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Case No: C1/2008/0698

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT
LORD JUSTICE MAURICE KAY and MR JUSTICE BURTON
CO/6174/2007

Strand, London, WC2A 2LL

Date: 28/07/2008

Before :

LORD JUSTICE BUXTON
LORD JUSTICE TUCKEY
and
LORD JUSTICE KEENE

- -

Between :

R(C)	**Appellant**
- and -	
The Secretary of State for Justice	**Respondent**

- -
- -

Mr Patrick O'Connor QC and Mr Duran Seddon (instructed by **Bhatt Murphy**) for the **Appellant**
Miss Nathalie Lieven QC and Miss Sarah-Jane Davies (instructed by **The Solicitor to Her Majesty's Treasury**) for the **Respondent**
Mr Richard Hermer and Miss Carolyn Hamilton on behalf of **The Children's Commissioner,** intervening by written submissions
Ms Karon Monaghan QC on behalf of **The Equality and Human Rights Commission,** intervening by written submissions

Hearing dates : 16 and 17 July 2008

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Approved Judgment

Lord Justice Buxton :

1. The preparation of the appeal took an unsatisfactory form. The appellant filed a 61 page skeleton, to which was appended a 24 page "summary of evidence", together with 89 authorities. The Secretary of State filed a further 10 authorities, and the Equality and Human Rights Commission, although only an intervener, another 23. It accordingly proved difficult to reduce the proceedings to a coherent form, and that difficulty will no doubt be reflected in the judgment that follows.

Brief summary of the issues

2. The case concerns the permissible physical restraints that can be imposed on persons who are detained in Secure Training Centres [STCs]. STCs accommodate persons who either have been sentenced to custody or have been remanded in custody by a court. Their population contains males aged between 12 and 14; females aged between 12 and 16; and males aged between 15 and 17 and females aged 17 who are classified as vulnerable.

3. All of the four STCs in England and Wales are operated by private contractors under contract with the Secretary of State. By section 7(2) of the Criminal Justice and Public Order Act 1994, and also under the terms of the operators' contracts with the Secretary of State, STCs have to be run in accordance with the Prison Act 1952 and the Secure Training Centre Rules. So far as permissible physical restraint is concerned, until July 2007 the rules restricted the use of physical restraint to cases where it was necessary for the prevention of escape, damage to property, and injury either to the person restrained or to another. In June 2007 the Secretary of State laid before Parliament the Secure Training Centre (Amendment) Rules 2007 [the Amendment Rules]. Their effect is to add to the permissible uses of restraint the case where restraint is thought to be necessary for the purposes of ensuring good order and discipline: the latter expression conveniently referred to in these proceedings by the shorthand of GOAD. As will be seen, "restraint", although the statutory term, bears an extended meaning in practice, which again has in these proceedings been conveniently referred to as Physical Control in Care [PCC].

4. These proceedings seek to quash the Amendment Rules, for two types of reason. First, in purely domestic terms it is contended that the Amendment Rules were laid before Parliament in breach of various rules of law in relation to prior consultation and to the making of a Race Equality Impact Assessment [REIA]. The Divisional Court held that there had been breaches in two respects, but declined to grant the remedy of quashing the Amendment Rules. The Secretary of State does not appeal the finding that he failed to fulfil those duties. The appellant appeals against the Divisional Court's refusal of relief. Second, it is contended that the Amendment Rules involve or actually are breaches of articles 3 and 8 of the European Convention on Human Rights [ECHR]. The appellant failed in both of those respects before the Divisional Court, and appeals that finding to this court.

5. Much was made on both sides of the circumstances in which and the reasons for which the Amendment Rules were introduced, and the practical implications of their being quashed. As the hearing proceeded, it became clear that the history, at first sight of only background interest, was of some significance to the legal issues before us, and that there were relevant aspects of it that had not been ventilated before the

Divisional Court. And during the hearing it also became clear that the Secretary of State relied on some practical and operational issues that again had not been raised, or at least had not been stressed, before the Divisional Court. It will, therefore, be necessary to give some account of those matters before turning to the legal issues. Before doing that, it will be convenient for purposes of reference to set out, without further comment at this stage, the relevant terms of the rules, and of an associated Code of Practice that played a significant part in the argument.

The rules and Code of Practice

6. Before amendment, the relevant rules read as follows:

> 36 (1) Where it appears to be necessary in the interests of preventing him from causing significant harm to himself or to any other person or significant damage to property that a trainee should not associate with other trainees, either generally or for particular purposes, the governor may arrange for the trainee's removal from association accordingly.
>
> (2) A trainee shall not be removed under this rule unless all other appropriate methods of control have been applied without success.
>
> (3) A trainee who is placed in his own room during normal waking hours in accordance with arrangements made under this rule shall ...
>
> (c) be released from the room as soon as it is no longer necessary for the purposes mentioned in paragraph (1) above that he be removed from association ...
>
> 37 (1) An officer in dealing with a trainee shall not use force unnecessarily and, when the application of force to a trainee is necessary, no more force than is necessary shall be used.
>
> (2) No officer shall act deliberately in a manner calculated to provoke a trainee.
>
> 38 (1) No trainee shall be physically restrained save where necessary for the purpose of preventing him from
>
> (a) escaping from custody;
>
> (b) injuring himself or others;
>
> (c) damaging property; or

(d) inciting another trainee to do anything specified in paragraph (b) or (c) above,

and then only where no alternative method of preventing the event specified in any of paragraphs (a) to (d) above is available.

(2)No trainee shall be physically restrained under this rule except in accordance with methods approved by the Secretary of State and by an officer who has undergone a course of training which is so approved.

7. The Amendment Rules added the words "for the purposes of ensuring good order and discipline or" after the word "necessary" in the first line of rules 36(1) and 38(1), thus extending the permissible uses of PCC to the ensuring of GOAD.

8. Behaviour management in STCs is governed by a Code of Practice issued by the Youth Justice Board [YJB] in 2006. The parts of the Code of Practice discussed in these proceedings read as follows:

10. A system for restrictive physical intervention

10.1 Only staff who are properly trained and competent to use restrictive physical interventions should undertake them.

10.2 Restrictive physical interventions must only be used as the result of a risk assessment.

10.3 They must be mindful of the particular needs and circumstances of the child or young person being restrained (for example, medical conditions or pregnancy).

10.4 Restrictive physical interventions must not be used as a punishment, or merely to secure compliance with staff instructions.

10.5 Any intervention must be in compliance with the relevant rules and regulations for the establishment, and carried out in accordance with methods in which the member of staff has received training.

