housing Trust* [2009] EWCA Civ 587 on whether a grant-funded housing association was a public authority for Human Rights Act purposes, a case the Supreme Court declined to hear, in *Knowsley Housing Trust v. White and Other Cases* [2008] UKHL 70 when he established that a claim to exercise the right to buy had survived a period during which the occupier had been a tolerated trespasser (before, in the same group of cases, the House of Lords effectively ended that most oxymoronic housing status) and in an obscure decision on improvement grants (*R. v. Greenwich L.B.C., ex p. Glen International Ltd.* (2000) 33 H.L.R. 21, C.A.) to the point when I feared I would never be able to win against him. Eventually I got lucky (and Richard was dealt a weak hand) with a case on licensing of houses in multiple occupation (*Islington LBC v Unite Group Plc* [2013] EWHC 508 (Admin)). I also had the brief privilege, when I had taken silk and Richard had not yet done so, of leading him in a challenge to housing benefit regulations for non-consultation (*R. v. Secretary of State for Social Services, ex p. A.M.A.* (1992) 25 H.L.R. 131), a subject on which he was of course most authoritative.

For all Richard's ability and "starring role" in so many cases, he lacks airs and arrogance; he fought his cases in court, not outside; he was one of the nicest opponents I appeared alongside – although, it may be true to say, he was arguably the messiest dresser! (I was chairing a conference at which he delivered his talk from a lectern, his shirt hanging full out at the back throughout). He was always good humoured: I think his most elusive quality

was the way he could keep the court “with him” personally, even when it was not attracted to his case. I recall in Pinnock at the Court of Appeal when a member of the court put to him (by way of example) that he could be held responsible for the anti-social conduct of his children, as he could tell them what to do: “Even the dog doesn’t do what I say,” he replied to laughter.

More usually than not, the courts did.

David Blundell KC, Landmark Chambers

When less is more: in praise of incremental advocacy

To paraphrase the Lord Chancellor in *Iolanthe*, when I went to be Bar as a very young man, part of my new and (not very) original plan was to work with Richard Drabble.¹ I began my career as a pupil in Richard's set, Landmark Chambers, in October 2002. Richard was already a monumental presence at the Public Law Bar by that stage, having been called in 1975 and in silk since 1995. For anyone taking their first, tentative steps in the law in practice at that time, his was a name that inspired awe. How could it be otherwise as someone who had been instructed in the *GCHQ* case, that most seminal of modern Public Law cases?²

Anyone who has had the very real privilege and pleasure of working with or against Richard knows, however, that his towering legal achievements represent only a small part of what has made him such a special and valued colleague. In an era when the pressure to achieve success in court occasionally leads to aggressive and hyperbolic advocacy, Richard's approach is a welcome reminder that there is another way to do this job. He is, and always has been, the ultimate class act. And, as he once told me when I was just starting out at the Bar, he is an incrementalist. At the time, I was not entirely sure what he meant by that. But, over more than twenty years as colleague, leader and opponent, I think I have begun to understand.

Richard held grandfather status in my own pupillage experience. He had been Pupil Master to Nathalie Lieven, now Mrs Justice Lieven, who was, in turn, my Pupil Mistress. Together with Tim Mould, now Mr Justice Mould, and with Richard at the helm, they represented a uniquely

supportive and friendly group to welcome new recruits to the Public Law fold in 4 Breems Buildings, one of the two predecessor sets to Landmark Chambers. This was often via the medium of fish and chips in Inner Temple Hall on a Friday lunchtime.

I recall distinctly the first time I saw Richard in court. He was representing the appellants in *R (Carson) v. Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577, a case about differing pension rates for British pensioners living abroad, argued by reference to Article 14 ECHR, when the domestic jurisprudence on that provision was still in its infancy. I had blagged an afternoon in court from Nathalie, on the grounds that it was an essential part of my legal education to see Richard in full flow in the Court of Appeal. Whether or not I really believed that at the time, or whether I was just trying to avoid some assessed written work is now obscure. But my (claimed) justification proved to be correct. Richard was masterly, as ever. Before he had even risen to speak, Simon Brown LJ, who was presiding, made it clear that the moment he had really been waiting for in the case was Richard's argument. As he began, the three Court of Appeal Judges – Simon Brown, Laws and Rix LJJ – sat with their pens poised above their pages. I had – and still have – never seen quite such a remarkable physical manifestation of the advocate's promised land: "having the ear of the court". Those three most eminent judges were literally hanging on Richard's every word.

This was part of a judicial pattern. A year later, as a Judicial Assistant to the Law Lords, and shortly before I was due to return to practice, I was asked by Lord Brown, then recently promoted, to which chambers I was returning.

¹ "When I went to the Bar" (Lord Chancellor), Iolanthe, Gilbert and Sullivan, 1882.

² Council of Civil Service Unions v. Minister for the Civil Service [1984] AC 374.

When I named Landmark Chambers, he paused for a moment. “Richard Drabble’s set? The consummate advocate, make sure you get to see him on his feet” he said. That was not a lone view on the Law Lords’ Corridor. When Lord Slynn asked me the same question a few days later, his response was similar: “Landmark Chambers? That’s Richard Drabble’s chambers. The finest advocate we ever saw in the European Court of Justice”. Several years later, when appearing as junior counsel for the Secretary of State in *R (Wiles) v. Social Security Commissioners* [2010] EWCA Civ 258, a case about the test for judicial review of the Social Security Commissioners, and an early forerunner to Richard’s notable success in *R (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, I recall Richard taking the Court of Appeal through a number of cases in which that test had been developed. Sedley LJ intervened on the morning of the first day to say “Mr Drabble, arguing this case must be like drowning for you.” Richard paused and, for a split second, displayed the merest hint of puzzlement. Sedley LJ continued, “You see your whole career pass before your eyes”. Of course, it was true: Richard had been in nearly all the cases, developing the underlying principles gradually and by incremental steps. So I can, perhaps, be forgiven for being in awe of Richard’s abilities as an advocate, and for wanting a slice of the action.

I have been privileged to learn from Richard, as both leader and opponent, on a number of occasions, in every forum from the Upper Tribunal to the Court of Justice of the European Union, via the High Court, Court of Appeal and Supreme Court. As an opponent, he was daunting but always the embodiment of fairness and straight dealing. He was encouraging to me when I first appeared against him in the Court of Appeal in *JD (Congo) v. Secretary of State for the Home Department* [2012] EWCA Civ 327, [2012] 1 WLR 3273. He repeated the kindness when, as one of my opponents in my first case unled in the Supreme Court, *Patel and Shah v. Secretary of*

State for the Home Department [2019] UKSC 59, [2020] 1 WLR 228, he could perhaps sense my apprehension shortly before the Justices entered the courtroom and confided to me that he was always nervous before appearing there. He did not need to do that; some opponents might have sought to take advantage of a novice's nerves. But it says everything about Richard the man, as well as Richard the advocate, that his first instinct was one of humanity and kindness. It is those sorts of acts that make a sometimes challenging profession tolerable. They are remembered by those who benefit.

Against that background, I have tried, for the purposes of this article, to select the one case that best represents all that Richard has brought to the Law in his time at the Bar: his erudition, learning, good sense and common humanity; and also his incremental approach to legal development. The case is not, in my view, as well-known as it deserves to be (and not just because we won).³ It also has a particular "Landmark" flavour, dealing, as it does, with public law principles applicable to the planning law system for the development of property. It is *R (West Berkshire DC) v. Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923.

Like most legal cases of any note, *West Berkshire* is a decision very much of its time. The background is set by the stagnation in housebuilding in the early years of the 2010-2015 Coalition Government. Planning policy has long made provision for affordable housing; that is, housing provided, at subsidised levels compared to market rates. Obligations to provide such housing are a common feature of grants of planning permission for housing

³Although it is beginning to gain a slightly wider currency: see, for example, *R (KA) v. Secretary of State for the Home Department* [2023] 1 WLR 896, on the legality of the Secretary of State's ARAP scheme.

development, either by way of direct provision (for example, a requirement in a planning agreement requiring a certain proportion of housing units to be provided at subsidised rates of some kind) or indirectly, by the payment of a commuted sum (a system of tariff-based contributions from the developer for affordable housing to be provided off-site). The Court of Appeal in *West Berkshire* noted that the use of thresholds for affordable housing contributions in planning dated back at least to 1993: [4].

The political, social and pragmatic arguments to which such requirements give rise are often predictably fraught. Developers may argue that the provision of affordable housing will render a whole scheme undeliverable because of the reduced profits which flow from the dilution of what would otherwise be 100% market rate housing; or arguments that full cost housing will be more difficult to sell if combined with social housing. Local authorities, on the other hand are under considerable pressure to deliver adequate housing that can actually be afforded by those they represent in their local communities. It is thus an area of particularly sensitive social and economic policy.

The Coalition Government was elected in the aftermath of a global recession. By 2013, the economy had started to recover. But things were not so simple for the housing industry. The Chancellor of the Exchequer announced his 2013 Autumn Statement on 5 December 2013. By that point, it was clear that the construction of new housing had fallen significantly below the level of housing need in the United Kingdom. The small-scale housing industry had not recovered from the recession and continued to decline. Housebuilders had been vocal about the fact that obligations to provide affordable housing were having an adverse impact on the provision of small-scale housing schemes in particular. As a result, the Government proposed reducing the requirement for affordable housing contributions,

in an effort to revive the sector and increase the provision of housing. The Autumn Statement included a commitment to consult on a proposed new 10-unit threshold for section 106 affordable housing contributions. To anyone reading the King's Speech of 17 July 2024, announcing the legislative plans of the new Labour administration a decade after the events in *West Berkshire*, with its promise to "*get Britain building*" by accelerating "*high quality infrastructure and housing*" through the Planning and Infrastructure Bill, the state of the nation might sound eerily familiar. *Plus ça change*.

Against that background, the Government launched a consultation on 23 March 2014. The consultation paper indicated the proposals being considered included the introduction of a ten-unit and 1,000 square metre gross floorspace threshold for affordable housing contributions through section 106 obligations. This was said to be likely to aid the delivery of small-scale housing sites. Rural exception sites were said to be excluded from the threshold.

More than 300 responses were received to the consultation. In response, on 28 November 2014, the Minister announced the new policy (the "Policy") by means of a written ministerial statement ("WMS") in the House of Commons. The National Planning Practice Guidance ("NPPG") was amended on the same date. Given the nature of the issues in the case, the specific wording of the Policy in the WMS is important. So far as is relevant, it stated that:

"Due to the disproportionate burden of developer contributions on small-scale developers, for sites of ten units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff-style contributions should not be sought. This will also apply to all residential annexes and extensions.

For designated rural areas under section 157 of the Housing Act 1985, which includes national parks and areas of outstanding natural beauty, authorities may choose to implement a lower threshold of five units or less, beneath which affordable housing and tariff-style contributions should not be sought. This will also apply to all residential annexes and extensions. Within these designated areas, if the five-unit threshold is implemented then payment of affordable housing and tariff-style contributions on developments of between six to ten units should also be sought as a cash payment only and be commuted until after completion of units within the development.”

West Berkshire District Council (the “Council”) was one of a number of local planning authorities (“LPAs”) which objected to the Policy. For LPAs which were striving in difficult circumstances to meet central government targets on the provision of affordable homes within their areas, there was no doubt that the Policy was an unwelcome development given that, whatever progress it might encourage in the provision of market level housing, it would mean a drop off in the provision of affordable homes on small-scale sites with the consequent impact on their ability to meet their targets overall. There could be little doubt that such hard-pressed authorities were caught between a rock and a hard place.

Accordingly, the Council commenced judicial review proceedings challenging the Policy in the High Court. Richard and I were instructed on behalf of the Secretary of State, the only time we worked together on behalf of the Government of the day. Things did not begin well. The Council’s challenge succeeded before Holgate J on four grounds: (i) inconsistency with the statutory planning regime, (ii) failure to take into account material considerations, (iii) failure to consult lawfully and (iv) breach of the public sector equality duty. The Secretary of State appealed on all four grounds.

The Court of Appeal (Lord Dyson MR, Laws and Treacy LJ) heard the appeal on 15 and 16 March 2016, handing down judgment on 11 May 2016. It allowed the Secretary of State's appeal on all grounds. Laws and Treacy LJ gave a joint judgment, with which Lord Dyson MR agreed. Given the scope of the grounds, the decision is important for a wide range of issues in Public Law. But it is the first ground, and the Court's response to it, that is of particular interest, representing *"the major focus of the case"*: [13]. Behind the functional heading of *"Inconsistency with the statutory scheme"* lies an analysis of the relationship between executive government, policy and the common law which is as grounded in long-standing principle as it is in contemporary administrative pragmatism. As such, it reflects perfectly Richard's own special ability to marry legal rigour with real-world practicality.

The legal premise for the Council's argument was section 38(6) of the Planning and Compulsory Purchase Act 2004 (the "2004 Act"). That provision gives statutory primacy to the development plan: determinations under the Planning Acts, including but not limited to applications for planning permission, are to be made in accordance with the development plan unless material considerations indicate otherwise. As all those with any involvement in planning law know, this is a principle of long-standing. At first instance, Holgate J the argument that, by virtue of section 13 of the 2004 Act, the policies in the development plan were formulated by reference to a local evidence base and satisfied the requirements of a statutory process leading to adoption. As against that framework, *"The legislation does not give a general priority to, or presumption in favour of, national policy as against statutory local policy"*. As a result, *"The new national policy is inconsistent with the statutory scheme because its aim, and the language chosen, purports to confer exemptions in each and every case where affordable housing requirements in an adopted local plan policy"*

are inconsistent with the national thresholds". Thus, it was said, a policy in these terms was improper because it purported to override relevant policies in the statutory development plan in so far as they were inconsistent with the national policy; as such, it ignored or circumvented the presumption in section 38(6) and the approach in such seminal planning law cases as *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447.

