Leveson Inquiry into the Culture, Practice and Ethics of the Press

WITNESS STATEMENT

I, ADAM MARC WAGNER, will say as follows:

Career history

1. I am a practising barrister specialising in public law, public inquiries, human rights and medical law. I am a tenant at 1 Crown Office Row, the chambers of Philip Havers QC. I was called to the Bar in 2007 and completed my pupillage at 1 Crown Office Row in October 2009.

2. I graduated from St Anne's College, Oxford University in 2003 with a degree in Politics, Philosophy and Economics and attained an MA in Political Science at Columbia University in 2005. I have previously worked as the chair of a national youth organisation.

3. I write regularly for guardian.co.uk, mostly through the Guardian Legal Network, and for Legal Week.

Questions posed by the Inquiry

(1) What material your website, UK Human Rights Blog publishes, and why

4. The UK Human Rights Blog (http://ukhumanrightsblog.com '**UKHRB')** was launched on 31 March 2010. The blog aims to provide an objective and legally accurate update service on UK human rights law which is useful for lawyers but also accessible to non-lawyers. The blog was set up in part to

counteract the somewhat hysterical coverage of human rights law in the mainstream press.

5. I am effectively the "commissioning editor" and I have two co-editors: Angus McCullough QC and Rosalind English, both members of 1 Crown Office Row. Posts are written by a mixture of members of 1 Crown Office Row and guest contributors. The vast majority of of posts are written lawyers, legal academics or law students.

6. The blog does not generate any revenue. We do not allow advertising and subscription is free.

7. UKHRB has been a success. Since its launch we have published over 1,000 posts, attracted close to 1,000,000 page views (around 75,000 per month at present) and now have around 10,000 subscribers across email, Twitter and Facebook. The blog is consistently ranked as the leading legal blog in the *ebuzzing* "influence" rankings, and as being amongst the top-100 UK blogs overall. It was nominated for the 2010 JUSTICE Human Rights Award and I was longlisted for the 2011 Orwell Prize for political writing in respect of my own posts.

8. UKHRB blog posts fall into the following five categories:-

    a. Case law[1]: Human rights case law summaries and comments;

    b. In the news: Human rights news items which are not directly linked to a recent court ruling;

    c. Poor reporting: Posts exposing poor human rights reporting by the press;

[1] I have hyperlinked these categories and blog posts mentioned below.
[2] see the Wordpress webpage on their servers and status here http://en.support.wordpress.com/status/

[3] http://www.1cor.com/1090/text/1712/files/Complaints%20Procedure_London.pdf
[4] The barrister was also struck off for separate offences – see http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-

d. Roundup: A weekly roundup of human rights news.

e. Public / Environmental law - We also sometimes cover case law and legal developments which have a bearing on public law, such as environmental cases, albeit not directly involving the European Convention on Human Rights

(2) Where are your servers located? Do you consider the UK courts to have jurisdiction over the way in which your website is operated in the UK, and how far does this jurisdiction extend?

9. UKHRB is hosted by Wordpress.com. Wordpress servers are spread across different data centres in the United States[2]. I would be very surprised if the UK courts did not have jurisdiction over what is published on UKHRB, and we certainly work on the assumption that the site is subject to all UK civil and criminal laws.

(3) How you source stories (there is no need to name individuals) and where you consider the responsibility for checking sources of information to lie, with you, or with the person who has provided you with the information.

10. I commission or write all posts which appear on the site. One of the basic principles of the blog is that information is drawn from primary sources, for example case law (we almost invariably link to the free online resource BAILII), legislation (using legislation.gov.uk) or reports, and all references are hyperlinked to the original source. I seek to ensure that all blog posts apply this principle.

11. Occasionally, I receive tip-offs or requests to cover a particular issue. However, it is very rare that I would publish or allow something to be

[2] see the Wordpress webpage on their servers and status here http://en.support.wordpress.com/status/

published quoting an anonymous source (I can think of only one occasion); this goes against the basic open principle of the blog mentioned above.

(4)The extent to which you are aware of the sources of the information which make up the central items featured on your blog.

12. See above. The sources of information which make up the items featured on the blog are almost always primary sources such as case law or legislation and we always try to link to these sources directly. If we cannot provide an accessible link to the source - for example, if a ruling is only available via a pay-per-view service such as *Westlaw* - we will generally wait to publish a post until a freely accessible source such as *BAILII* is available.

(5) The extent to which you consider what ethics can and should play a role in the blogosphere, and what you consider 'ethics' to mean in this context.

13. The definition of "blogging" is now extremely wide, so much so that the term "blog" has become in essence meaningless.

14. A blog can be a "*web log*" within the original meaning of the word, that is a "*personal journey published on the World Wide Web consisting of discrete entries ("posts")"* (Wikipedia), but it can also be a news and comment website such as UKHRB, a photo-sharing website, a website promoting a business – practically any website can call itself a blog. Mainstream newspapers now produce "blogs" online and as such the boundary between traditional journalism and blogging has also become unclear.

15. The number of websites calling themselves blogs is phenomenal. There are now over 70m sites registered on *Wordpress* alone, accounting for 800m page views each week. This is a significant proportion of the total number of internet sites worldwide.