10.6 Restrictive physical interventions must only be used as a last resort, when there is no alternative available or other options have been exhausted.

10.7 Methods of restrictive physical intervention that cause deliberate pain must only be used in exceptional circumstances.

10.8 Restrictive physical interventions must be carried out with the minimum force, and for the shortest possible period of time.

10.9 The degree of physical intervention must be proportionate to the assessed risk.

10.10 Every effort must be made to ensure that other staff are present before the intervention occurs.

The history

Preliminary: varieties of PCC

9. It is not possible to understand the history, or the appeal, without setting out in some detail what happens in practice under the authority of the rules. Rules 36 and 38 contemplate two different modes of intervention: removal from association with other trainees (rule 36); and physical restraint (rule 38). We are almost entirely concerned with the latter, PCC.

10. PCC comprises two elements, what we might call restraint proper; and "distraction techniques". So far as restraint is concerned, a number of specific "holds" are permitted. These are used to prevent damage or injury by the person held but also, we were told during argument, to restrict a person offending against GOAD until he agrees to comply. Distraction techniques are different. The YJB in its evidence to the House of Lords and House of Commons Joint Committee on Human Rights in 2008 [the JCHR] described them as relying on techniques that create pain, for instance by a blow to the nose or by pulling back the trainee's thumb. The YJB said in its evidence that the techniques

> ...are designed for use in dangerous or violent situations where a person is at serious risk of injury. Distraction techniques inflict a momentary burst of pain to the nose, rib or thumb to distract a young person who presents a danger to him/herself or others.

After criticism of its effectiveness, the nose distraction technique was withdrawn by the Secretary of State in December 2007.

The inquests and their aftermath

11. Unhappily, the Amendment Rules, and the controversy that they have caused, sprang from two deaths in the custody of STCs. On 19 April 2004 Gareth Myatt, a detainee in Rainsbrook STC, died whilst being restrained by staff. On 8 August 2004, Adam Rickwood, a detainee in Hassockfield STC, was found hanging in his room having taken his own life after he had been subjected to restraint by staff. The inquest into Adam Rickwood's death revealed a good deal about practice in the use of PCC in STCs. That included information that appeared to be unknown to the Secretary of State, despite what one supposes to be his public duty to monitor and control what is

being done by the private contractors to whom he has chosen to entrust persons deprived of their liberty by the courts.

12. The JCHR, at §33 of its report, gave a circumstantial account of the death of Gareth Myatt, a six and a half stone fifteen year old, who was asphyxiated whilst being restrained in an approved hold by three members of staff. I do not set out what the members of staff are alleged to have said and the approach that they adopted during that process, it being fully available in the JCHR report. If that account is true (and it has not been suggested to us that it is not) it demonstrates an outrageous attitude on the officers' part. Adam Rickwood, aged 14, hanged himself shortly after he had been restrained by use of the nose distraction technique. The circumstances in which that technique came to be used were thoroughly examined by the Serious Case Review Panel [SCRP] of the Lancashire Safeguarding Children Board, who produced a very full report on all aspects of the case. They reported, at their page 10, that

> Adam Rickwood was a model trainee and...the incident just prior to his death was his first episode of non-compliance and his first experience of being restrained. He was reported to have acted aggressively thereby evoking the ultimate restraint response. However, there was some video evidence that [sic] suggesting he did not respond in an overly aggressive manner.

And in their conclusions, at § 15.1 of the report, the SCRP said:

> On the evidence available to the SCRP, it is probable that AR should not have been restrained. It is improbable that it was necessary for the purpose of preventing him from doing any of the things specified in rule 38....The SCRP is concerned about the use of the "nose distraction" technique, particularly within a system which purports not to rely on pain compliance.

The inquiry also considered that what had been done was not in accordance with directions set out in the YJB *Physical Control in Care Training Manual*. I shall have to say more about this Manual in due course.

13. This evidence and enquiries demonstrated that there were two issues of potential, indeed of grave, concern. First, PCC appeared to be being used in cases where the law, as set out in rule 38, did not authorise it. Second, PCC techniques were being used that were inappropriate, excessive, or positively forbidden. That should have required immediate attention by those running the STCs; and immediate attention by the Secretary of State. His responsibility is to ensure that persons for whose custody he is responsible are not treated unlawfully. But, in addition, the contract for the running of STCs that we were shown provided that physical force should only be used on trainees for the purposes set out in the then rule 38, and continued

> Physical force will not be used at the Secure Training Centre on any Trainee for any other purpose nor will it be used on any Trainee simply to secure compliance with staff instructions.

14. Far from the STCs appreciating that they had been acting unlawfully or, apparently, the Secretary of State immediately reminding them of their contractual obligations, the STCs took the position that what had been done in the case of Adam Rickwood had been entirely lawful. That is apparent from a statement made in the present proceedings by Mr Trevor Wilson-Smith, the Director of Hassockfield STC, where Adam Rickwood had died, and as such an employee of Serco Home Affairs, the company that holds the contract to operate that establishment. At §10 of his statement Mr Wilson-Smith says:

> My position at the inquest into the death of Adam Rickwood was that the use of reasonable force to ensure compliance with instructions was lawful. Alternatively, Rules 36 and 38 of the STC were ultra vires the primary legislation, namely Section 9 of the Criminal Justice and Public Order Act 1994. I believed that both Rules 36 and 38 severely restricted the ability of Care Officers to maintain good order and discipline. I also believed that the primary legislation conferred to duty to ensure good order and discipline in an STC and gave power to use reasonable force to ensure good order and discipline.

According to Mr Wilson-Smith, that same view of the legislation was urged on the coroner by leading counsel instructed by Serco Home Affairs.

15. Mr Wilson-Smith, and leading counsel instructed by his employers, were wrong in their construction of the legislation, for the reasons set out by the Divisional Court in §§ 14 and 35 of its judgment. And, whatever the view of those running the STCs about the terms of the legislation, their contract with the Secretary of State made entirely clear what their obligations were, obligations that were inconsistent with the way in which Mr Wilson-Smith said that he in fact ran Hassockfield. The YJB, if not the Secretary of State as such, was represented at the Rickwood inquest, but there is no sign that it intervened to make clear that the policy asserted by its contractor was in breach of Serco's contractual obligations. Small wonder therefore that the Coroner wrote to the Secretary of State recommending urgent clarification of the legal position, in particular in relation to the claims made before him by the STCs.