In rejecting this analysis, the Court of Appeal's response was to go back to basics. At [16], it identified two principles which framed the debate in this area of the law and were at the core of the issue in dispute:

- 1) The first principle was that *"The exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception."* The source of this principle was, of course, *British Oxygen Co Ltd v. Board of Trade* [1971] AC 610. But the Court also identified that Lord Reid and Viscount Dilhorne in that case had cited the much earlier and *"classic authority"* of *R v. Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176, per Bankes LJ at 184.
- 2) The second principle was that *"a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of*

⁴ (2013) 7th Ed., Sweet & Maxwell, London.

the policy must allow for the possibility of exceptions". The Court cited *De Smith's Judicial Review*⁴ in support of this proposition.

The Court summarised the position at [18], before considering each of the principles in more detail (underlining added):

"Both of these principles – the rule against fettering discretion and the liberty (generally) to express policy without acknowledging exceptions – apply whether or not the policy-maker and the decision-maker are the same or different persons. If it were otherwise, neither would have any integrity as a principle. We have expressed them in general terms; their *application* in the planning field's statutory context requires further elaboration."

The analysis was thus one of general principle; just as Richard had argued the point. While context is undoubtedly everything in modern public law, one of Richard's many gifts lay in not letting the complexities of a specific situation obscure general principle.

As to the rule against fettering, the Court recalled that this was a general principle of the common law. It was critical to lawful public decision-making *"since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or unreasonable (through failing to have regard to relevant factors) or both"*: [19]. After more detailed consideration of the position in planning law specifically, the Court moved to the heart of the problem on this ground: *"The unqualified articulation of policy"*. The Court's conclusion on this central issue bears citation (see [21]):

"The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health

warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion ... A policy may include exceptions; indeed the WMS did so, allowing a five-unit threshold for certain designated areas in place of the ten-unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of sections 38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the application of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions."

None of this was to suggest that there were no limits to the articulation of policy by the Secretary of State: the basic tests of reason and good faith applied, and the policy, if articulated in a statutory context, could not promote an outcome which contradicted the aims of the statute: [22].

⁵ To anyone who ever saw them in court together, it was clear that Sir John held Richard in deep regard. This may have its roots in an encounter early on in Sir John's career as Treasury Devil. Richard once told me, with evident pride, that he was the first person to win a case against Sir John after his appointment to that role, with what he described as a "simple vires argument". A little forensic digging on Westlaw suggests that this might have been one of the two unreported decisions of Mann J in *R v. Secretary of State for Social Services, ex parte Cotton* and *R v. Secretary of State for Social Services, ex parte Waite*, both handed down on 31 July 1985. Having been defeated in the High Court by Richard, Sir John called in the cavalry for the Court of Appeal, where Michael Beloff QC failed to overturn the decisions before Sir John Donaldson MR, May and Glidewell LJ on 13 December 1985. Proof, if it were needed, that Richard always held his own against the very best at the Bar.

What, then, of the terms of the Policy in issue? The Court accepted that it was framed in mandatory terms (“*a threshold beneath which affordable housing contributions should not be sought*”). However, the Court identified three reasons why this was not legally objectionable:

- 1) As a matter of principle, once it was accepted that “*the articulation of planning policy in unqualified or absolute terms is not in principle repugnant to the proper operation of section 38(6), this use of language is in our judgment unobjectionable*”: [25]. As the Court put it, “*It must be obvious that, as Mr Drabble submitted in reply, the aim or goal of a policy’s author is that his policy should be followed*”: [25].
- 2) In the particular context of planning, the Secretary of State was both policy-maker and “*decision-maker in concrete cases, on appeals from the local planning authority*”: [25]. In such circumstances, he might well prefer his own policy to that in the development plan. He was entitled to do so, provided all the procedural requirement imposed by statute and the common law were complied with.
- 3) The Secretary of State was responsible for national planning guidance and was answerable to Parliament in that regard. That was an important factor to bear in mind.

Thus, reasons of principle, pragmatism and structure all supported the legality of the unqualified articulation of policy. The Policy’s unqualified terms did not demonstrate that it was intended to “*countermand or frustrate*” the effective operation of the statute: [28]. The Secretary of State

⁶ (2013) 7th Ed., Sweet & Maxwell, London, at p523.

was not obliged to assure the reader that that was not his intention, or to state that the Policy was subject to the development plan: [28]. The error at first instance was in conflating what the policy said with how it was lawfully to be deployed: [30].

Re-reading the decision today, the voice of that great public law jurist Sir John Laws resonates powerfully in the Court's analysis, with its appeal to principle balanced by pragmatism.⁵ But this was Richard's analysis and argument, enthusiastically embraced by a Court which respected and valued him.

The Court's reference to both *ex parte Kynoch and De Smith* really holds the key to its confirmation of the ability of administrative decision-makers to articulate policy lawfully without the express qualification of exceptions. It was a balance between two passages in those sources which led to the Court's conclusion. Beginning with the general law on the application of policies and the no fetter principle, the position was summarised in *De Smith*, at para. 9-013⁶ (footnotes omitted):

"... a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy ... but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself."

Thus the fact that a policy is, on its face, silent as to its flexible application or its ability to admit of exceptions, is no indicator of illegality. For Public Law elevates substance over form, and so the proof of the fetter is in the

pudding. Similarly, it was Banks LJ in *R v. Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176 who articulated the distinction between, on the one hand, a decision-maker who maintains a policy and applies it according to the facts of the case before him, and, on the other hand, one who has decided in advance not to listen to someone with something new to say. The former is lawful, the latter is not. Per Banks LJ, at 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 ... 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 whosoever made. There is a wide distinction to be drawn between these two classes.”

This was why the Secretary of State’s position – that the policy was no more than a material consideration, albeit a weighty one, and that decision-makers would be able to depart from it in appropriate circumstances – was ultimately upheld. The contrary position would make it necessary for every policy to state expressly on its face that the general principles of public law applied to its interpretation; or it would need to deal in every case with the circumstances in which the policy was not to apply. Yet, as *Kynoch*

⁷That is consistent with more recent authority at the highest level: in *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, it was the application of the policy in question which demonstrated that it was operated in a blanket fashion and was, therefore, unlawful: per Lord Dyson at [21].

made clear, it is perfectly legitimate for the policy in question to set out the general position; what matters is that it is applied flexibly.⁷ There was no need for a policy to repeat each and every legal control over its application which has been developed by the common law. Rather, policies apply always *subject* to the rules of the common law.

By 2016, the legality of articulating policy on an unqualified basis without admitting of exceptions on its face ought not to have been controversial; but it was. That is why the challenge succeeded at first instance. Given the volume of Public Law litigation in the near century between the decisions in *Kynoch* and *West Berkshire* and the scale of development in the field, it is truly remarkable that it took until the *West Berkshire* decision for this position to be articulated clearly by the Courts. That is particularly so considering developments in the approach to the reviewability of policy and guidance following *Gillick v. West Norfolk and Wisbech AHA* [1986] AC 112, forty years earlier.

Indeed, considering the proliferation of administrative policy and guidance as tools of executive governance in the post-war era, the degree of confusion over the approach to reviewing policy statements is striking. Nowhere is that confusion more evident than when considering the effect of policies in the abstract, especially as regards the potential *risk* of unlawful decision-making. Such arguments have posed real challenges for the courts in establishing the correct test to apply, as if to illustrate frequent judicial dicta regarding the dangers and difficulties of considering Public Law legality in the abstract, devoid of a real factual matrix. The *West Berkshire* challenge was, in a sense, abstract in this way, arising from a generalised challenge to the legality of the policy, rather than its application to a given set of facts in a real case. It is notable that the Judge at first instance relied on the early (by contemporary standards) decision in *R (Suppiah) v. Secretary of State*

for the Home Department [2011] EWHC 2 (Admin), although neither party had cited the case. That was problematic since the decision had given rise to considerable debate and controversy: see, for example, *R (Tabbakh) v. Secretary of State for Justice* [2014] EWCA Civ 827, [2014] 1 WLR 4620, per Richards at [34]-[45] and especially [34], [35], [44] and [45], disapproving the test of “unacceptable risk of unlawful decision-making” and, on the other hand, *R (Howard League for Penal Reform) v. Lord Chancellor* [2015] EWCA Civ 819, per Sir Brian Leveson P at [19]-[21]. The law in this field was not settled until the Supreme Court considered the issue in its important decision in *R (A) v. Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931. As recently as 2022 the Divisional Court’s decision, in *R (All the Citizens) v. Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin), [2022] 1 WLR 3748, has made clear that not all policies and guidance are intended to create legal effects and be enforceable. So, there are policies and, well... there are policies. It is perhaps not surprising that, in 2016, the situation was uncertain, confusing and ripe for development.

And, as ever, when the moment of development arrived, Richard was not only there, he was the catalyst for change. He achieved change not by revolution or radical reappraisal, but rather by incremental development from established, but in this case overlooked, principle – the classic common law way. In so many ways, therefore, the *West Berkshire* decision represents all that has made Richard’s contribution to the law so significant. It is Richard as incrementalist, in the best tradition of the common law.

Tim Buley KC, Landmark Chambers

I joined what was then 4 Breams Buildings (now Landmark) as a pupil in October 2001, with the hope of practising in public law. Richard Drabble was already one of the seminal public law silks at the Bar. He was, more than any other reason, the basis of my choice of 4 Breams, and I had viewed him from afar with a degree of awe, and not a little trepidation. But my first proper interaction with him was on a bus over Waterloo Bridge, which I found myself sharing with him by chance one morning when I was making my way to chambers for the start of the day. In this slightly unexpected context, I recall being unsure of how to act – should I talk to him, or leave him to his own elevated reflections? So it was with some astonishment that I realised, as we shuffled awkwardly into separate seats, and eventually became separated by other people boarding at later stops, that he was as shy, or at least as unsure, of me, as I was of him. This was not the intimidating or grand personality that I had imagined in a senior silk.

Since then I grew to know Richard well, and was privileged to be led by him in many cases. These included four cases in the House of Lords and Supreme Court (*Odelola v SSHD* [2009] WLR 1230, on the status of the immigration rules, *R (JS) v SSWP* [2015] 1 WLR 1449 and *R (DA) v SSWP* [2019] 1 WLR 3289, on the first and second benefit caps, and *R (Tolley) v SSWP* [2016] 1 All ER 40, on EU law). Our work together also included many other notable cases where Richard was able to advance the law, of which I will mention only a sample: *R (SO) v Barking and Dagenham LBC* [2011] 1 WLR 1283 (local authority duty to accommodate former relevant children), *Burnip v Birmingham CC* [2013] PTSR 117 (*Thlimmenos* discrimination, additional room rate for disabled housing benefit claimant), *R (Gudanaviciene) v LC* [2015] 1 WLR 2247 (legal aid, EU Charter of Fundamental Rights), *R (Baker*

Tilly UK Audit LLP v FRC [2017] EWCA Civ 406 (professional regulation, financial services). We were co-counsel in many other cases, including the *Rwanda* litigation (in my case, only the Court of Appeal).

That is of course a mere fragment of Richard's caseload, in the Supreme Court and elsewhere. In the final years of his practice I have the impression that the majority of his practice was in the Supreme Court, with only the occasional slumming in the Court of Appeal. As these cases hint, and as the full account of Richard's court appearances would prove, Richard's range was extraordinary, in terms of the breadth of subject matter, range of courts, and type of client. He was adored by clients across the spectrum, from government, local and other public authorities, commercial clients from planning to financial services, and of course by individuals and NGOs. I still remember one of our past senior clerks telling me that it was Richard Drabble that the commercial clients really wanted, if only they could get him. But there is no doubt that his heart lay in representing the interests of the disadvantaged and mistreated, and his work at the Bar leaves a legacy of cases on their behalf that continues to resonate, in a way that only a few senior judges can rival.

Richard was trusted, to an almost unique extent in my experience, by the senior judges before whom most of his advocacy was carried out. This trust was justified by his approach to advocacy, which was candid and straightforward, and sought to acknowledge and address, rather avoid, any problems in his case, whilst always focussing on the key issues.

I will mention two linked cases that we were involved in together, which illustrate the depth of Richard's contribution to the law and give an insight into his advocacy and standing with the court: *R (Wiles) v Social Security*

Commissioners [2010] EWCA Civ 258, and *R (Cart) v Upper Tribunal* (Divisional Court: [2010] 2 WLR 1012, Court of Appeal: [2011] QB 120, Supreme Court: [2012] 1 AC 663).

Wiles, where Richard led me, was a claim for judicial review of a decision of a Social Security Commissioner who had refused permission to appeal from the lower tribunal. Such claims for judicial review had a long history in the social security and immigration fields, and Richard had played a major part in establishing that jurisdiction in cases such as *In re Woodling* [1984] 1 WLR 348. By the time of *Wiles*, however, the Social Security Commissioners were about to be replaced by the Upper Tribunal, and the government had made clear its view that, though there was no ouster, equivalent claims for judicial review would not be possible, on the basis of a separate and more recent line of cases starting with *R (Sivasubramaniam) v Wandsworth CC* [2003] 1 WLR 475. The government argued that judicial review of the Commissioner was likewise now excluded by *Sivasubramaniam*, which had displaced the earlier approach in *Woodling et al*. It was clear that was some sympathy amongst the judiciary with this view, for entirely understandable reasons concerning the protection of the resources of the court. It was therefore recognised on all sides that *Wiles* would be an important preliminary skirmish in the battle that was to come. So it proved. The court accepted that judicial review of the Commissioner remained available, thus cementing the *Woodling* line of cases in that context notwithstanding the *Sivasubramaniam* line of cases. Richard and I had discussed the possibility, by way of fallback, that the court might nevertheless be able to manage its case load by the adoption of a limiting test, such as the second appeals test which applied to certain appeals to the Court of Appeal. The court did not find it necessary to take this course but it appears in the judgment of Lord Justice Dyson as a possible solution for the Upper Tribunal, in what proved to be significant later on.

In *Cart*, I was not led by Richard, but by Michael Fordham QC (as he then was), intervening for the Public Law Project. Richard acted for Mr Cart himself, so I was able to witness his advocacy. The conflicting line of cases to which I have already referred, between *Woodling* through to *Wiles*, on the one hand, and *Sivasubramaniam*, on the other, lay at the heart of the case.

Lord Justice Laws, who presided in the Divisional Court, was of course a man of immense intellect with a great grasp of constitutional law. At least in his later years on the Bench, he was also a judge who, though not rude, could be impatient with counsel at times, and who was not averse to allowing that impatience to become apparent in a way that might be intimidating to all but the most assured, or oblivious, of advocates. When Richard wanted to take him to the *Woodling* / *Wiles* line of cases, he forcefully expressed the view that this was not necessary, and not a good use of the court's time. He accepted the proposition that he thought Richard wished to establish, which was that judicial review had previously been permitted in the Commissioner / IAT context, and saw no need to trawl through the cases to demonstrate that. That was not the limit of Richard's purpose in taking the court to the cases, which was to demonstrate more particular features of the reasoning, including the importance that judicial review had played in this context of developing the law and preventing the fossilisation of bad law at the tribunal level.

Richard's quiet insistence that the cases needed to be looked at by the court provoked something of an outburst, words to the effect that he had heard that brevity was the soul of good advocacy and that it was a shame that more advocates did not realise that.

This was plainly intended as a strong steer about how Richard should proceed, and many advocates would have wilted under the pressure.

Most others would have failed to resolve the situation, and aggravated the court by simply pressing ahead in the face of the court's reluctance. Richard made neither of these mistakes. His response came after a short but pregnant pause:

"My Lord, I think I know that"

There was just the faintest emphasis on the word "I". Perhaps I imagined it. But in any case Laws LJ did indeed know that Richard knew that, not least from cases where he had been against Richard when he was Treasury Devil. He paused in turn, before offering a climb down:

"Yes, Mr Drabble, I know that you do"

There were no further interruptions, and the court listened to Richard's submissions with the rapt attention that is accorded to only a very few advocates by the senior judiciary. In so far as the prior relationship between the advocate and the judge here played its part, that in itself reflected the trust which Richard had earned over many long years.

Richard's argument did not prevail before the Divisional Court, nor in the Court of Appeal. But it formed the essential basis of success in the Supreme Court, where the court (including within it the now Lord Dyson) adopted the very approach suggested in *Wiles*, of permitting judicial review where the second appeals test was satisfied. The *Woodling / Wiles* line of cases, which Laws LJ had been unwilling to consider, had proved decisive.

As many others will attest, Richard's brilliance as an advocate and as a lawyer is accompanied by a gentleness and lack of self-aggrandisement that is rare amongst senior silks, and particularly so amongst those who reach the very top of the profession. It is difficult for a senior silk to retain a sense of humility when those around them treat their utterances with reverence. That Richard managed to avoid this, to a greater and more

consistent extent than anyone else I have encountered at the Bar, despite having more reason than most to fall into it, speaks volumes. I nevertheless like to reflect on the exchange with Laws LJ in *Cart* as illustrating that he has an understanding of his value, and of what he achieved, rarely and quietly expressed as that was.

Richard has been my lodestone since that first encounter: the barrister I would like to be, in and out of court. He has also become a friend, and, I like to think, something of a mentor, though many others would wish to claim him in that regard. His retirement is well deserved, but he will be sorely missed, not only by colleagues, and by the judiciary, but also by the many people whose lives he touched by advocating on their behalf. His influence on UK public law, via the cases he argued and the many lawyers that he influenced, will endure.

Lord Carnwath of Notting Hill, former Justice of the Supreme Court of the United Kingdom

It is a great pleasure for me to contribute to this collection in honour of Richard Drabble, having known and worked with him longer, I believe, than any of the other writers. Our paths first crossed when he joined chambers in the early 1980s. At that time, apart from my main areas of practice, notably in planning and local government, I had been acting in a number of test cases on social security law. I was instructed principally by Henry Hodge (later Mr Justice Hodge), as solicitor for the Child Poverty Action Group.

When Richard arrived he quickly stepped into my shoes and took over the bulk of the work. I found myself occasionally instructed on the other side by the Treasury Solicitor. Richard proved a formidable opponent, expert in this complex area of law, but able to present it simply and attractively to the court. The only judgment from that period which I have been able to trace in the Law Reports is *Chief Supplementary Benefit Officer v Leary* [1985] 1 WLR 84 in the Court of Appeal. That turned on a somewhat esoteric point about whether the Social Security Commissioners were bound by decisions of the High Court which had previously exercised the same jurisdiction. They were not, as Richard successfully argued. Sadly, I have no direct recollection of the exchanges.

In 1994 I became a judge in the Chancery Division, but also sat regularly in the Administrative Court, where Richard made frequent appearances. I have not attempted to trace the many cases in which he appeared before me in the High Court and later the Court of Appeal. When I moved to the Supreme Court in 2012, I was pleased to find that Richard was a regular visitor there also. I have identified some 10 cases over the ensuing 8 years

in which he played a leading role.⁸ Many of these concerned the rapidly changing sets of rules relating to immigration and social security. It was often the case that even the promoting Department did not have a consistent view of what the rules meant or how they were supposed to operate in practice. As we observed in one case, the appellants and their advisers had been “faced with something of a moving target. The position now adopted by counsel for the Secretary of State represents a significant change from statements made at the time the rules were laid before Parliament.”⁹ It was a great comfort to the court to have the benefit of Richard’s experience, as someone who had worked with the rules and watched their development over many years. He had a remarkable ability to find his way through the complexities and inconsistencies, and guide the court to the true path.

The last case in which he appeared before me, on the day before my retirement, was completely different. It was all about the rating of ATM machines. Somehow the court had arranged for my last case to be one in which all four leading counsel came from Landmark Chambers. I was a little surprised to find Richard among them, because I was unaware of this expertise in the field of rating law. However, his submissions when they came were characteristically clear and to the point. Sometimes there are advantages to hear from an advocate who has not become too deeply embroiled in the complexities of a specialist area of the law.

In conclusion I shall look back on my encounters with Richard in the courts with great admiration, and wish him a very happy and fulfilling retirement.

⁸ *New London College Ltd, R (on the application of) v Secretary of State for the Home Department* [2013] UKSC 51 (17 July 2013); *SG & Ors, R (on the application of) v Secretary of State for Work and Pensions (SSWP)* [2015] UKSC 16 (18 March 2015); *Daly & Ors, R (on the application of) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58 (9 November 2016); *MM (Lebanon) & Ors, R (on the applications of) v Secretary of State and another* [2017] UKSC 10 (22 February 2017); *Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42 (14 June 2017); *HC, R (on the application of) v Secretary of State for Work and Pensions* [2017] UKSC 73 (15 November 2017); *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53 (24 October 2018); *DA & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21 (15 May 2019); *Patel v Secretary of State for the Home Department* [2019] UKSC 59 (16 December 2019); *Cardtronics UK Ltd and others v Sykes and others (Valuation Officers)* [2020] UKSC 21 (20 May 2020)

⁹ *MM(Lebanon)* para 62.

Sir Patrick Elias, former Lord Justice of Appeal

GCHQ: forty years on

I first met Richard when we were both junior counsel on behalf of the unions in the GCHQ case.¹⁰ Richard was first junior and. I was second.¹¹ Although I had been called to the Bar some ten years earlier, it was my first year in practice, and Richard had not been in practice for much longer. I doubt whether a less experienced junior team has ever acted for a party in the House of Lords. Our leader was Louis Blom-Cooper QC. He was a gregarious, warm and impulsive man, who combined his practice with academic duties, journalism and book writing. He had a fertile mind - too fertile, is my recollection. One of our more important functions was to dissuade him - tactfully if possible, but sometimes tact was difficult - from running some of his more outlandish arguments.¹²

The case raised very significant points of law and is recognised as one of the decisions laying down the foundations of modern public law. It arose out of a decision by Margaret Thatcher, acting in her role as Minister for the Civil Service rather than as Prime Minister, to ban membership of independent trades unions at the Government Communications Headquarters (GCHQ). This involved removing a contractual right conferred on the relevant

¹⁰ *Council of Civil Service Unions v The Minister for the Civil Service* [1985] A.C.374.

¹¹ In fact, I noted for the first time when researching this article that the official law report of the House of Lords decision puts me as first junior. I am not sure how that happened. An intelligent and perceptive law reporter exercising excellent judgment, I would say. Richard might disagree!

¹² When revisiting this case I discovered – or possibly rediscovered after having forgotten – that Richard and Louis together wrote a short article about this case in the journal *Public Law*: see “*GCHQ Revisited*” [2010] P.L.18.

employees to be union members. They could choose to move elsewhere in the civil service if they were unhappy with this change, or would receive £1,000 if they remained working in GCHQ under the new rules.

GCHQ provides signals information to government and secures the confidentiality of official and military communications. Essentially, the reason for this instruction, as explained in an affidavit by Sir Robert Armstrong, Cabinet Secretary and Head of the Home Civil Service, was that industrial action at GCHQ, which had been taken with some regularity in the previous few years, risked undermining national security. Sir Robert said that this step might have been taken sooner save for the fact that the government did not wish formally to acknowledge the nature of the work done at GCHQ, and banning union membership would have revealed its functions. However, this changed in mid 1983, some months before the instruction, following a report by the Security Commission into the circumstances of a conviction under the Official Secrets Act 1911 of Geoffrey Prime, who had been an officer at the GCHQ. Thereafter, the security role of GCHQ became common knowledge.

As servants of the Crown, the terms and conditions GCHQ staff were regulated by the Royal Prerogative. The instruction was made pursuant to Article 4 of the Civil Service Order in Council 1982 on the 22 December 1983. That Order regulated the way in which the prerogative would be exercised and delegated its exercise to a Minister. The instruction, therefore, involved the exercise of a prerogative power. Surprisingly, the instruction was made orally and was apparently cast in general terms, although its precise terms were never disclosed. (The courts at all levels rejected a submission that its lack of precision should of itself invalidate it.) The changes effected were formally published in a General Notice given to staff on 25 January 1984. This was the first time the unions became aware of it.

Many GCHQ employees were members of one of six different civil service unions. The unions were all members of the Council of Civil Service Unions. Together with a number of individuals, the Council challenged the decision by way of judicial review. It was accepted that the Minister was entitled to form the view on the evidence that the operations of GCHQ and the safeguarding of national security might be prejudiced by industrial action – although the unions disputed that it did so. The question was whether, notwithstanding this, the instruction was legally valid.

There were initially a number of grounds of challenge, but the main focus, and the argument which raised fundamental questions of public law, was that the instruction had been issued without any prior consultation with the employees, either directly or (more realistically) through their representative unions. It was argued that the government was bound to consult either contractually, or alternatively on the grounds that the unions had at the very least a legitimate expectation that they would be consulted before changes were made to terms and conditions of employment, given the consistent practice of consultation and negotiation under the Whitley machinery which had been set up in 1919.¹³

Initially, the government raised three arguments in response. The first and most far-reaching was that since the instruction was made in the exercise

¹³ In the Public Law article, Richard and Louis said that the legitimate expectation point was taken by Glidewell J at first instance. I had forgotten this, but do not dispute it. Forty years on it seems that it was an obvious point to take. Perhaps it was, and junior counsel were incompetent. I prefer to think that the doctrine was still relatively undeveloped then and that it was this case which helped emphasise its potential significance in judicial review.

¹⁴ See *Attorney General v De Keyser's Royal Hotel* [1920] A.C. 508 HL

of the Crown's prerogative power, it could not be reviewed by the courts. There was authority to the effect that whilst the courts could determine the nature and scope of an asserted prerogative power, it could not thereafter question how it had been exercised.¹⁴ On this analysis, the scope of judicial review depended upon the source of the power. If the act involved the exercise of a power conferred by Parliament, the courts could review it in accordance with judicial review principles; but if it was the exercise of a common law power of the Crown, it was unreviewable.

The second argument was that even if the power was reviewable, there was no basis for saying that the duty to consult was engaged in the particular circumstances, for two reasons. First, it was said that the exercise under consideration was a quasi-legislative act, and considerations of fairness or natural justice had no application to such acts. Second, it was suggested that it was obvious that consultation would not have affected the result; it would be a futile exercise on the facts of this case since it was clear that the unions would not be willing to give up their right to call industrial action whenever they thought it beneficial to do so.

The third argument, which eventually won the day, was that even if consultation would normally be required with respect to changing terms and conditions of employment, that would have to give way if national security would be put in jeopardy by the very act of consultation itself. The extraordinary feature of this - in the event decisive - submission was that it was not advanced at all before the first instance judge, Glidewell J. It was first introduced into the argument in the opening submissions of Simon Brown QC, then the Treasury Counsel, in the Court of Appeal.¹⁵ In our submissions we thereafter disparagingly referred to this as the "Brown point", reflecting our contention that it was an evidentiary point manufactured by counsel rather than truly arising out of the material before the court.

The case had important political as well as legal dimensions, reflected in the extremely rapid passage of the case through the courts. The instruction was taken on the 22 December 1983 but not made public until it was announced in the House of Commons on the 25 January 1984. Mr Justice Glidewell gave his judgment on the 16 July 1984, finding in favour of the unions; the Court of Appeal gave its judgment upholding the appeal extremely soon afterwards, on 8 August 1984; and the hearing before the House of Lords took some 6 days in the beginning of October and judgment was delivered on the 22 November 1984, dismissing the union's appeal.¹⁶

The hearing before Glidewell J

Before Glidewell J we advanced some essentially peripheral arguments which owed more to ingenuity than legal merit. First, we submitted that the Trade Unions Act 1927, made in the aftermath of the General Strike and which effectively denied the right of public sector workers to join independent unions, had curtailed any prerogative power which might otherwise have existed to ban union membership, and that this prerogative had not been revived when the 1927 Act had been revoked by the Trade Disputes and Trade Union Act 1946. This was notwithstanding that the latter provided in terms that "every enactment and rule of law amended or otherwise affected by that Act shall have effect... as if the Act of 1927 had not been passed." The judge was not impressed. We also argued that the

¹⁵ He became a judge between the Court of Appeal and House of Lords hearings and was replaced by Robert Alexander QC still leading John Mummery. Simon Brown subsequently went to the House of Lords as Lord Brown of Eaton-under-Heywood.