16. That request had, however, been anticipated by the YJB, which on 27 May 2007 had written to the Directors of all STCs in these terms:

> The legal position is that the STC rules describe the only circumstances in which the powers provided for in section 9 of the Criminal Justice and Public Order Act 1994 can be used by officers in carrying out their duties.
>
> This means that restraint can only be lawfully used in the circumstances described in rule 38 of the STC rules. This position reflects the terms and conditions of the contract as set out in Schedule D, M5. The YJB will be monitoring STCs closely to ensure compliance with the STC rules and with the contract in this regard.

> I want to reassure you that the YJB has been working closely with the Ministry of Justice and previously the Home Office to amend the STC Rules in line with previous consultation with yourselves. I am advised that changes are imminent. In the meantime, it is your responsibility to ensure that the use of force within your establishment is being carried out lawfully.

Changes were indeed imminent, the Amendment Rules being laid before Parliament three weeks after the YJB's letter.

17. When opening the Secretary of State's case before us Miss Lieven QC submitted that the Amendment Rules were required, and were introduced, to remove the uncertainty that had been identified for instance by the coroner, with the corollary that quashing of the Amendment Rules would reintroduce the uncertainty that had previously reigned. That submission was entirely inconsistent with the YJB's letter of 27 May 2007. That could not have been clearer as to the legal position and the obligations of the STCs. The Amendment Rules were not thereafter needed for any purpose of clarification, and were not introduced for that purpose. What the YJB's letter goes on to make clear is that the Amendment Rules were introduced, after consultation with those operating the STCs, deliberately to change that legal position, in order to legitimise the use of PCC for the purposes of GOAD: the practice that the evidence of the STCs at the Rickwood inquest had not merely revealed but also sought to justify.

18. Faced with this difficulty, a different case was developed before us to demonstrate the reasons for making the Amendment Rules and the difficulties that would be caused by their removal. That was that serious problems would arise in the running of STCs if PCC was not available to ensure GOAD. That is important not only in relation to whether the Amendment Rules, admittedly introduced in breach of legal requirements of consultation, should nonetheless remain in force; but also when considering the requirements of necessity for particular forms of intrusive conduct that are imposed by articles 3 and 8. It is therefore necessary to address that part of the Secretary of State's case in a separate section of the judgment.

19. I will be forgiven for making the preliminary observation that this case does not seem to have been made before the Divisional Court, or at least its centrality was not appreciated by that court; it was not mentioned, nor any evidence given about it, by the Secretary of State's deponent before the Divisional Court; it is difficult or impossible to identify it in the 24 page skeleton argument filed by the Secretary of State two days before the hearing; and the case as addressed in the following section of this judgment really only emerged under questioning by this court, and depended a good deal more on the considerable forensic skills of Miss Lieven than upon any evidence-based statement of policy on the part of the Secretary of State.

The need for PCC to ensure GOAD

The evidence

20. The Secretary of State filed no evidence of his own on this point. Miss Lieven however took us to two documents, neither of them, as already indicated, mentioned in her skeleton argument. The first was the witness statement of Mr Wilson-Smith, already introduced in §14 above. The origin of this statement was that Hassockfield

STC (or, more accurately, Serco) sought to intervene in these proceedings when they were before the Divisional Court, and Mr Wilson-Smith's statement was made in support of that intervention. It is not necessary to try to explain the order that was made, since in the event Serco did not take any active part in the proceedings before the Divisional Court. Nor did the Secretary of State before the Divisional Court rely on what Mr Wilson-Smith had said. Before us, however, the Secretary of State did rely on this statement, which continued to assert a view of the legal position that the YJB had said, in its letter of 27 May 2007, to be incorrect. Mr Wilson-Smith then said, at his §11:

> I identified myself with the submissions made on behalf of Serco Home Affairs to the effect that the evidence heard at the inquest into the death of Adam Rickwood by Care Officers, Trainers and Managers served only to underline the fact that, stripped of the power to tell young people to go to their rooms/move to another part of the Centre and of the corresponding power to use force as a last resort, STC's would potentially descend into anarchy. Moreover the staff would lose control and the underlying aims of the Act would not be able to be achieved. I genuinely believed that Centres would have to close. That remains my firm view today.

That is indeed a strong statement, that demands a number of comments.

21. First, it is not merely a technical objection that Mr Wilson-Smith's evidence was not relied on by the Secretary of State before the Divisional Court, but was present in the papers only as a statement made by a different party for a purpose that was no longer active. Had this been the Secretary of State's evidence before the Divisional Court, I have no doubt that the applicant would have wanted to cross-examine the deponent, or at the least to make substantial submissions to the court about what he said. That examination would have stressed that the statement was in terms of pure assertion, apart from a reference to evidence that by no means necessarily carries the point that Mr Wilson-Smith extracts from it. And there is other material pointing in a different direction that could legitimately have been put to Mr Wilson-Smith.

22. Second, the SCRP (see § 12 above) gave very careful consideration to the evidence at the inquest to which Mr Wilson-Smith refers, and reached significantly different conclusions on the basis of it.

23. Third, despite the absence of a formal consultation process a significant range of persons expressed concern at the proposed introduction of the Amendment Rules. These included persons with experience of running penal institutions, as well as bodies such as the Children's Commissioner and the NSPCC with concerns for the welfare of children. This evidence was not scrutinised in detail before us, and was not put forward in an attempt to undermine what was said by Mr Wilson-Smith. The point rather is that in the absence of evidence from the Secretary of State there are positive reasons for not doing what Miss Lieven invited us to do, and use our commonsense to assume that the forebodings now expressed by the Secretary of State must be soundly based.

24. Fourth, I regret to have to say that Mr O'Connor was justified in asking us in any event to look with scepticism at the statement of Mr Wilson-Smith. His STC, under his management, has been strongly criticised in the wake of the death of Adam Rickwood and the practices revealed at the inquest, and it is understood that further proceedings are pending in that regard. He had every incentive to stress the necessity of the practices that had been followed, and the aggressively justificatory tone of his statement does nothing to deflect those concerns. I am not surprised that the Secretary of State did not rely on the statement earlier in the proceedings. I regret that he sought to do so before us.

25. The other document relied on by Miss Lieven was the draft Explanatory Memorandum for the Amendment Rules which were to be laid before Parliament by the Secretary of State. Again, this document does not appear to have been referred to by anyone in these proceedings until it was read to us by Miss Lieven in the course of her submissions in this court. The Memorandum read, in its §§ 3.1 and 7.4:

> Operational advice is that the use of physical restraint [to ensure GOAD] is essential to allow for the safe operation of secure training centres and accordingly we have decided that the appropraite [sic] changes to the 1998 Rules are required immediately. .....[7.4] Good order and discipline are essential if any custodial establishment is to be run safely. Physical restraint of young people in custody should be used only as the last resort, but there can be occasions where lack of a clear power to secure compliance with instructions may put the safety of the establishment as a whole at risk or at least make its running extremely difficult. Without the powers that the [Amendment Rules] prescribe, it would not be possible to ensure that centres continue to operate in the orderly way that is necessary if safety is to be maintained.