¹⁶ The relevant reports can be found in [1984] IRLR 309 (Glidewell J); [1984] IRLR 343; and [1985] A.C. 354 (House of Lords).

change in terms and conditions was a breach of contract, which the judge rejected because any breach could be avoided. The Crown could lawfully terminate contracts at will and offer new terms which did not include the right to union membership. He also held that any such action would not constitute duress, as we optimistically sought to allege, because it was simply the exercise of an established power.

A more respectable argument was that by denying trade union rights, the government was in breach of ILO Convention 87 on Freedom of Association. A difficulty with this submission was that ILO Convention 151 Article 1.2 provided that national law will determine the rights of, *inter alia*, employees "whose duties were of a highly confidential nature". Our first argument relied on the well-established principle that ambiguities in the common law should be resolved by interpreting the law in accordance with international standard. Glidewell J accepted the principle but rejected its relevance on the grounds that domestic law was clear. A second argument was that Sir Robert Armstrong had in his affidavit asserted that the Minister had had regard to these obligations but did not believe that any Convention right was infringed by the instruction. Mr Blom-Cooper argued that this analysis was erroneous and constituted a misdirection of a material fact which invalidated the instruction. He accepted, however, that he would have to show that the misdirection was clearly wrong. The judge considered that the proper interpretation of the Conventions was far from clear; he could not possibly say that the Minister's interpretation was clearly wrong.

¹⁷ Lord Diplock described it as an "impeccable judgment" (p.408C) and Lord Roskill expressed admiration for its "thoroughness and clarity" (p.415H).

¹⁸ [1984] IRLR 309, para.63.

However, we won on the two more fundamental questions. In an outstanding judgment,¹⁷ Glidewell J held that the exercise of prerogative powers was in principle reviewable. After an extensive analysis of the relevant authorities, he said that he could see:

“no reason in logic or principle why the exercise by a Minister of a power conferred by an Order in Council should not be subject to the same scrutiny and control by the courts as would be appropriate to the exercise of the same power if it had been granted by statute”.¹⁸

As to the obligation to consult, the judge held that whilst there could not be said to be any contractual obligation to consult, there was a clear legitimate expectation that the government would do so. Moreover, the judge was not prepared to say that consultation would be a futile exercise. Accordingly, he granted a declaration that the instruction had been invalid, essentially for lack of procedural fairness.

As I have said, it was not argued before Glidewell J that national security may be compromised by the very act of consultation. This is so even though the potential relevance of security considerations on the exercise of consultation was raised by Treasury Counsel. Glidewell J said in terms that he accepted the submissions of Simon Brown QC that considerations of national security might quite properly limit the scope of any consultation. But it was never suggested that it was a good reason to refuse any consultation at all. This was not advanced until the hearing before the Court of Appeal. Even then, it was argued in wider terms than were finally advanced in the House of Lords.

The Court of Appeal

The Court of Appeal (the Lord Chief Justice, Lord Lane, Watkins LJ and May LJ), in a single judgment, upheld the appeal and dismissed the cross-appeal (which broadly related to the matters on which we lost below essentially for the reasons given by the judge). It held that even if prerogative powers could be reviewed – a point they left open – national security would preclude review on the facts of this case. On reading the judgment again, it seems to me that the Court misunderstood the central point of the appeal. It emphasised that questions of national security were for the government to determine and in its view there was plainly a justification for removing union rights. But that was never in issue. The question was whether there was evidence which justified not even consulting with the unions about whether national security might be protected without the drastic step of removing union membership rights altogether. The Court did observe that it was “doubtful” whether consultation could have achieved anything, without formally deciding that question, but in my view, it did not properly engage with the national security issue as it pertained to consultation at all.

The House of Lords

The focus in the House of Lords was on the reviewability of the prerogative;

¹⁹ There was some debate about exactly how binding the evidence was on the court, with some disagreement about the implication of certain observations of Lord Devlin in *Chandler v. Director of Public Prosecutions* [1964] A.C. 763. Lord Scarman, at p.406, agreed with the observations, which seemed to suggest the courts, in some cases at least, could question the evidence allegedly establishing that national security should trump other considerations. However, Lord Diplock found Lord Devlin’s observations to be confusing (p.408) and Lord Roskill thought they were out of line with other opinions expressed in that case (p.421). As Blom-Cooper and Drabble pointed out in their article, courts showed a greater deference to government about these issues at the time..

legitimate expectations; and national security. Three members of the Court, Lords Diplock, Roskill and Scarman, all agreed that prerogative powers were in principle reviewable, although they would not always be justiciable because of the nature of the issue under consideration. Lords Fraser and Brightman accepted that prerogative powers would be reviewable where they had been delegated – as they had here by the Order in Council – so as to keep the delegate within the scope of the powers conferred. But they both preferred to leave open the question whether the direct exercise of a prerogative power could itself be reviewed. However, the fact that the majority expressed such clear views about the general reviewability of the prerogative, even though strictly obiter, put that issue to bed thereafter. It provided clarity to a fundamental issue in public law.

The members of the court all agreed that there was a legitimate expectation that the unions would be consulted before changes in terms and conditions were altered “the whole history of the relationship between management and staff since 1919”. But the expectation may be thwarted where national security was in issue, and this was, in their Lordships’ view, the key issue.

It is important to note how narrow the debate had become. We accepted that it would in principle have been open to the Minister properly to take the view that the act of consultation would of itself have risked industrial action, potentially undermining national security. The judges recognised that there had to be evidence before the court that this was indeed the reason for the failure to consult,¹⁹ and our case was that the evidence was lacking. There was no proper evidence that the Minister had actually addressed this question and taken this view; it was not in fact the reason why she had failed to consult.

The key paragraph of Sir Robert Armstrong's affidavit was para 16:

"To have entered such consultations would have served to bring out the vulnerability of areas of operations to those who had shown themselves ready to organise disruption..."

It is my view critical to note that this paragraph was entirely consistent with the submission of Simon Brown QC before Glidewell J, namely that there were matters of national security which would have justified truncating the nature and extent of any consultation since they would otherwise "bring out the vulnerability of areas of operation". The judge accepted this, but in his view it did not render consultation pointless. However, the House of Lords accepted the submission that when read in context, this paragraph plainly meant that the very act of consultation would have undermined, or risked undermining, national security. Yet if that was the obvious meaning, how did it escape the attention of the Crown's two extremely able counsel? I still believe that it was a very generous construction of at best an ambiguous paragraph.²⁰ Had Sir Robert Armstrong intended to say that consultation itself might jeopardise national security, he chose an obscure way of saying it.²¹

Conclusion

Although we ultimately lost, it was a great privilege for us both to have been involved in such a major case so early in our careers at the Bar. During the course of the case, I developed a great regard for Richard, both as a man and as a lawyer. Our paths have periodically crossed since then, not least because he has frequently appeared before me in court. He always had the

ear of the court because of his measured and thoughtful submissions and deep knowledge of the law, often in the more arcane areas of the law. He is without doubt one of the outstanding public lawyers of his generation and can look back on a long career with great pride.

²⁰ As Lord Fraser in terms accepted, para. 16 did not of itself support the broad contention, set out in para.27 of the Respondent's case in the House of Lords, that the decision not to consult was taken because it would provoke industrial action which would prejudice national security.

²¹ As the article by Blom-Cooper and Drabble observes, we did consider seeking an order to cross-examine Sir Robert Armstrong in the Court of Appeal but thought it was too risky because of the uncertainty of his response. For myself, I am sure that the Court of Appeal would never have agreed to the order in any event.

Matthew Fraser, Landmark Chambers

I was led by Richard Drabble KC in the case of *RR v Secretary of State for Work and Pensions* before the Supreme Court in 2019. It remains the highlight of my career, and it is a pleasure for me to write about this case for Richard's *Festschrift*.

In and amongst the wide range of cases in which he acted throughout his career, Richard often represented people in the welfare benefits system. Richard is considered by many to be the "Godfather" of social security law, having appeared in most of the leading cases over the decades. *RR* is fittingly a case about housing benefit, albeit it also raised wider constitutional questions.

Housing benefit is a means-tested benefit to help a recipient pay their rent. In 2013, the Government introduced what became known as "the bedroom tax" or "the removal of the spare room subsidy", depending on political inclination. It was a cap on housing benefit in cases of "deemed under-occupation" of social sector housing (i.e. where the number of bedrooms in a dwelling exceeded the number of bedrooms to which the claimant was entitled). The Government's stated aim was to ensure that social sector tenants of working age who were occupying premises with more bedrooms than they required should, wherever possible, move into smaller accommodation.

It was recognised at an early stage that a housing benefit entitlement based solely on numbers of rooms and occupants would cause problems for some people with disabilities. In predecessor legislation to the "bedroom tax", the government initially decided that, rather than creating legislative exceptions for persons with disabilities, their needs would instead be met

as required through the provision of “discretionary housing payments” based on an individual assessment.

This proved unsustainable, and came under attack in litigation culminating in a decision of the Court of Appeal in a trio of cases, *Burnip v Birmingham City Council*, *Trengove v Walsall MBC*, and *Gorry v Wiltshire Council* [2012] EWCA Civ 629. Richard Drabble appeared for all three successful appellants. In *Burnip* and *Trengove*, the claimants were adults with disabilities who required the presence of a carer throughout the night. *Gorry* concerned a family including two children of the same sex who suffered from severe disabilities which made it inappropriate for them to share a bedroom. The court did not consider that the provision of discretionary payments was an adequate response to the discriminatory impact of the bedroom tax on persons with disabilities. Parliament amended the law to cover cases like these through specific legislative exceptions.

More “bedroom tax” litigation ensued, in respect of persons with varying reasons why they needed an additional bedroom for disability-related reasons. On 9 November 2016, the Supreme Court gave judgment ([2016] UKSC 58) in four linked cases against the Secretary of State for Work and Pensions, namely *Carmichael & Rourke*, *Daly*, *A and Rutherford*. Richard represented Mrs Carmichael, as well as Mr and Mrs Rutherford. Mrs Carmichael needed to sleep in a separate room from her husband because of her disability. It was argued that her situation was materially indistinguishable from the Gorry situation of children who were unable to sleep in the same room (who were at that time catered for in the legislation, whereas equivalent provision for adults was not). Mr and Mrs Rutherford cared for their grandson who needed an overnight carer because of his disabilities. It was argued that their situation was indistinguishable from that the *Burnip* situation of an adult with disabilities requiring an overnight carer

(which was also catered for in the legislation, whereas equivalent provision for children was not).

The Supreme Court, again, did not find discretionary payments to be an acceptable solution. The Court held that where there was “a transparent medical need for an additional bedroom” which was not catered for in the legislation, there was unjustified discrimination on the ground of disability and thus a violation of the claimant’s rights under article 14 of the European Convention on Human Rights (“ECHR”), read with article 8: see [41]-[49] per Lord Toulson. The relief ordered by the Supreme Court proved to be significant. It was limited to a declaration that the claimant in both cases had suffered discrimination contrary to article 14 of the ECHR. The Supreme Court did not change the award of housing benefit for either claimant.

A few months after the Supreme Court gave judgment in *Carmichael*, on 2 March 2017, the Secretary of State for Work and Pensions amended the “bedroom tax” provisions in order to cater for the two instances in which the Supreme Court had held that the earlier version of the regulations led to violations of the ECHR. Those provisions came into effect on 1 April 2017 and – again importantly – they did not have retrospective effect.

The amendments introduced two new categories: “a member of a couple who cannot share a bedroom” and “a member of a couple who can share a bedroom ...”. A new definition, found subsequently to be “in the best traditions of the dense drafting of social security legislation” – provided as follows:

“For the purpose of these Regulations, reference to a member of a couple who can share a bedroom is to a member of a couple where the other member of the couple is a member of a couple who cannot share a bedroom.”

Whatever this baffling provision meant for cases going forward, it became necessary to deal with those benefit claims relating to periods before the regulations were amended. What were decision-makers in the housing benefit system, i.e. local authorities responsible for making housing benefit payments, and the First-Tier Tribunal ("FTT") and Upper Tribunal ("UT") hearing appeals from local authority decisions, supposed to do with those cases? Did they have to carry on applying the regulation in the original pre-amended form, despite this resulting in a breach of Convention rights? Or were they instead required to calculate housing benefit without making the percentage deduction, in order to avoid a Convention breach?

The first attempt at answering this question was made by the UT in Mr Carmichael's own case. The UT accepted Richard's submissions that Mr Carmichael's housing benefit was to be calculated without making the bedroom tax deduction, because otherwise the UT would breach Mr Carmichael's Convention rights, contrary to section 6(1) of the Human Right Act 1998 ("HRA"), which makes it unlawful for a public authority (which includes a court or tribunal) to act in a way which is incompatible with a Convention right.

Richard cited *Chief Adjudication Officer v Foster* [1993] AC 754, in which he successfully persuaded the House of Lords (while I was still a toddler in Australia) that the statutory authorities with responsibility for dealing with claims for state benefits (which at the time consisted of adjudication officers, social security appeal tribunals and commissioners) have jurisdiction to decide whether a provision in subordinate legislation is invalid because it is *ultra vires* if it is necessary to do so in order to determine whether a claimant is entitled to a benefit. Richard argued that there was no relevant distinction between invalidity in secondary legislation said to arise from

being outside the powers conferred by the enabling legislation, and invalidity said to arise from being unlawful under the Human Rights Act.

The Court of Appeal allowed the Secretary of State's appeal by a majority (Sir Brian Leveson PQBD and Flaux LJ), with Leggatt LJ (as he then was) dissenting: *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548. Accepting the submissions of Sir James Eadie QC, the majority held that the UT did not have the power to act as it did, because this would amount to an impermissible rewording of the regulation. Instead, any remedy for the accepted violation of Convention rights was to be obtained by bringing a claim for damages in the County Court under section 8(2) of the HRA.

No doubt fatigued by years of litigation stress, the Carmichaels decided not to appeal to the Supreme Court. However, their lawyers, Leigh Day, had no difficulty finding an alternative claimant (there were, at the time, about 130 so-called "Carmichael/Rutherford lookalike cases" in the Tribunal system). RR (anonymised) stepped forward. The stay in his case was lifted, and the UT accepted it was bound by the Court of Appeal's judgment. RR appealed. A leapfrog certificate was granted (leapfrogging the Court of Appeal), and the Supreme Court granted permission to appeal.

RR's appeal was heard by the Supreme Court on 3 July 2019. Richard Drabble, leading me, appeared for RR. Sir James appeared for the Secretary of State. The Court also heard submissions from two interveners: the Equality and Human Rights Commission (represented by Dan Squires QC), and a joint intervention by Liberty, Child Poverty Action Group and Public Law Project (represented by Martin Chamberlain QC, now Mr Justice Chamberlain).

I remember an early conference with Leigh Day in the lead up to the hearing in the Supreme Court. Richard was asked to give a percentage for the prospects of success in overturning the Court of Appeal's verdict. When asked such a question, some barristers will equivocate or caveat. Others will give a conservative estimate. Across all areas of law, most barristers will not stray much above 60-70%, in order to account for the inherent vicissitudes of litigation. That is especially so when one is considering the prospects of reversing the judgment of two senior judges of the Court of Appeal. However, with a quiet conviction of the correctness of his position, Richard put the prospects of success for RR at 90%. In my years of practice before or since that conference, I have never seen a barrister give a percentage that high for anything, nor is it an estimate that I – as a junior – would be likely to offer, even when I am confident of success. But Richard knew he was right and was not afraid – in his humble and understated way – to say so.

He was right to be confident. On 13 November 2019, the Supreme Court unanimously allowed RR's appeal. The succinct lead judgment was given by Lady Hale, at that time the President of the Supreme Court, with whom the other members of the panel agreed. Richard's submissions were accepted. Describing it as an "important constitutional question", Lady Hale found that "there is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear". Section 6(1) and 6(2) of the HRA display the "clear and careful distinction between primary and subordinate legislation". The breach of Convention rights arising from the housing benefit regulations was not mandated by primary legislation.

As Lady Hale said at para. 29: “[i]f it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so”.

It was a great honour and privilege to work with Richard on this case, and to experience his advocacy in the Supreme Court first hand. I wish him a very long and happy retirement.

Zoe Leventhal KC, Matrix Chambers

Doubtful penalisation? Protest, politics and the Parliamentary draftsman

"Hello, Richard. You were the one I wanted to take my brief. I'm glad you did."

They had never met before, but this was how Richard was greeted outside Court by Brian Haw, the long-term peace protester who camped for around 10 years in Parliament Square. Many will remember he wore an army-style hat covered in peace badges and usually a cheeky smile.

"Hi there, Brian, it's nice to meet you," said Richard, in his inimitable, understated style, in full robes, albeit with his wig slightly askew.

Whilst Brian's case (*Haw v Secretary of State for the Home Department*¹) is far from being the most legally complex or ground-breaking of Richard's cases, for me it encapsulates some of Richard's unique qualities as a barrister: the quiet authority of his advocacy, his renowned commitment to 'fighting the good fight', and the enduring impact he has had on so many of us at the public law bar.

For me, as Landmark's most junior tenant in 2005, and a mere 9 months into practice, this case was the stuff that (geeky public lawyers') dreams are made of. I was being led in my first judicial review by the legendary Richard Drabble QC (definitely awe inspiring, as David Blundell KC has described him), instructed by Bindmans & Partners, in front of my first three-judge Divisional Court comprised of Smith LJ, McCombe J and Simon J (as they then were). Our opponent, acting for the Home Secretary was the (then) A-panelist, Nathalie Lieven, Richard's former pupil, my former pupil

supervisor, and a close colleague for us both. The final jewel in the crown was the subsequent appearance of David Pannick QC (as he then was) for the Secretary of State in the Court of Appeal. Memorable doesn't really cover it.

The context was a new piece of legislation, the Serious Crime and Police Act 2005, which introduced a requirement to seek prior authorisation for any demonstration occurring within the vicinity of Parliament Square, and empowered the police to impose restrictions on it. Hence, Brian, who had been in situ since 2001, was told he could face criminal sanctions if he did not comply. His protest was (unsurprisingly) sometimes noisy, aimed at embarrassing the Government of the time on sensitive issues such as the war in Iraq, and was gaining quite a lot of traction with the press. Westminster Council's attempt to have his camp removed as an obstruction to the highway had failed in 2002.²

Part of the justification for the legislation advanced in Parliament had been the potential security risk posed by protests in his area. The Home Secretary's position implied that terrorists might use Brian's placards to hide explosive devices, rather than (of course) evincing any intention on the Government's part to curtail his important yet inconvenient his protest. That could never happen in a democratic society.

¹The Divisional Court judgment is at [2006] QB 359 and the Court of Appeal at [2006] Q.B. 780.

²*Westminster City Council v Haw* [2002] EWHC 2073 (QB).

The essence of Richard's legal argument was simple, and followed basic public law principles. The press report in The Guardian for that day records it as follows:

"At the heart of the case is the proposition that, on ordinary principles of statutory construction, it is quite clear that the section does not apply to demonstrations which had already started before commencement (of the new act)."

Section 132(1) imposed a criminal offence on anyone *"organising a demonstration in a public place in a designated area... if, when the demonstration starts, authorisation for the demonstration has not been given under section 134(2)."* A subsequent commencement order attempted to undo the effect of this language by providing that the underlined phrase in fact meant demonstrations *"starting or continuing after 1 August 2005"* (the date of commencement of the Act).

Richard argued that the commencement order was ultra vires as it purported to amend the clear words of s.132. That was, he argued, outside the scope of the enabling power in s.178(10), which was limited to transitional, transitory or commencement provisions. To interpret the words in s.132(1) in any broader way, as the Secretary of State argued, would infringe the principle of doubtful penalisation and criminalise conduct which was not unlawful at the time of the commencement of the Act.

My recollection is that the advocacy from both Richard and Nathalie that day was something to behold; a masterclass in judicial review, and particularly how to hold the attention of the Court. Richard's style has always been to craft a simple and irresistible narrative (I recall him always writing out every word by hand in flowing script in biro in a blue counsel's notebook, which he then delivered without looking at his notebook). Nathalie's by contrast

was highly structured and straight-talking: the Guardian report notes her description of our argument as “absurd,” although she had to accept the draftsman had made a mistake.

“Nobody is infallible, including parliamentary draftsmen. It is plain it was a mistake. The wrong words were used.”

The Divisional Court upheld our challenge and quashed the relevant parts of the commencement order, by a majority of 2-1 (Mr Justice Simon being won over by the Lieven straight-talk). Brian lived to fight another day.

The Court of Appeal hearing was a different story, with a different masterclass in advocacy from David Pannick QC, before a judicial panel of Sir Anthony Clark MR, Laws LJ and Hallett LJ. The purposive approach won out in the end. But Brian’s demonstration remained in situ in one form or other (facing numerous other legal challenges over the years) until 2011. I know that Richard felt that it was a privilege to have been one part of Brian Haw’s remarkable story.

And this is how I feel about working with Richard. I was lucky enough to be led by Richard in five other major cases, with a focus on the social security system and those marginalised by society: including as particular highlights *RJM v Secretary of State for Work & Pensions* [2008] UKHL 63 in the House of Lords (the domestic follow-on from *Stec v UK* described here by Helen Mountfield KC) and the two benefit cap cases in the Supreme Court (*JS v SSWP* [2015] UKSC 16, *DA & DS v SSWP* [2019] UKSC 21) about which Lady Hale has written vividly.

Richard inspired me to focus much of my practice on grasping the technical world of social security (still a work in progress), and more broadly on other areas of social justice. My practice and my understanding of the law would

simply not be the same without him, and his body of work is extraordinary. As Nathalie has said, Richard's ability to explain a complex scheme to a Court is something I shall always aspire to. "*You just have to show the judge the way home,*" is the phrase of Richard's which rings in my ear as I prepare my submissions.

I shall miss his presence at the Bar greatly. Richard can and should be incredibly proud of a wonderful career which has touched many lives, and which he has conducted always with humility and humanity.

Dame Nathalie Lieven, DBE, Justice of the High Court of England and Wales

It is with great pleasure, but also sadness, that I write this contribution. I have known Richard for 34 years, as my pupil supervisor, occasional leader, frequent opponent and once advocate before me. Richard has guided my career and has always been there to answer questions, give advice and go to lunch in Inner Temple Hall. I will hugely miss his presence at the Bar.

Richard is an extraordinary, and probably unique, barrister. He combines being a brilliant advocate, having an exceptional intellect and an almost endless intellectual curiosity, with having none of the arrogance that success at the Bar can sometimes bring.

Richard's career has followed (and often led) the development of public law in the UK courts. He built his reputation through his unmatched expertise in social security law, combining his intellectual skills and his commitment to using law to help the disadvantaged and to give them a voice. It is no exaggeration to say that Richard was integral to the creation of social security law, both in the UK, but also in Europe. A reading of the ECJ and ECtHR caselaw in the field throws up Richard fighting the UK Government in virtually all the early cases. His knowledge of the statutory scheme was legendary – I remember Michael Beloff QC, his opponent in *Plewa v Chief Adjudication Officer*, telling the House of Lords Appellate Committee that they would be much better off asking Richard the complicated question on the social security scheme rather than him, because Richard was the “expert” in the field.

When Richard moved to 2 Paper Buildings (later becoming Landmark Chambers) in 1984 he seamlessly developed a practice in planning law. He applied the same rigorous approach of understanding the statutory scheme and then forensically interrogating the issues, as he had in social security. Although I suspect Richard's heart always lay in representing the disadvantaged, he put the same energy and intellectual force into advocating for HMG in challenges to Heathrow Third Runway and for the developers of Whatley Quarry (as well as many others) as to any case perhaps closer to his heart. There were many Inner Temple lunches when he would attempt to explain to me the workings of the aquifer under Whatley Quarry and why it was that his client was not going to pollute the entire Bath water supply. Happily he was proved correct.

Having mastered planning, both law and quarrying, he then moved on to become a leading silk in immigration law. Lady Hale has set out the many cases in the Supreme Court where Richard helped develop the field, and where he had many triumphs and the occasional loss. Like social security, immigration law consists of an intensely complex statutory and regulatory scheme, which is, at least in theory, tied together by some overarching policy intentions. It was Richard's ability to get to grips with the minutiae of the scheme, and be able to explain it to the Court, whilst at the same time seeing the broader policy picture, that helped him to be so successful in the legal minefield of immigration law. He also developed a whole new group of fans in immigration juniors who had been, or wanted to be, led by him in the most difficult cases.

Finally, Richard became an expert in the equally complex if more esoteric field of rating law. I think this is an example of Richard's extraordinary intellectual curiosity. I struggle to find any interest in Automated Transaction

Machines ("ATMs") but Richard spent many lunches explaining to me and Tim Mould (now Mr Justice Mould) the reasons why HMRC was wrong in its approach to rating ATMs. He became utterly enmeshed in the subject matter. I have no idea whether he was right or wrong, but no advocate could have put more intellectual effort into representing his client.

I think Richard's success as an advocate was the combination of intellectual brilliance and a real desire to explain his position to the judge in the most compelling way possible. Richard always believes in his case (sometimes surprisingly so) and will engage with patience and huge effort to persuade the occasionally sceptical judge as to why he is right. I vividly remember when I was his pupil Richard trying to elucidate indirect discrimination in an obscure benefits case to Mr Justice Mummery (as he then was) through the medium of dividing up lollipops. The concepts were both complex and esoteric, but Richard's forensic skill won through.

Another key to Richard's success is that judges always felt that they could trust him because of his intellectual honesty. Some barristers could perhaps be described as rather grand used car salesmen, selling dodgy cars with a lovely sheen. Richard would open the bonnet and grapple with the problems with his case, rather than trying to hide them. He would strip down the statutory scheme, explain how it was supposed to work, and then show why on that analysis his case should win. The contest was often on different conceptions of what the statutory scheme was supposed to achieve, but Richard was always compelling in his vision of the justice of the case.

His career has been extraordinary and everyone who has worked with him has learnt from him, and become a better lawyer.

Christopher Lockhart-Mummery KC, Landmark Chambers

We were asked to contribute to a recollection of cases involving Richard, and no doubt the request will lead to a number of very learned contributions. My very brief contribution is not learned, but personal.

Quite plainly, Richard is the best Supreme Court Justice we never had. Others will speak to his extraordinary legal skills which would amply have justified this role. In this contribution I focus, essentially, on his character.

In the days when I was in chambers, whenever I had a tricky legal question where I needed a clear and entirely reliable steer, I would try to enter his room, not an easy or safe process with mounds of papers on the floor, and seek an audience. He was usually in the Supreme Court, but occasionally I struck lucky.

One such request led, in due course, to the *Sainsbury's Wolverhampton* case²². In brief, Wolverhampton City Council had made a CPO to acquire from Sainsbury's part of a site for which Sainsbury's and Tesco were competing for the construction of a foodstore. The CPO was explicitly made in part in order to enable the development of land elsewhere in the City nominally for the regeneration of that area, but practically for the benefit of Tesco's proposed development in that area for a foodstore. It seemed to me to be blindingly obvious that this was a misuse of CPO powers and clearly challengeable. I could barely believe my luck. But there were

²² [2010] UKSC 20.

those who argued that this exercise of CPO powers was justified by the “wellbeing” provisions of section 226 of the Act (and in due course Sullivan LJ, no slouch, took this view). Before launching inevitably high profile proceedings, I needed my hand held by an unmistakably authoritative view. Richard’s firm endorsement of my position ultimately led (with Eian Caws as my junior) to the Supreme Court (7 Justices) overruling Sullivan LJ in the Court of Appeal.