26. This again is cast in terms of pure assertion, perhaps appropriate for the purpose for which it was written, but not appropriate if the document is relied on as evidential proof. We know nothing of the source and terms of the "operational advice" on which the assertions are based; and I will not speculate as to whether Mr Wilson-Smith was one of the sources relied on.

27. I have gone through this material in some detail because it is the only material adduced by the Secretary of State in support of what turned out to be a central part of his case. The material cannot serve as evidence to support that case, and the Secretary of State therefore necessarily fails on that point. There are, however, further reasons why this part of the Secretary of State's case is unpersuasive.

The Secretary of State envisages changes in the regime

28. In her submissions about whether the court should issue a quashing order, to which I come below, Miss Lieven said that of central importance was the "wide-ranging review" of the use of PCC throughout all types of juvenile custodial establishments that the Secretary of State had commissioned in the wake of the Rickwood inquest. That review had reported to the Secretary of State in June, and he expected to announce future policy in the light of it at the end of October. Miss Lieven adduced

as a reason for not interfering with the Amendment Rules that it was possible that the regime that they established might be altered in that policy review. We await to see whether or not that happens. The point at the present stage of the case is that if changes to the availability of PCC to ensure GOAD are even contemplated, and we were assured that that option remains open, then it cannot be the case that the availability of PCC to enforce GOAD is seen as necessarily essential to the continued safe running, indeed essential to the continuation in operation, of STCs, as Mr Wilson-Smith, supported by the Secretary of State, would wish us to think.

A comparison between STCs and LASCHs

29. Second, there are significant difficulties for the Secretary of State's argument in a comparison with the arrangements in Secure Children's Homes. The Divisional Court explained the nature of these institutions in its §§ 8-9:

> STCs exist alongside Secure Children's Homes run by local authority social services departments (LASCHs). According to the YJB, LASCHs
>
> ... focus on attending to the physical, emotional and behavioural needs of the young people they accommodate ... [they] provide young people with support tailored to their individual needs. To achieve this, they have a high ratio of staff to young people and are generally small facilities, ranging in size from 6 to 40 beds. [They] are generally used to accommodate young offenders aged 12 to 14, girls up to the age of 16 and 15 to 16 year old boys who are assessed as vulnerable.
>
> If one takes, for example, a 15 or 16 year old vulnerable male, he could be detained in a STC or a LASCH, the decision resting as much on matters of geography and place availability as on anything else. LASCHs are governed by different primary and secondary legislation. Pursuant to powers conferred upon him by the Care Standards Act 2000, the Secretary of State has made the Children's Homes Regulations 2001. These Regulations, and in particular Regulation 17 which governs behaviour management, discipline and restraint, are structured differently from the Secure Training Centre Rules, and there is a distinct Good Practice Guidance issued in relation to LASCHs by the Secure Accommodation Network. It is common ground that removal from association and physical restraint purely for GOAD purposes are not permitted under the LASCH regime.

30. If allocation to STCs and to LASCHs is interchangeable in the way described by the Divisional Court, it is very difficult to see why PCC to ensure GOAD is essential in STCs, but not essential in LASCHs. When this point was put to him, the Secretary of State sought to meet it by saying that LASCHs are significantly different institutions from STCs. I examine that claim in the following paragraphs, but first it should be noted that, as the Children's Commissioner pointed out in valuable submissions to

this court, the view expressed by the Divisional Court was fully justified by evidence before it that had gone unanswered by the Secretary of State. That evidence was provided by Mr Roy Walker, a manager of a LASCH and deputy chairman of SAN, the umbrella organisation for LASCHs. He said:

> LASCHs provide care for the same groups of young people who may also be placed in [STCs] and in fact STCs are associate members of SAN. By way of example we presently have children in the age range of 12-17 including those charged with serious offences up to and including murder as well as sentenced young people.

31. The Secretary of State said that that was an incomplete picture. Differences between STCs and LASCHs included that LASCHs also accommodated children in care, rather than involved in the criminal justice system, of as young as ten years; could refuse to accept a particular child, as an STC could not; and had a higher staffing ratio than did STCs.

32. The first of these points is irrelevant. The question is whether PCC to enforce GOAD is necessary for the range of children that find themselves in STCs. If it is needed there, it is needed for *those* children if they find themselves in a LASCH. That there may be *other* children in LASCHs for whom the regime is unnecessary or inappropriate only goes to demonstrate a further difficulty for the case, which will appear when it is tested against the requirements of the ECHR. PCC to ensure GOAD is made available to an institution in "blanket" terms, without any formal consideration of the types of person within the institution for whom it is appropriate. I agree that the second point has some potential relevance, but without further information about the extent and terms in which a LASCH can or does refuse a placement it is impossible to assess its force. Had the point been raised earlier it would have been important to have the view of Mr Walker upon it. That this is a significant difference does not seem consistent with the general tenor of his evidence.

33. The third point, that STCs have a worse staffing ratio than LASCHs, caused the court great concern when it was raised before us. Prudently, Miss Lieven declined an invitation to explain the exact relevance of the point, contenting herself with saying that it was merely a respect in which the two types of institution are different. It is hardly necessary to say that if the Secretary of State was indeed influenced in his policy of introducing PCC to enforce GOAD in STCs but not in LASCHs by any need to cover defects in staffing provision in the former, commercially run, establishments, then that would be fatal to any prospect of justifying that policy in ECHR-compliant terms.

34. It has been necessary to set out the arguments on these issues in some detail, not only because they changed a good deal from what was before the Divisional Court, but also because they are important in understanding the legal issues in the appeal: to which I now come.

Failure to consult, and the appropriate remedy

The failures as found by the Divisional Court

35. The Divisional Court rejected most of the complaints about failure on the part of the Secretary of State to consult before laying the Amendment Rules before Parliament, but it found against the Secretary of State in two respects, neither of which holdings is the subject of appeal by the Secretary of State.

36. First, it was accepted by the Secretary of State, under the general head of *Wednesbury* unreasonableness, that if the amendment rules had reflected a significant change of policy in relation to children there would have been wider consultation in particular with the Children's Commissioner [CC]. However, the Secretary of State's case was that the Amendment Rules represented no such change of policy, so the obligation to consult the CC was not triggered.