The *Sainsbury’s Witney* case²³ involved Tesco’s proposal to provide to the highway authority a £6m bung to pay for works at a road bridge barely affected by their development. The question for the courts involved the role of “necessity” in the legality and materiality of section 106 contributions. In the Plymouth case the Court of Appeal had confirmed that a necessity test was not a legal requirement for a section 106 contribution, and therefore that unnecessary contributions (bird hides etc) could be a material factor in the planning decision. Planning obligations must be for a planning purpose, must fairly relate to the proposed development and not be Wednesbury unreasonable. There was no additional test of necessity.

Richard was my junior. Our case was that Tesco’s offer was not a material consideration because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable. Richard (possibly with marginal assistance from myself) formulated the test of materiality as follows:

²³ *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 759.

A planning authority may lawfully take into account a developer's offer to provide off-site infrastructure or other benefits whose objective and effect are to render his development acceptable so that it may be granted planning permission under section 70 of the Town and Country Planning Act 1990.

The submission was rejected by Lord Hoffmann:

The test of acceptability or necessity put forward by Mr Lockhart-Mummery suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of the planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable?

Revenge many years later was subsequently sweet. Regulation 122(2)(a) of the CIL Regulations 2010 provides that one of the tests for the validity of a planning obligation is whether it is *necessary to make the development acceptable in planning terms*. Sounds familiar? We prevailed (or rather Richard did) in the end.

But my keenest tribute and recollection of Richard is for his advocacy. This was no Marshall Hall or “welded rail” (Bob Alexander). Richard's style was advocacy at its most persuasive – I could describe this in many ways: plain speaking, as a teacher “I am telling you what to do”, bedside manner etc. Generally without reading from a script, Richard engaged the full attention of the court (I speak from personal experience as a Deputy Judge) by gently telling the court: *listen carefully, this is how it is*. It was an unusual skill, in my opinion in a class of its own.

The Bar (and potentially the Bench) are the poorer without him, but his legacy will long be remembered.

Helen Mountfield KC, Barrister at Matrix Chambers and Principal of Mansfield College, Oxford

Sex, money and status: how the Stec case brought Article 14 analysis into the social security sphere

The first time I was instructed on a 'policy' judicial review was in 1993. It was a challenge on behalf of the Law Society to restrictions in the payment of legal aid (plus ça change). I was brought in by a chambers silk as a second junior to Richard Drabble. I was excited to be working with Richard: his great reputation preceded him. So I expected him to be the kind of urbane, rather self-satisfied senior junior of the sort then so prevalent at the Bar. That was not what I found. Richard was quiet and unassuming, but – as I soon also discovered – so focussed and laser-sharp in his analysis that it was obvious why he had such a stellar reputation. I was later privileged to work with Richard on many occasions. When I had a difficult benefits case, 'how would Richard put this?' was a question I often asked myself.

This essay is a reflection on one of the most important cases we worked on together: *Stec v United Kingdom* in the Grand Chamber of the European Court of Human Rights ((2005) 41 EHRR SE 18 (GC) ('the admissibility decision'); and (2006) 43 EHRR 1017 (GC) ('the substantive decision')). The *Stec* admissibility decision established unambiguously, for the first time, that all social security benefits, however they are funded, fall within the ambit of the right to respect for property in Article 1 Protocol 1 of the European Convention of Human Rights ('ECHR').

That mattered across the Council of Europe because it meant that discriminatory criteria for receiving social security rights could be challenged

using Article 14 ECHR, which requires states to secure equal enjoyment of other Convention rights. And in the UK, *Stec* meant that after financial crash of 2008 and the savage Osborne austerity cuts which followed, there was a measure of judicial accountability for the differential effects of those cuts on members of different affected groups. It is true that the majority of challenges to discriminatory aspects of the benefits structure failed – and that they are very difficult to fight, particularly in the present judicial climate. But some succeeded.

And *Stec* established an important matter of principle. A state which confers social security entitlements confers rights which have the character of proprietary interests. That means they fall within the ambit of Article 1 Protocol 1 ECHR. It follows that the equal enjoyment guarantee in Article 14 ECHR provides that the state must secure equal enjoyment of those rights, without any discrimination based on status or situation which is “illogical or unsustainable”. Although the legislature’s assessment of the policy choices justifying particular provisions will generally be given a wide ‘margin of appreciation’, a state which discriminates in the design of benefit criteria without adequate thought and justification acts unlawfully. This matters. It also matters that the Grand Chamber in the *Stec* admissibility decision linked the interpretation of possessions in Article 1 Protocol 1 ECHR with the concept of a ‘proprietary interest’ which should be protected by access to a court in Article 6. So if a state’s criteria for a pecuniary benefit discriminate on grounds of status without a logical, sustainable and proportionate justification, then in order to give effect to Article 14 ECHR the national court must say so.

The story of how Richard and I came to argue *Stec* in Strasbourg is a curious one. We were separately instructed in separate cases – me by Unison,

him by Child Poverty Action Group – to argue appeals before the Social Security Commissioners (as the social entitlement chamber of the Upper Tribunal were then known) on related points of law.

Our claims were about the fantastically convoluted cut-off provisions introduced in 1996 for a benefit called Reduced Earnings Allowance ('REA'), and because they were brought before the Human Rights Act 1998 was in force, they were based entirely on EU law.

Between us, Richard and I had five clients who had suffered industrial injuries of one kind or another which had forced them to leave work before their state pension age and to claim REA. All of them were born between 1924 and 1933, and all suffered a sex-related detriment as a result of the changes to REA introduced in 1996.

REA was available to replace lost earnings for those who had been obliged to cease work as a result of a workplace injury or disease. It was a replacement to the old workmen's compensation schemes which preceded even the National Assistance Act 1948. Workmen's compensation schemes had originally been contributory, but REA was funded from general taxation and did not rely on National Insurance payments for its receipt.

Since reduced earnings during working life also had some effect on income in retirement, REA continued to be payable into retirement. This was considered anomalous, so in 1996, a new cut-off age was introduced for REA at state pension age, after which claimants were shifted to the less valuable Retirement Allowance (RA). Those over state retirement age at the date when the change was introduced were entitled to continue to receive REA thereafter, but at a frozen rate.

For unrelated reasons, state pensions had recently become age-related not retirement-related – that is, they were payable at ‘state pension age’ whether or not an individual had actually ceased to work. However, the age at which a person could get a state pension remained 60 for women and 65 for men. Whilst a decision had been taken to slowly equalise pension ages upward from 1995, culminating in complete equalisation in 2020, pensionable ages were not equal at the date of the claims. This meant that when RA was introduced, the new cut-off age for REA was different for women and men.

As is the way with social security law, the technical details were blindingly complicated and the combination of the cut-off provisions and differential state pension age resulted in some curious and adverse consequences for different recipients.

Mrs Hepple and Mrs Stec were moved onto RA at the age of 60 (when it was deemed that they would have retired), though if they were men, they would have continued to receive REA until they were 65.

Mr Lunn was moved to RA, but said that if he had been a woman, he would have been deemed to have retired five years earlier, before the changes came into effect, and so would have continued to receive frozen-rate REA for life, which was more valuable than RA.

Mrs Spencer had reached the age of 60 before the changes were introduced. She was treated as being entitled only to frozen-rate REA, whereas a man of her age would have been deemed to have been still of working age, and could have received full REA until his 65th birthday.

And Mr Kimber – my client – was moved onto RA, but said that if he were a woman, he could have opted to have retired earlier, and had he had and exercised that option, he like Mr Lunn would have been entitled to frozen-rate REA for life.

In short, although some were male and some were female, each of our clients were treated less favourably than they would or might have been if they had been a person of the other sex born on the same day. And this was new sex discrimination introduced in 1996 into a benefits scheme which had existed without discrimination since at least 1948.

The blackletter law was complex, and although we were separately representing our clients before the Commissioners, I was glad that Richard, doyen of social security law, was in the room and on my side. Our argument was that the sex discrimination in the payment of the benefit discriminated contrary to Directive 79/7 of the European Union – the Sex Discrimination Directive which then governed discrimination in relation to social security benefits, but which by Article 7 excluded differences in dates for receipt of state pension and benefits necessarily linked to them. The Commissioners were persuaded to refer this question to the European Court of Justice (ECJ).

Before the ECJ, the UK government accepted that there was no necessary financial link between having an age cut-off for REA (which was compensation for loss of earnings) and receipt of old age pension. But it argued that the differences were necessary for the logical coherence of a scheme which was intended to dovetail with state pensions which men and women could receive at different ages. On the reference, the Court of Justice accepted that the new cut-off date REA fell within the exception to the Directive for benefits linked to different ages for receipt of state pensions which meant the sex discrimination in conditions for their receipt was not contrary to EU

law (*Hepple & others v Adjudication Officer* C-196/98 [2000] ECR I-3701). So we lost.

But this was on 23 May 2000. The Human Rights Act 1998 had been passed, and was due to come into force on 2 October. I was part of a troop of lawyers being sent about the country by Stephen Sedley (Mr Justice Sedley as he then was) to train judges, tribunal chairs and others on the consequences of the Act for their actions, and the possible relevance of the provisions of the ECHR for social security challenges was on my mind. Disappointed by the Luxembourg judgment, I suggested to Richard that we might have another roll of the dice by bringing a challenge in the European Court of Human Rights (ECtHR) in Strasbourg, arguing discrimination in relation to property.

Unlike EU Directive 79/7, the non-discrimination provision in Article 14 ECHR was general and had no special carve-out for discriminatory retirement ages. Given that there was no financial reason for introducing new sex discrimination into the age at which REA was frozen or converted to RA, and no longer any assumption that state pension age was the age at which recipients would give up work, it seemed illogical to create new discrimination in relation to that benefit, rather than introduce a cut-off at one uniform age. Richard and I thought that there was a decent chance that the European Court of Human Rights might hold that the 'very weighty' justification which its caselaw suggested was required for sex discrimination (*Schmidt v Germany* (1994) 18 EHRR 513) was not made out for criteria for receipt of REA just because a novel link to a discriminatory retirement age had been introduced in 1996.

But there was a hitch. Article 14 ECHR is not a free-standing anti-discrimination provision. It guarantees only 'equal enjoyment' without discrimination of 'other Convention rights': if treatment is not 'within the

ambit' of another Convention right, then Article 14 does not apply. There is no Convention right to social security *per se*. And it was not unambiguously clear that social security benefits as such amounted to property rights within the ambit of Article 1 Protocol 1 of the Convention unless they were the product of individual insurance contributions. So to even get the argument before the Strasbourg court, we would need to establish that REA was a property right even though it was non-contributory.

Did non-contributory benefits fall within the ambit of Article 1 Protocol 1? A recent chamber judgment (*Gaygusuz v Austria* (1996) 23 EHRR 364) had suggested that they might. But 30 years of prior Commission authority pointed to a distinction between benefit entitlements which were based on contributions which were treated as possessions and non-contributory benefits, which were not. It was at least arguable that the emergency payment in *Gaygusuz* which had been held to fall within the scope of Article 1 Protocol 1 was only so classified because of a link to a contributory unemployment allowance, and the *Gaygusuz* judgment was ambiguously worded on this point.

Fortified by Richard's view that it was worth a go, I drafted a letter of introduction for my client in November 2000. My opinion stated firmly that "Counsel for the other applicants (Richard Drabble QC) and I would propose to work jointly on a joint petition for all the applicants". I think that bit was my idea.

We were informed that jurisdiction had been ceded to the Grand Chamber, and that the Grand Chamber would first hold a full oral admissibility hearing on the question of whether REA fell within the ambit of Article 1 Protocol 1. So it was that we found ourselves in July 2005, in Strasbourg arguing the admissibility of the claim against David Pannick QC for the UK government.

Later that year, the Grand Chamber handed down the very important admissibility decision in *Stec v United Kingdom*. In short, the Court decided that when determining whether a statutory pecuniary entitlement had the character of a property right, there was no justification for distinguishing between 'contributory' benefits funded by individual contributions or 'non-contributory' benefits funded by general taxation. The Grand Chamber held at paragraph 54:

"In cases, such as the present, concerning a complaint under article 14 in conjunction with article 1 of Protocol No 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question. Although Protocol No 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with article 14".

This meant that across the Council of Europe a state can only impose eligibility criteria in social security schemes if the criteria discriminate only for rational reasons, proportionately and without conferring a disproportionate individual burden. A scheme which discriminates otherwise is incompatible with the state's undertaking to 'secure equal enjoyment' of other Convention rights without discriminate on grounds of status. So we went on to fight another day, and to make submissions about whether the discrimination in the criteria for receiving REA did breach Article 14.

The substantive decision in *Stec* was not a great and glorious victory for our clients. Even though very weighty reasons are generally required for discrimination on grounds of sex, the substantive judgment held at

paragraphs 52 and 54 that where a social policy choice has been made by a democratically elected government, the court will generally respect that choice unless it is 'manifestly without reasonable foundation'. Since a gradual move to equalise pension ages was justified in view of the enormous costs of doing so and the social adjustment required by women – whose earlier pension entitlement was said to be linked to their earlier weaker earning capacity - so too was linking REA, intended to compensate for loss of anticipated working life, to pension age. We lost the case.

All the same, I am proud of the *Stec* admissibility decision and the accountability principle it established. Cases like *In Re Brewster* [2014] UKSC 5, *Mathieson* [2015] UKSC 47 and *McLaughlin* [2017] UKSC 8 could not have succeeded unless *Stec* had established the foundational principle that social security benefits are proprietary rights within the ambit of the equal treatment guarantee. *Stec* established that governments are accountable to courts for the criteria they apply in devising social security benefits. The consequence is that the compatibility of provisions of social security schemes with equality criteria is a justiciable issue across the Council of Europe.