37. Like the Divisional Court I cannot see how the Secretary of State and his counsel (not at that stage Miss Lieven) could have so thought, and much less could have advanced that argument in court. We have already seen how the purpose of the Amendment Rules was to change the legal (and therefore inferentially at least the contractual) rules governing the management of STCs, and that that was made entirely clear in the YJB's letter of 27 May 2007: see §16 above. The change in *policy* was therefore plain. The Secretary of State's position could only be saved by saying, in terms that there was some inclination to repeat before us, that the Amendment Rules brought about no change because they had merely legitimised existing *practice*, as demonstrated by the evidence of the STCs at the Rickwood inquest. As the Divisional Court commented with, with respect, considerable restraint in its § 33:

> there is something unattractive about the stance of the Secretary of State. It embraces the proposition that the previous use of removal from association and restraint for GOAD purposes was in accordance with Government policy, even if it contravened Rules 36 and 38.

38. The Secretary of State relied on the proposition that the Code of Practice (see §8 above), and in particular that the provision in paragraph 10.4 that restraint could not be used merely to secure compliance with staff instructions, had remained the same throughout, and therefore policy could not have changed. That argument is revelatory as to the Secretary of State's view of the function of the Code of Practice, a matter to which I will have to return. In the present context it was rejected out of hand by the Divisional Court, which said in its §35 that the issue of the permissible ambit of the use of restraint

> was resolved in a particular, limited way in the 1998 Rules and, in our judgment, it was resolved in broader, less limited ways by the Amendment Rules in 2007. We unhesitatingly characterise that as a significant change of policy and we do not consider that the Secretary of State, if he had applied [his] mind to it, could reasonably have seen it in a different way. For these reasons we conclude that, so far as consultation with the CC is concerned (and we do not feel able to reach the same

> conclusion about any other potential consultee), the *Wednesbury* challenge succeeds in substance

39. Second, it was accepted that the effect of section 71(1) of the Race Relations Act 1976 was to require a race equality impact assessment [REIA] where it was proposed to change policy in a matter that might raise issues about racial equality. This was plainly such a matter, in view of the significant numbers of black and ethnic minority trainees (who include the claimant in this case) accommodated in STCs. The Secretary of State said that he was not required to perform an REIA because his policy had not changed. The Divisional Court rejected that argument for the same reason as it rejected the argument in relation to failure to consult the CC.

The relevant law on relief

40. At its §48 the Divisional Court cited, and apparently were much influenced by, some observations of Webster J in *R v Secretary of State for Social Services ex p the AMA*, [1986] 1 WLR 1 at p15. This passage was strongly relied on by the Secretary of State before us. It reads:

> ... it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be *ultra vires*, to revoke the instrument, but ... the inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument ... in principle, I treat the matter as one of pure discretion.

41. It has proved difficult to find other authority on the specific point. Webster J's dictum does not seem to be discussed, much less adopted, in any of the standard works on administrative law, and for my part I would not wish to endorse it. As with any administrative decision, the court has discretion to withhold relief if there are pressing reasons for not disturbing the status quo. It is, however, wrong to think that delegated *legislation* has some specially protected position in that respect. If anything, the imperative that public life should be conducted lawfully suggests that it is more important to correct unlawful legislation, that until quashed is universally binding and used by the public as a guide to conduct, than it is to correct a single decision, that affects only a limited range of people.

The Divisional Court's reasons for not quashing the Amendment Rules

42. I accordingly approach the decision made by the Divisional Court on the back of Webster J's dictum with some caution. The reasons that they gave for their decision were set out in their §§ 50-51:

> 50. In the present case, [counsel] refers to a number of factors which, he submits, militate against the grant of such relief. He places particular reliance on the following: (1) the fact that, unusually in a negative resolution case, there was a substantial, informed debate about the Amendment Rules prior to their coming into force and Parliament was aware of the limited nature of the consultation that had taken place; (2) although the

> CC and others were denied formal consultation, Parliament was aware that he and they had concerns that were being overridden; and (3) in the event, Lord Carlile did not press his motion to annul the Amendment Rules in the House of Lords because he and others accepted that the Secretary of State has established a wide-ranging review of the issues which is expected to result in a report in April 2008, in the light of which the position will receive further consideration. These three points are all documented in the *Hansard* report of proceedings in the House of Lords on 18 July 2007, cols 281-311.
>
> 51. In our judgment, these are all important considerations. They lead us to the conclusion that it would not be appropriate to quash the Amendment Rules on the application of a claimant who is no longer at risk of action against him for the purpose of ensuring GOAD and in circumstances where the whole issue is receiving active consideration in good faith within a reasonable timescale. That reconsideration enables the legal deficits (failure to consult, in particular, the CC and failure to carry out a race equality impact assessment) to be remedied.

43. I am unable to agree with that analysis. I do not comment further on the fact that the claimant (who has left his STC) is no longer at risk. That was only mentioned in passing by the Divisional Court, and is irrelevant because these proceedings have been accepted on all sides as being in the nature of a general, test case. The problems in relation to the other grounds mentioned are as follows.

44. *The relevance of the Parliamentary debate.* There are two objections to reliance on the House of Lords debate, one practical and one of principle. The practical objection is that it is very hazardous to draw any conclusions from the observations of various speakers in a debate, and particularly a debate that is not pressed to a vote, as to what the majority of members understood, let alone decided or were prepared to overlook. To say or suggest that "Parliament" had approved the failure to consult the CC is therefore an assumption too far.

45. The objection of principle is that the Divisional Court's approach confuses two different constitutional functions. The legal obligation to take certain steps before laying legislation before Parliament is that of the executive. It is not Parliament's role to control that obligation: that is the function of the courts. Rather, the function of Parliament is simply to approve or disapprove the Amendment Rules as laid. Its failure to disapprove the Amendment Rules cannot supply the executive's failure to perform the legal obligations that it bears before laying the Amendment Rules in the first place.

46. The importance of these distinctions has recently been reiterated in this court in *R(Bancoult) v Secretary of State for Foreign Affairs (No 2)* [2008] QB 365. At §104 of his judgment Waller LJ reminded us of the observation of Taylor LJ in *R v Secretary of State ex p US Tobacco* [1992] QB 353 at p 372A:

> Although the Regulations were subject to annulment by negative resolution of the House of Commons but were not so annulled, Parliament would be concerned only with the objects of the Regulations and would be unaware of any procedural impropriety. It is therefore to courts, by way of judicial review, that recourse must be had to seek a remedy.

Nor is this important constitutional distinction confined to cases where Parliament has simply failed to disapprove subordinate legislation. I venture to cite an observation from *Hoffmann La Roche v Secretary of State for Trade* [1975] AC 295, one of the fundamental cases on the courts' control of delegated legislation. Lord Cross of Chelsea said at p 372D:

> I am not, any more than my noble and learned friend Lord Diplock, prepared to agree with the view apparently expressed by Lord Denning MR that an order made by statutory instrument acquires the status of an Act of Parliament if it is approved by resolutions of both Houses of Parliament.

47. I am accordingly unable to agree with this reason given by the Divisional Court for not quashing the Amendment Rules.

48. *The "wide-ranging review" and absence of an REIA.* Reliance on the (prospective) wide ranging review as a reason for the court not intervening suffers from the problem identified by Taylor LJ in relation to the Parliamentary process, in that the review is into the *merits* of PCC, and not at all into the question here at issue, the *process* whereby PCC was extended to GOAD. In particular, it cannot supply the defect of omission of an REIA. That was somewhat belatedly realised after the Divisional Court had given judgment, and the court extracted from the Secretary of State an undertaking, not previously offered to the court, to conduct an REIA. I deal below with the position now that an REIA has been produced. The omission of an REIA was however a serious matter.

49. Leading judges have stressed the importance of REIAs as an instrument in guarding against race discrimination. They include Arden LJ in *R (Elias) v SSHD* [2006] 1 WLR 321 [274] and Sedley LJ in *R(BAPIO)v SSHD* [2007] EWCA Civ 1139. In the latter case Sedley LJ said at § 3 that the decision in that case not to interfere with the trial judge's decision not to quash the alteration of the Immigration Rules that had taken place without an REIA

> does not in any way diminish the importance of compliance with s71, not as a rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government.

I respectfully agree. In the present case, absence of an REIA was the result not of inattention but of a mistake made by the Secretary of State. It was however a mistake that the Divisional Court found very surprising: see § 38 above. In my view it sent out quite the wrong message to public bodies with responsibilities under section 71 to allow that deficit to be cured by a review only undertaken eight months after the Amendment Rules had been laid, and in the face of an adverse court decision; and

only completed a year after the Amendment Rules were laid, and four days before the hearing in this court. That process has also produced the result that the REIA needed to come to a particular conclusion in order to preserve regulations that the court has found to have been introduced unlawfully. I do not of course in any way doubt the good faith of the grade seven civil servant who has produced an REIA that demonstrates that PCC is not applied in a discriminatory fashion. But as a matter of principle it cannot be right that a survey that should have been produced to inform the mind of government before it took the decision to introduce the Amendment Rules was only produced in order to attempt to validate the decision that had already been taken.

50. I therefore consider that the reasons given by the Divisional Court for not quashing the Amendment Rules were mistaken. That court should have quashed those regulations.

Should this court now quash the Amendment Rules?

51. Although much is said about the decision of the lower court in this matter being one of "discretion", it was not suggested that it was an exercise of discretion with which this court can only interfere on "*Wednesbury*" grounds. We have to make up our own mind as to the proper course now to be followed.

52. The position now is that four days before the hearing the Secretary of State produced the promised REIA, which did indeed validate the Amendment Rules in that respect. And although there has still not been formal consultation with the CC, he has had his day in court. In addition to those points, Miss Lieven said that there were two further and important considerations. First, the review had now reported, albeit three months later than the Divisional Court had been led to expect. The Secretary of State was not prepared to reveal what the review had recommended, but in the light of the review he would be producing his own considered view of policy in regard to the use of PCC throughout youth custody institutions at the end of October. The implication was that everything should remain as it is until then. Second, as we have seen Miss Lieven stressed the uncertainty; and then the positive difficulty; that would be produced if the Amendment Rules were quashed: see §§ 17-18 above.

53. For the reasons set out in §§ 20-34 above I am unable to accept that latter element in Miss Lieven's submissions. Nor do I find relevant the possibility of future changes of policy. As I have indicated when discussing the position before the Divisional Court, the present issue is as to the procedural legality of the Amendment Rules, and not as to the merits of the regime that they introduce. A change in the latter will not cure the former defect. The only issue is, therefore, whether quashing remains an appropriate remedy in view of events that have occurred in the five months since the hearing before the Divisional Court.

54. In considering that issue I am strongly influenced by the failure to produce an REIA. Although here characterised as a procedural defect, it is a defect in following a procedure that is of very great substantial, and not merely technical, importance, as the observations of Arden and Sedley LJJ make clear. It continues to be of the first importance to mark that failure by an appropriate order. That an REIA has now been produced, more than a year after it should have been, is by no means conclusive on this issue of principle, granted the unsatisfactory conditions under which that work

was undertaken. Miss Lieven pointed out that despite this court's strictures in *BAPIO* it did not interfere with the refusal of the trial judge to quash the regulations. But that was a case where the mistake had been realised and corrected before the matter came to court, and was the subject of proper apology. Neither of those things is true in this case.

55. Accordingly, I continue to consider that the rule of law and the proper administration of race relations law require the Amendment Rules now to be quashed. I would so order.

56. That order, if my Lords are of the same mind, suffices to dispose of these proceedings. It is, however, important that we should go on and address additionally the position under the ECHR, since that affects the substance of the regime contained in the Amendment Rules, and not just the procedure by which the Amendment Rules were introduced.

Article 3

57. It is necessary to stress three preliminary matters.

The state's obligations under article 3 to trainees in STCs.

58. We tend to think of obligations under article 3 in terms of extreme violence, deprivation or humiliation. Convention jurisprudence however makes clear that depending on the circumstances article 3 may be engaged by conduct that falls below that high level. Two circumstances that have been identified as imposing special obligations on the state are that the subject is dependent on the state because he has been deprived of his liberty; and that he is young or vulnerable. That is the uniform jurisprudence of the ECtHR, to quote by way of example only the court's judgment in *Selmouni v France* (1999) 29 EHRR 403, where at §§ 99-100 the court said

> The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading. In any event, the Court reiterates that, in respect of a person deprived of his liberty, resort to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3....The Court considers that....the "minimum severity" required for the application of Article 3 [is], in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the age and state of health of the victim, etc.

59. Trainees in STCs are persons deprived of their liberty. It is clear from the above passage, and in particular from the use of the words "in any event", that the need for strict necessity for resort to physical force applies in every such case, and not just in cases of the type of force that was used in *Selmouni*. And the trainees are either males

aged less than 15; females aged less than 17; or persons of both sexes up to the age of 18 who are classed as vulnerable. They all require particular attention under the article 3 jurisprudence set out above.