And working with Richard, on this occasion as always, was a pleasure. It assured me that the best barristers need not be self-aggrandising. His quietly convincing, laser-sharp focus is what has made him so successful an advocate, over so many years. The unassuming lightness with which he wears his learning is what has made working with him always such a delight.

David Thomas, former Legal Officer at Child Poverty Action Group

I first met Richard soon after I joined CPAG as legal officer in 1993. Child Poverty Action Group is, in fact, something of a misnomer. The charity does not just focus on child poverty or even family poverty (to which it is, of course, inextricably linked) but poverty more generally with its multifactorial causes.

Richard had, I believe, worked for CPAG before beginning at the Bar, an early indication of his commitment to challenging poverty with its devastating consequences for health, housing and life chances. He was always willing to take on cases pro bono or at extremely modest rates – my discussions with Stephen, his normally tough negotiating senior clerk, sometimes involved my trying to persuade him to accept some fee on Richard's behalf ...

Even by that relatively early stage of Richard's career his reputation as a first-class lawyer and advocate was established. I recall Simon Brown, then a Court of Appeal judge, singing his praises at a CPAG function at the House of Lords. This was before we were introduced. I was somewhat in awe but need not have worried: Richard has always been down-to-earth and willing to discuss legal issues and much more.

Tom Bingham, then Master of the Rolls, remarked at another CPAG reception that social security was the most difficult area of law the Court of Appeal dealt with (which gave me comfort as I struggled to come to grips with it). But it quickly became clear that Richard was an acknowledged expert, and I noticed that, for all his characteristic modesty, as a junior he felt no need to be led by a QC in the higher courts. It sometimes struck me that judges were just taking notes of his submissions for their judgments!

I was privileged to do a number of cases with Richard during my time with the charity. As luck would have it, we had no fewer than six appeals in the House of Lords as well as numerous cases in the High Court (on judicial review), Court of Appeal, ECJ and ECtHR. He featured in most of these and was a leading advocate challenging gender discrimination in benefits law at the ECJ. He won two separate CPAG cases in the House of Lords on the same day, surely a record. There have been cases we have worked together on in other contexts too. Here are just a couple of highlights:

- **Halliday:** this case was about disability living allowance. DLA largely replaced attendance allowance and mobility allowance in the early 1990s while carrying over many of the criteria (DLA has itself now been replaced by personal independence payment for adults below pensionable age). In fact, the case followed hot on the heels of a successful CPAG AA case in the House of Lords involving a blind person, Eric Mallinson, in which Richard also acted. DLA is a multi-component benefit. The part at issue was the middle rate of the care component (day attention), where the test is whether a claimant requires frequent attention in connection with a bodily function throughout the day. Becky Halliday was a profoundly deaf young adult. The question was whether help from a signing interpreter which she needed to overcome the effects of her disability could be taken into account, even in the social context. Richard admitted to being uncomfortable with the proposition from a legal point of view, because his involvement with AA cases had underlined that ‘attention in connection with a bodily function’ was restricted to activities such as toileting and feeding – in other words, intimate help for the most severely disabled. Becky, though hampered by her deafness, was able to work, drive and lead a relatively ‘normal’ life. There is a canon of construction that statutes

are a living instrument and should be construed to reflect changing social mores, but the canon has not often been applied and in any event AA had only been around since 1970. Richard's instincts were for an incremental approach to test cases, rather than the more radical leap which only encourages judges to defer to Parliament. Undaunted, he embraced the case. He led Nathalie Lieven in the Court of Appeal and David Wolfe in the House of Lords (when Natalie was unavailable). We were fortunate that Lord Justice Glidewell, always a sympathetic figure in benefits cases, presided in the Court of Appeal and gave the leading judgment allowing Becky's appeal. Lord Justice Hobhouse dissented. (In those days, the CAO sent judgments by fax, and it was only when I read the final sentence of the final page that I knew we had won ...).

I recall discussing with Richard whether we could make use of the UN Convention on the Rights of the Child in the House of Lords, which includes protection for disabled children. Not formally part of domestic law, the ambiguity in the statutory criteria demonstrated by the Hobhouse dissent might nevertheless be used to our advantage, I thought. Richard's instinct, I am sure realistic, was that seeking to invoke an international instrument might demonstrate a lack of confidence in our domestic construction and that we should focus on that alone.

We did indeed maintain the win in the House of Lords, with Lord Slynn (a big fan of CPAG as it happens) dissenting this time. Richard's advocacy, as ever, was crisp and persuasive, straight to the heart of the matter: his philosophy, it became evident, is that, if one has a strong point, running a less strong point is unlikely to improve the prospect of success, indeed it may diminish it. That is a lesson I continually have to relearn. The decision relaxed the criteria for the care component of DLA and tens of thousands of disabled claimants (not just deaf people), perhaps

hundreds of thousands, have benefited as a result. Not everyone in the deaf community supported Becky, interestingly. Some see themselves not as disabled but as 'other abled' and therefore disavow claiming disability benefits. Despite the criticism she received, Becky stuck to her guns.

The case had other memorable features. Becky, understandably, wanted to come to both the Court of Appeal and the House of Lords. This meant she would need an interpreter. Both courts were accommodating. Interpreting is very tiring and the interpreter therefore needed frequent breaks. That helped to bring home to the judges the extent of the support profoundly deaf people need to participate in society. Visual images can be so much more powerful than words.

The case was heard with *Cockburn*, an AA case which considered whether time spent washing the soiled bed clothes of a disabled person away from her home could be taken into account. I did a media round after the two decisions. During one interview on FiveLive I said that, although we lost *Cockburn* on the facts, the case had nevertheless advanced the law for disabled claimants so it was not all 'black news' (one obviously wants to win for the particular litigant but with a test case strategy such as CPAG's the principal objective is to advance the law for the constituency as a whole). Afterwards, my colleague accompanying me said 'That was great but you shouldn't have said "black news" because that has negative connotations for the black community'. I was duly chastised. The need for sensitivity of language – or 'wokeism' for some – has a longer pedigree than is sometimes realised.

Forthright criticism of a progressive judgment by the forces of reaction is not new, either. I had a spat with a *Daily Mail* journalist who wrote 'Now judges tell taxpayers that they must pay for deaf people to have a social

life'. That is not what the House of Lords decided, of course: they simply decided that help to overcome the effects of deafness, in all reasonable contexts, could be taken into account as 'attention in connection with a bodily function' when computing frequency, the bodily function in question being that of hearing.

I remember driving home after doing a live Radio 4 interview that evening, about to appear on the television news. It was a beautiful summer's evening and I had Bob Dylan's *Like a Rolling Stone* blaring out of the open window. It was a special day. The irony, of course, was that Becky would not have been able to enjoy the music.

- **Protective costs orders:** CPAG argued, in a JR against the Lord Chancellor challenging the non-availability of legal aid for even the most complex cases before tribunals and social security commissioners (now the Upper Tribunal), that the High Court had the power to make a pre-emptive costs order early in a case, so that a public interest litigant would have comfort that it would not be landed with a ruinous costs bill if it lost. We drew on trust and company law, highlighting that no area of law is hermetically sealed. Amnesty and Redress joined the case for their own substantive issues. Richard led Rabinder Singh and Murray Hunt.

The Lord Chancellor, Derry Irvine, fiercely disputed jurisdiction (his advocate arguing at one point, to general mirth, that CPAG had the option of taking test cases or decorating its offices instead – this was just after Lord Irvine had courted controversy by spending huge sums on Pugin wallpaper for his office). Nevertheless, Mr Justice Dyson recognised that he had jurisdiction, albeit one to be exercised only in exceptional circumstances with a number of tough criteria (and he declined to grant CPAG protection). Richard was involved in the *Corner House* cases which eased the criteria

to some degree, but the jurisdiction was still underused. Some years later, I instructed him in a judicial review brought by BUAV (now Cruelty Free International) relating to the assessment of suffering of, and the care provided to, macaques used in brain research at Cambridge University. The Home Office, the regulator, argued that it would need no fewer than 10 experts, in a flagrant attempt to make the case unaffordable for BUAV. Mr Justice Bean granted a PCO, accepting that the test of exceptionality was necessarily met if the various Dyson criteria were met.

In the case itself, the Court of Appeal, overturning the High Court, gave a pretty brutal judgment, super deferential to the regulator in the face of compelling evidence, but did support a number of legal propositions Richard advanced. This included that the Home Office was wrong to reserve for the 'substantial' category of severity, relevant for the statutory harm:benefit test, the most severe experiments it licensed – it should simply ask if the experiments would lead to a 'major departure from an animal's usual state of health or well-being', as per statutory guidance.

Had it not conceded the substantive issue at the door of the court, the FCO would also have agreed to a PCO in a JR Richard stepped into at the last minute. Burma Campaign UK challenged the FCO's rather bizarre argument that, whilst the human rights situation in Burma was dreadful, it had been dreadful for a long time and therefore could not be said to be 'urgent', the threshold under EU law for unilateral imposition by a member state of financial sanctions.

PCOs now have statutory recognition, of course.

There are so many other cases I have been privileged to work with Richard on, including Brian Haw's JR challenge to legislation with some retroactive effect banning his one-man permanent protest against the Iraq war outside Parliament.

I feel honoured, too, to count Richard as a friend and have always admired his values, underpinned by compassion and integrity. The Bar is a poorer place without him.

A footnote: when in Malawi last summer for World Child Cancer, my favourite place was an art gallery/café where one could buy second-hand books. I bought novels by each of Richard's illustrious sisters, Antonia and Margaret. When I returned them for resale, the waitress shared with me which of the two authors was her favourite. Why not, of course, but it was not a discussion I had expected in a Blantyre café! A small illustration of the reach of the Drabble family.

Joseph Thomas, Landmark Chambers

Chapman v United Kingdom (27238/95) (2001) 33 E.H.R.R. 18

The facts underpinning the case of *Chapman v United Kingdom* were undoubtedly tragic. The significance and legal reasoning of the case have been contested. Given that this was a split decision (ten votes to seven) by the Grand Chamber of the European Court of Human Rights (“Strasbourg”), this is perhaps unsurprising.

In terms of its significance, the case has been variously described as a “significant step,”²⁴ and a “missed opportunity,”²⁵ and others went as far to state that *Chapman* made it inevitable that the status quo would be successfully challenged within five years.²⁶ A deadline that has long passed. However, Richard’s eminent contemporary at Landmark Chambers,

²⁴ Peroni, Lourdes and Timmer, Alexandra “Vulnerable groups: the promise of an emerging concept in European Human Rights Convention law,” I.J.C.L. 2013, 11(4), 1056-1085 at page 1077.

²⁵ Ringelheim J. *Chapman redux: the European Court of Human Rights and Roma traditional lifestyle*. In: Brems E, ed. *Diversity and European Human Rights: Rewriting Judgments of the ECHR*. Cambridge University Press; 2012: 426-444.

²⁶ “An emerging consensus on the special needs of minorities: the lessons of *Chapman v. UK*” published 15 August 2001, accessed on 31 July 2024 (<https://www.errc.org/roma-rights-journal/an-emerging-consensus-on-the-special-needs-of-minorities-the-lessons-of-chapman-v-uk>)

²⁷ *Westminster CC v Great Portland Estates Plc* [1985] A.C. 661; [1985] J.P.L. 108.

²⁸ Lockhart-Mummery KC, Christopher and Henderson, Matthew, “50 years of changes in planning law: 1972 to 2022: plus ça change, plus c’est la même chose?” J.P.L. 2022, 13, OP4-OP19 at page OP16.

Christopher Lockhart-Mummery KC has indicated that the case and other decisions of the Strasbourg court are unlikely to have made a material difference since the personal circumstances have been held to be a material consideration in planning decisions since at least 1984²⁷ ("it is difficult to describe this influence as significant").²⁸

This short article will summarise this noteworthy case from Richard Drabble KC's career and argue that the considerations that were in play remain as valid today as they did over 20 years ago.

Sally Chapman was a Gypsy; her husband and she had four children. They led an itinerant and nomadic life travelling around Hertfordshire in search of work and suitable pitches for their caravan. They applied for a permanent pitch but were never offered a site. Whilst using unofficial sites, she was harassed and evicted. Consequently, her children's education was constantly interrupted, and courses abandoned. Determined to bring some stability to her children's education she bought land and parked her caravan without planning permission. The land was in the Green Belt where development is exceptionally rare. She made multiple applications for planning permission, but these were unsuccessful before the Local Planning Authority and on appeal to the Secretary of State. Her unique circumstances were considered in those appeals. By the time enforcement action was taken against her, her nonagenarian father who suffered with senile dementia lived with her and she was his carer. The planning authority that took enforcement action against her had no official sites and there had been insufficient provision for such sites for the whole of Hertfordshire since 1985.

The entire court held that “the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle”²⁹ and that the failure to provide suitable sites coupled with enforcement action amounted to interference with their identity.³⁰ Accordingly, the court held that there had been interference with the Ms Chapman’s private life, family and home. The court also held given the elaborate statutory scheme regarding planning, such interference was prescribed by law.³¹

The entire court accepted that there was a positive obligation arising from Article 8 to “facilitate” the Gypsy way of life.³² It was the extent of that duty to “facilitate” that was in issue.

The court was split on whether the interference was necessary in a democratic society. The majority held that it was necessary, their reasoning essentially fourfold:

- 1) Domestic authorities enjoy a wide margin of appreciation in planning matters, where the needs of the community are balanced against the impact on individuals and courts (let alone international ones) are poorly placed to make such judgments.
- 2) There was no international consensus that respect for minority rights usurped the need to balance the competing interests in planning matters and accordingly Ms Chapman’s undoubted status as a gypsy did not operate as a trump card in such matters.
- 3) Treating Ms Chapman and other gypsies differently would raise (unspecified) problems under Article 14.

- 4) Article 8 does not impose a duty to provide a home and finding a positive obligation to tolerate unlawful pitches where there are insufficient lawful ones for the Claimant would be tantamount imposing such a duty.