The state's obligations to children

60. Trainees in STCs are children, some of them as young as twelve years old. In her seminal speech in *R(R)v Durham Constabulary* [2005] 1 WLR 1184 [26] Baroness Hale of Richmond reminded us that Convention jurisprudence requires article 3, as it relates to children, to be interpreted in the light of international conventions, in particular the Convention on the Rights of the Child, article 37(c) of which provides that

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

And in her equally important speech in *R(Williamson) v Secretary of State for Education* [2005] 2 AC 246 [84]-[86] Baroness Hale of Richmond emphasised that UN Committee on the Rights of the Child is

> Charged with monitoring our compliance with the obligations which we have undertaken to respect the rights of children…the authoritative international view of what the UN convention requires.

61. The JCHR pointed out to the Secretary of State that General Comment 8 of the UN Committee states that deliberate infliction of pain is not permitted as a form of control of juveniles. The Secretary of State denied that he sanctions the use of "violence" against children but, as the JCHR pointed out, that is exactly what PCC, at least in the form of distraction techniques, does provide for. Further, the Secretary of State appeared to suggest to the JCHR that he was bound only by the Convention, and not by the view of the UN Committee. The JCHR, at §30, stated that it was very disappointed by the Secretary of State's apparent lack of respect for the views of the UN Committee. So am I. And in view of the observations of Baroness Hale of Richmond that must raise serious doubts as to the degree of understanding with which the Secretary of State approaches his obligations under article 3.

The nature of PCC viewed in relation to article 3

62. The question is whether PCC is, or could be, degrading or, to adopt the language of §99 of *Selmouni*, diminishes the trainee's human dignity; or, in terms of the UN Convention, lacks respect for the trainee's inherent dignity.

63. No attempt was made to suggest that distraction techniques for good purposes passed any of those tests. So far as restraint is concerned, it can be seriously suggested that any use of restraint where it is not justified also fails those tests. But in any event, use of restraint threatens much more serious consequences. We have already seen that Gareth Myatt died from asphyxia while being restrained by a (then) approved

technique. That was not an unforeseeable outcome. At §37 of its report the JCHR said:

> The Prison Service Training Manual on PCC notes the potential dangers associated with the use of restraint:
>
> > A number of adverse effects are possible following the application of restraints. These include being unable to breathe, feeling sick or vomiting, developing swelling to the face and neck and development of petechiae (small blood-spots associated with asphyxiation) to the head, neck and chest.
> >
> > A degree of positional asphyxia can result from any restraint position in which there is restriction of the neck, chest wall or diaphragm, particularly in those where the head is forced downward towards the knees. Restraints where the subject is seated require particular caution.

64. I have no hesitation in saying that any system that involves physical intervention against another's will, and carries the threat of the sort of outcome identified by the Prison Service Manual, is in any normal understanding of language degrading and an infringement of human dignity. That is *a fortiori* the case when the person against whom that conduct is directed is a child who is in the custody of the state.

65. It might therefore be thought that all that remains to be considered is whether, although the conduct is *prima facie* in breach of article 3, it may be saved from condemnation under that article because, when applied to enforce GOAD, the availability of PCC is, in the terms used in *Selmouni*, strictly necessary in order to control the trainee's behaviour that is inconsistent with GOAD. But the Secretary of State urged a different approach, which had persuaded the Divisional Court, and which I must address in the next section of this judgment.

Article 3: the test of risk

66. Miss Lieven submitted that a regime would only be in breach of article 3 if it exposed the persons subject to it to a significant risk of treatment in particular cases that would be in breach of article 3. If the Amendment Rules were read with the Code of Practice, which for instance forbade PCC merely to secure compliance with staff instructions; required the use of minimum force; and permitted the causing of deliberate pain only in exceptional circumstances; then there was no significant risk of breaches of article 3 occurring.

67. For this proposition Miss Lieven relied heavily on the speeches in the House of Lords in *R(Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148. Munjaz was a patient in a secure mental hospital, who was subjected to long periods of "seclusion" on medical grounds. The trust running the hospital did not, apparently unlike other institutions, have a policy of regular medical reviews after a period of seven days seclusion. It was contended that that policy was itself in breach of article 3. In the passage relied on by Miss Lieven, at §29 of his speech, Lord Bingham said:

> The trust must not adopt a policy which exposes patients to a significant risk of treatment prohibited by article 3.....the policy must be considered as a whole...the policy, properly operated, will be sufficient to prevent any possible breach of the article 3 rights of a patient secluded for more than seven days and..there is not evidence to support the proposition that the frequency of medical review provided in the policy risks any breach of those rights

And Lord Bingham went on to set out in detail the elements in the policy that safeguarded against breaches of article 3 even in the absence of medical reviews.

68. *Munjaz* was therefore a case quite unlike our case. The policy as to medical reviews was entirely neutral in article 3 terms. What mattered was whether that policy would cause or contribute to breaches of article 3 in different respects. But in our case the institution under review, the use of PCC on children under detention, is for the reasons set out in §§ 58-64 above, far from neutral in article 3 terms. It involves, in itself and by its very nature, conduct that engages article 3. The issue is therefore not of future risk of article 3 conduct; that risk, if that is the right word to use, is incurred by the policy itself.

69. I would therefore reject this part of the Secretary of State's case. But in view of the weight placed on it by the Secretary of State I go on to consider whether he is right in saying that at least with adherence to the Code of Practice there is no, or no significant, risk of future conduct that is in breach of article 3.

The risk in this case

70. Miss Lieven opened this part of her submissions by saying that Lord Bingham had held in §29 of *Munjaz* that a court when considering the effect under article 3 of the whole of an institution's policy must assume that those controlled by the policy will respect its terms. That was a remarkable submission indeed. Lord Bingham did not even use words that in verbal terms had that effect. What he did was to proceed on the assumption, drawn from the evidence, that the policy would be respected in that particular case. He laid down no general rule, and it would have been astonishing if he had done so, as to the factual assumptions to be made about the behaviour of other state officials in other factual situations.

71. If therefore we approach our case with an open mind on this point, it seems to me to be impossible to say that the Code of Practice ensures that there will be no breach of article 3 when PCC is applied in cases of GOAD. I set out the grounds for scepticism in no particular order.