Once they applied those principles to the facts of the case (particularly the explicit consideration of her circumstances in the appeals), the majority held that there had been no violation of Article 8.³³

The minority forcefully dissented:

- 1) There is a clear recognised need (and international consensus) that authorities should take positive steps to protect minority rights not only for their benefit but also to preserve cultural diversity for the benefit of the whole community.
- 2) The minority accepted that a supervisory court is not well placed to substitute its judgment on an individual planning judgment. However, this case did not concern a single planning judgment but a series of decisions and judgments that led to a situation which was undoubtedly lamentable given that Ms Chapman was being moved-on where no other sites existed. Accordingly, the court's role is not merely supervisory, and the court should intervene where enforcement action is taken against gypsies where there are no alternative sites and where there are no "compelling reasons." (paragraph 3)

²⁹ Paragraph 71.

³⁰ The court held that even though Gypsies such as the Claimant would settle for a number of years either out of frustration at the paucity of suitable sites or to facilitate the education of their children, occupation of a caravan and the possibility of travelling again were inherent parts of their identity which were covered by Article 8.

³¹ With one exception, Judge Bonello.

- 3) Article 14 points towards making exceptions for Ms Chapman and other gypsies; it is incompatible with article 14 to fail to treat different persons whose situations are significantly different differently.
- 4) Ms Chapman was not being asked to be provided with a home, she had a home and was being denied use of it.

Given this alternative approach, the minority held that the enforcement action and the threat of further enforcement action amounted to a violation of Article 8 since Ms Chapman was effectively denied the opportunity to pursue her way of life that was integral to her identity and no compelling circumstances or alternative sites had been demonstrated.

Judge Bonello further dissenting judgment went further and held that the systematic failure of the local authority to fund sufficient places for Gypsy meant that the authorities were “manifestly in a state of illegality from before the time the applicant took the law in her own hands.” For Judge Bonello’s view a state should only be able to rely on the law if it upholds the law and the finding by the majority that the state can still rely on their laws despite “entrapping” a vulnerable individual into breaking the law to protect her fundamental right is a “disquieting event” that requires greater scrutiny.

The reasoning of the majority has been both celebrated and heavily criticised. The acknowledgement of some vague duty to facilitate the Gypsy way of life has been described as an “important move”³⁴ since it placed some (unspecified) burden on a state to do at least something to

³² Paragraph 96.

³³ The court also considered Article 14 and Article 1 of Protocol 1 and for similar reasons found no violation.

make Gypsy lives viable. No longer could their plight be ignored. Similarly, the recognition that the use of caravans and the potential for travel were integral elements of Gypsies' private and family lives (an issue which was overlooked in the previous case, *Buckley v United Kingdom*)³⁵ was described as an "important evolution."³⁶ Conversely, the deference shown towards the government in Chapman has been cited as an example of the Strasbourg court understanding its proper role and competence.³⁷

The reasoning and the conclusion, however, have also been heavily criticised for downplaying the international consensus regarding Gypsy lives as nothing more than a general aspiration, focussing on international consensus rather than the impact the UK's failure had on Ms Chapman, treating Ms Chapman and other Gypsies desire to travel as a preference rather than an integral part of their existence and failure to uphold the principle in *Thlimmenos v Greece* that like dislike cases should not be treated alike.³⁸

Moreover, the vague duty to "facilitate" Gypsy lives was arguably counter-productive since it appeared to be a move in the "correct" direction in protecting the Gypsy way of life but would in actuality be easy to discharge. The existence of this half-way house may have arguably delayed confronting the hard choices the court sought to avoid and therefore delayed formalising Gypsy rights regarding their home.

With regard to the observation that the finding in Chapman was unlikely to have a significant impact on domestic planning decisions, the situation is likely more nuanced. It is quite right that personal circumstances have been material to planning decisions for several years prior; however, by articulating a set of principles and producing such a forceful dissenting judgment Chapman has arguably created a floor under which the rights of

Gipsy in planning cases cannot fall beneath were a future government so minded. That said, had English jurisprudence not already established that personal circumstances were material, the deference the Strasbourg court showed to the UK would unlikely have been replicated. In that regard, it arguably has a long lasting and significant impact.³⁹

The Chapman case is a prime example of the meeting of politics and law and for many this was a case of justice delayed given that Ms Chapman and her family were denied a peaceful existence in accordance with their identity. The sword of Damocles hanging above their head in the form of potential enforcement or even the council taking direct action must have been particularly upsetting when there were no viable sites for them. The politics, however, of Gipsy sites are deeply contentious and the court successfully found a way to avoid disrupting the status quo and causing a political ruckus. Equally, the court avoided substituting its own judgment regarding the community's interest in Green Belt protections and individual rights. But at what cost? The population of Gipsies in the UK mean they are extremely unlikely to ever amount to a political caucus sufficient to rewrite the laws and, therefore the risk of "forced assimilation" by indifference as Richard Drabble KC put it so forcefully in his submissions to the court

³⁴ Ringelheim J. Chapman redux: the European Court of Human Rights and Roma traditional lifestyle. In: Brems E, ed. Diversity and European Human Rights: Rewriting Judgments of the ECHR. Cambridge University Press; 2012: 426-444.

³⁵ *Buckley v. the United Kingdom*, 25 September 1996.

³⁶ Ringelheim J. Chapman, page 427.

³⁷ McGoldrick D. A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee. *International and Comparative Law Quarterly*. 2016;65(1):21-60.

³⁸ Ringelheim J. Chapman redux: the European Court of Human Rights and Roma traditional lifestyle. In: Brems E, ed. Diversity and European Human Rights: Rewriting Judgments of the ECHR. Cambridge University Press; 2012: 426-444.

remains real. Similarly, the risk of the court abdicating its duty to intervene and the counter-risk of a judicial body overstepping its proper role into balancing competing demands remain similarly live.⁴⁰ Finally, Judge Bonello's observations regarding the need for the state to act lawfully before punishing those who fall foul of the law may take on a greater significance in an age of climate change protests and repeated failure of states to meet legally binding targets.

³⁹ The Planning Inspector Training Manual now includes separate chapters on the interaction between planning and human rights as well as a separate chapter on Gypsy, Travellers and Travelling Showpeople.

⁴⁰ See for example the dissenting judgment of Judge Eicke in *Verein Klimaseniorinnen Schweiz and Others V. Switzerland* (53600/20)

Stewart Wright, Judge of the Upper Tribunal (Administrative Appeals Chamber)

Others will I am sure pay tribute to Richard's contribution to other areas of the law such as immigration, housing and, for example, his role in seeking to bring General Pinochet to justice. I want to highlight Richard's immense and unique contribution to social security law. If there ever could have been a standing counsel for social security claimants, Richard would have been it.

I was the penultimate pupil Richard had, in 1993-1994, before he took silk. However, I had come across Richard nearly 10 years earlier when working as a volunteer in Glasgow after finishing University. Some volunteers and I set up a welfare rights advice service that toured round the poorer parts of Glasgow in a 'Benefits Bus', which was no more than a portacabin on wheels. Maximising benefit entitlement was a key aspect of helping poorer families and this led me into having to understand the law on which that entitlement was based.

I hadn't studied law at University. The (Scots) law students seemed to spend all their time in the library, getting paler by the day and reading what looked like very old and dull cases. Despite this inauspicious starting perspective, in order to understand the law that affected social security claimants I had to read the case law. At that time, the reported decisions of the social security commissioners (now Judges of the Upper Tribunal (Administrative Appeals Chamber), of which I am lucky enough to now be one) came in individual paper copies, A5 sized and manilla in colour. It was in these that I first came across the name Richard Drabble, arguing on behalf of social security claimants about what to me at the time were fascinating legal points. These points covered, for example: how "normal

gross income" covered periods when the worker was on strike (R(F) 4/85); whether a person who need to be guided due to sight impairment when walking out of doors could be said to be virtually unable to walk (*Lees v Secretary of State for Social Services* [1985] 1 AC 930; the relevance of behavioural factors to whether a person was (physically) virtually unable to walk (R(M)1/86); and whether a person standing by to intervene in the event of the claimant having an epileptic attack was providing "supervision" of the claimant (*Moran v Secretary of State for Social Services* (R(A)1/88). I was hooked, and have been ever since. It led me to get a job as a welfare rights worker in a Law Centre in the west of London. There I read more of these A5 case reports in which Richard's name would often appear acting for the claimants. One case involved whether the claimant had an accrued right to unemployment benefit under section 16(1)(c) of the Interpretation Act 1978 (R(U)1/91). Another involved whether the attendance allowance board could delegate its decision-making, or at least the writing of its decisions, to staff within the attendance allowance board (R(A)4/90). By this point, and Richard may be embarrassed by my saying this now, Richard became a hero of mine; though not quite in the same mould as a football icon of his alleged lookalike (so Richard told me) Charlie George of Arsenal (it was the length of the hair).

Fast forward to my qualifying to be a barrister in 1993, and there was only one person I wanted as my pupil supervisor, and that was Richard, and I was lucky enough to be his pupil from October 1993 to April 1994. I spent a very happy six months drafting Form 86A judicial review claim forms for Richard, usually on social security challenges for claimants. The only downside of my pupillage time with Richard was when he was successful in the House of Lords in *Mallinson v Secretary of State for Social Security* [1994] 1 WLR 630, in which Richard established that 'seeing' is a 'bodily

function' for the purpose of attendance allowance and disability living allowance. I was broadening my pupillage training by looking at a party wall agreement case with another barrister in chambers while he was arguing *Mallinson* in the House of Lords. In carrying forward earlier case law that had established that the test of whether the claimant "requires" (attention or supervision) meant "reasonably requires" as opposed to "medically requires", the appellate committee members in *Mallinson* posited whether a sight impaired person could reasonably require attention in connection with their sight in order to be a trapeze artist. Richard thought that had I been with him at the hearing I might have been able to offer a valuable answer to this question. In fact, the touchstone being sought in *Mallinson* was provided by the House of Lords in a later success of Richard's in *Chief Adjudication Officer v Fairey* [1997] UKHL 18. In holding that 'hearing' is also a bodily function, the House of Lords ruled that the benchmark for whether attention is reasonably required is whether it enabled the disabled person, so far as is reasonably possible, to live a normal life. Both *Mallinson* and *Fairey* were landmark cases in establishing disabled people's rights to function in wider society.

Just before becoming Richard's pupil, I had argued my first appeal before a Tribunal of Social Security Commissioners, in *McDonnell* (R(IS)26/95). I was fortunate that Richard had been appointed as amicus for the appeals before the Commissioners. The case turned on issues as varied as what was meant by "any reversionary interest" in the capital disregard rules for income support; how to value tenancies in common and other jointly held capital for the purposes of the same benefit; and whether the regulation containing the jointly held capital rule was ultra vires on the grounds of irrationality. The last point was founded on the House of Lords' decision in the seminal case of *Foster v Chief Adjudication Officer* [1993] AC 754,

in which Richard had established that the social security commissioners' 'error of law' jurisdiction extended to holding regulations to be *ultra vires* as outwith the enabling power in the statute.

What then of other social security cases in which Richard has been instrumental? These are just a selection of mine.

In *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 Richard persuaded the House of Lords that the Court of Appeal had been wrong in the earlier case of *Secretary of State for Social Security v. Tunncliffe* [1991] 2 All ER 712 to hold that a change in the law about recovery of overpaid social security benefits had not removed vested rights retrospectively.

In the best tradition of the Bar, Richard has also argued overpayment cases successfully for the Government. In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16 he secured the result that the Secretary of State cannot be assumed to know of all decisions made by her officials concerning the same claimant. Therefore the claimant could still be found to have failed to disclose a change concerning another social security benefit. And in *B v SSWP* [2005] EWCA Civ 929 the Court of Appeal affirmed that a failure to disclose had to be based on a legal (and not moral) obligation to disclose information. In both appeals I was the Child Poverty Actions Group's lawyer seeking to argue for the opposite legal conclusion.

One hallmark of Richard's early social security successes concerned cases before the European Court of Justice under the 'Equal Treatment Directive' (Directive 79/7/EEC) in respect of the discriminatory effects of linking benefit entitlement to the then different state pension age for women. These successes were halted by the decisions of the ECJ in *Secretary of State of Social Security v Graham* (Case C-92/94) [1995] ECR I-2521 and *Hepple v*

Chief Adjudication Officer (Case C-196/98) [2000] ECR I-3701. Undaunted, Richard 'appealed' the ECJ's decision in *Hepple* to the European Court of Human Rights. He was (perhaps unsurprisingly) unsuccessful. However, the Grand Chamber of the European Court of Human Rights' ground breaking decision in *Stec v United Kingdom* (2005) 41 EHRR SE 18 found for Richard, establishing that means-tested benefits are "possessions" within the ambit of Article 1 of the First Protocol of the ECHR sufficient to found discrimination arguments under Article 14 of the same Convention.

The final case I wish to highlight is perhaps a favourite of mine. In *Howker v Secretary for Work and Pensions* [2002] EWCA Civ 1623 Richard and I worked closely when I instructed him as Legal Officer at the Child Poverty Action Group. It might be described as establishing a high water mark for procedural *ultra vires*. Notwithstanding the best efforts of Philip Sales (for the Secretary of State) and John Howell QC (for the Social Security Advisory Committee (SSAC)), the Court of Appeal allowed Mr Howker's appeal. They ruled that the Secretary of State's misleading of SSAC (as to the effect of the proposed new regulations) had led to the important procedural protection of the draft regulations being referred to them being avoided. Parliament was thus denied a SSAC report before making the regulations. The result was that the regulations were *ultra vires* and of no effect. *Howker* illustrates for me Richard's ability to use principles of public law for the benefit of social security claimants, some of the most marginalised people in society.

Richard, as social security 'trainspotting' lawyers go (and I use the word 'trainspotting' in a wholly positive sense), you were the best and the greatest social security trainspotter of them all, and so much more.