72. First, the very open-ended terms of GOAD leave a great deal of discretion in the hands of officers on the ground. Much was made of the provision in the Code of Practice that PCC is not to be used merely to secure compliance with staff instructions. But that provision was introduced into the Code of Practice when GOAD was not a ground for the imposition of PCC. The Code of Practice has not been amended since the Amendment Rules were introduced, and the boundary between refusal to comply and threats to GOAD has therefore not been clarified.

73. Second, there seems to be no coherent, or indeed any, policy on what forms of PCC may be used in what circumstances and on which trainees. When we asked whether distraction techniques were authorised for use in cases of GOAD we were told that the Secretary of State could "envisage no circumstances in which that could occur". He was not ready to offer any undertaking to that effect, nor indeed could he in the absence of formal prohibition, since he is dependent on the behaviour of staff on the ground. And also it would appear that only ad hoc decisions are taken as to the appropriateness of techniques. We were told that the hold used on Gareth Myatt was no longer approved; and that the nose distraction technique used on Adam Rickwood had also been withdrawn. I will be forgiven for wondering whether there are any other techniques awaiting withdrawal only when something goes wrong.

74. Third, there is a history in the life of STCs of disobedience to legal and contractual requirements. We have seen how the Amendment Rules were introduced to legitimate practices that up to then were illegal and in breach of the operators' contracts. And Hassockfield STC is run by, and the Secretary of State relies on the evidence of, a man who before the Rickwood inquest, and in these proceedings, sought, apparently unchecked by the Secretary of State, to argue that his contractual obligations were not binding.

75. Fourth, the very careful report of the SCRP into the Rickwood case strongly suggested that there had been inappropriate and unauthorised behaviour on the part of staff. So did the account accepted by the JCHR of the circumstances of the death of Gareth Myatt (on both cases see § 12 above). We were told, on instructions, that supervision by the Secretary of State has been "tightened up" since those incidents. In the absence of better information I am not prepared to assume that the problem has been solved.

76. Fifth, some reliance was placed in argument on the Training Manual (see §12 above) as providing control and guidance to staff. It however transpired that copies of the Manual are not made available to staff, but only to trainers. It is a matter of some concern that there was uncertainty on this point in the submissions made by the Secretary of State.

77. Sixth, at §§ 102-103 of its report the JCHR reported that the coroners at the two inquests had made recommendations about further staff training, which were said to be under consideration. The JCHR was very critical of the training of front-line staff in order to ensure the lawful discharge of their duties. We were given no indication that this is being attended to.

78. Even therefore if the case put by the Secretary of State is well-founded in law, it fails on the facts. But it is not well-founded in law. A system of PCC of its very nature engages article 3.

Strict necessity for PCC in cases of GOAD

79. To say that the system "engages" article 3 is not the end of the matter. The conduct may be such as in principle to engage article 3, but not involve an actual breach of article 3 because PCC is necessary, for instance under the unamended rules to prevent injury to the trainee or others. The issue therefore is whether the Secretary of State can establish that PCC is necessary in the case of GOAD. For the reasons set out in

§§ 20-34 above he cannot do so. The Amendment Rules are accordingly in breach of article 3, and must be quashed on that ground.

Article 8

Article 8(1)

80. No attempt was made to argue that PCC is not an interference with the private life of the trainee. We therefore pass to article 8(2).

Prescribed by law

81. The appellant argued strongly that GOAD was too vague a term for legislation that used it to qualify as "law" for article 8(2) purposes. For the reasons given in §72 above GOAD is indeed a worryingly open-ended term, and a very fragile means of controlling the behaviour of staff on the ground. But the jurisprudence of the ECtHR is not strong on this point. If the common law use of the term breach of the peace qualified as law in *Steel v UK* (1998) 28 EHRR 603, then I do not see how GOAD can be disqualified.

Necessary in a democratic society

82. PCC in cases of GOAD fails this limb of the article 8(2) test, for the reasons given in respect of necessity under article 3. The Amendment Rules therefore breach article 8 as well as article 3.

Disposal

83. I would reverse the decision of the Divisional Court, and quash the Amendment Rules on all of the grounds set out in this judgment.

Lord Justice Tuckey :

84. I agree.

Lord Justice Keene :

85. I also agree, and I add only a few comments of my own. First, I firmly endorse the views expressed by Buxton LJ at paragraph 41 about the appropriate course to be taken by a court when delegated legislation is found to be ultra vires. Such a finding should normally lead to the delegated legislation being quashed, and only in unusual circumstances would one expect to find a court exercising its discretion in such a way as to allow such legislation to remain in force. Such legislation normally changes the law for the public generally or for a class of persons. It should not generally be allowed to stand if it has not come into being in accordance with the law, and certainly not merely because certain checks which should have been carried out beforehand are to be made subsequently. Such a course may well prejudge the outcome of those checks, and yet the public is expected to conduct its life in accordance with such delegated legislation in the meantime. That cannot normally be appropriate.

86. An illustration of the problems thereby created is to be found in the present case. The Divisional Court's decision was made on 8 February 2008, when the Amendment Rules had already been in force for just over seven months. No REIA had been carried out. The Divisional Court rightly found that one should have been. As at that date, no-one could reliably forecast what the outcome of an REIA into the Amendment Rules would be, and yet the Divisional Court's decision not to quash those Rules meant that they would continue in force for an uncertain period of time in the future, pending the outcome of an REIA. If the REIA eventually proved to be significantly adverse, one would have had a situation whereby delegated legislation which should never have come into force, at least in that form, would have had its life prolonged by the court's decision. I too agree, therefore, that the Divisional Court was wrong not to quash the Amendment Rules in the light of its conclusions on consultation and the carrying out of an REIA.

87. I would have been more hesistant about the exercise of *this* court's powers to quash the Amendment Rules, given what has happened since the Divisional Court decision, had it not been for the conclusions which I, like my Lords, have reached about Article 3 and Article 8 of the ECHR. As Buxton LJ has said, even if one were to adopt Miss Lieven's test of asking whether the Amendment Rules create a significant risk of treatment which would breach Article 3, the facts placed before this court indicate that that question must be given an affirmative answer. What has happened in the past in STC's demonstrates that those who staff them and who exercise these powers need very clear-cut guidelines about when and for what purposes force may be used. There has been a history of non-observance of the Code of Practice. To extend the purposes for which PCC can be used so as to include the maintenance of GOAD would be to aggravate the existing problem, because it would add an inherently vague, ill-defined justification for the use of force. In my judgment that would give rise to a significant risk of Article 3 treatment. Nothing placed before this court evidences a necessity to extend the powers in such a way. In those circumstances I too conclude that the Amendment Rules offend against Articles 3 and 8. I too would quash those Rules.