16. Moreover, Twitter is often described as a "micro-blogging" site, and I would support this description. Twitter allows individual users to publish statements and is in effect a smaller-scale (in respect of length of individual posts) version of blogging within its original meaning.

17. In this regard, asking whether ethics should play a role in the blogosphere is akin to asking whether ethics should play a role on the internet as a whole. My view is that ethics *should* play a role, in the same way that ethics should play a role in society generally. However, I would not want to recommend any particular system of ethics. The range of ethics (or lack of ethics) on the internet is as broad as the range in society generally, which is unsurprising given that a significant proportion of the world's population is online.

18. It is in society's interest that people are free to follow their chosen system of ethics, as long as their system of ethics does not unduly impinge on the freedom of others. Maintaining this sometimes uneasy balance is the basic task of a democratic state.

19. That being said, I do think that a rough ethical system is emerging in respect of blogging and tweeting. This is not officially enforced by sanctions, but is unofficially enforced by other users. For example, one important principle of blogging is attributing (usually linking to) sources used in a post.

(6) Do you have any policy which relates to complaints about articles on websites which are libellous, defamatory or considered to be an invasion of privacy? If not, do you have any relevant practices? Do you ever remove availabilty to such pages on that basis? The Inquiry would be grateful of some examples of this (anonymised if necessary). Please provide copies of any policies.

20. We have no specific blog complaints policy, but there is a 1 Crown Office Row complaints policy which applies to complaints against specific members of Chambers.[3]

21. We have a comments policy, published online, which is as follows:

> *"i) You grant us a perpetual license to reproduce your words in your comment and a name/web site link in attribution.*
>
> *ii) You acknowledge that a name, email address and IP address will be recorded and held by us on submission of your comment for so long as your comment remains on the site.*
>
> *iii) The email address and IP address will not be used by us for any purpose save those directly connected with the administration of the site and/or your comment(s). The email address and IP address will not be released or passed to third parties unless we are required to so so by law.*
>
> *iv) We reserve the right to delete or edit comments without notice. The following is a non-exhaustive list of circumstances in which we will delete or edit comments:*
>
> - *the comment is actually or potentially defamatory against an identifiable person.*
> - *the comment constitutes advertising.*
> - *the comment contains abuse directed at authors of the site, or other commenters, or an identifiable person.*
> - *the comment is wholly irrelevant to the post under which it is made.*
> - *the comment is, in the opinion of the editor, spam.*
> - *the comment contains a link to a commercial website which is in our opinion not appropriate or merited.*
>
> *The decision to edit or delete a comment is final.*

[3] http://www.1cor.com/1090/text/1712/files/Complaints%20Procedure_London.pdf

v) We cannot offer advice on individual's situations and cannot allow others to respond to comments containing individuals' legal problems or situations. Comments by individuals seeking advice or assistance will be deleted without notice.

vi) You acknowledge that you are the author of your comment and that the editor and other authors of the site take no responsibility for your comment. You are responsible for any inaccuracies, errors, omissions, and statements in your comment.

vii) You agree that, if your comment or comments contain or allegedly contain defamatory phrases, you indemnify the editor and/or any authorised author of this site in respect of any and all costs and/or losses and/or damages incurred by them in respect of that comment or comments.

viii) The editor of the site reserves the right to ban any commentor from posting further comments on what, in the opinion of the editor, is a breach of these conditions."

22. All comments are pre-moderated by me: that is, I read them first and then either authorise them, refuse to authorise them or authorise them in an edited form (for example, if a comment is relevant to a post but uses the final sentence to promote an unrelated website, I will generally publish it without the final sentence).

23. We have never received a serious complaint in relation to a blog post, and thankfully have never been threatened with legal action. I do occasionally receive emails or comments pointing out inaccuracies, which I aim to correct as soon as I possibly can, but these have never been egregious or have caused issues after they have been corrected.

(7) Do you consider yourself to be regulated and if so, how and/or by whom?

24. I am regulated by the Bar Standards Board and specifically by the terms of the Bar Code of Conduct. Blogging and tweeting are certainly caught by the Code of Conduct: a barrister was recently fined £2,500 for anonymously publishing inappropriate tweets during a trial, conduct which was found to be "*likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute*".[4]

25. I have argued that the Bar Code of Conduct and the Legal Services Act 2007 also place lawyers under a professional *obligation* to increase public understanding of law through, for example, activities such as blogging.

(8) The Inquiry would also welcome your views on the extent to which the content of websites, and the manner in which you operate, can be regulated by a domestic system of regulation

26. I do not think blogs can or should be regulated by a domestic system of regulation, for the following reasons:

    a. Practically unworkable: Practically it would be impossible to regulate all blogging. Hundreds of thousands of blogs are *set up* each day, let alone posts published, and the term is so elastic (see above) that the task would be simply too large and amorphous for any regulator to manage. Even if only popular blogs were targeted, say those over a certain number of hits, what is to stop an individual blogger simply setting up a new blog in order to avoid regulation? I expect that such a system would be simply unworkable.

    b. Current system works: The current system of criminal and civil law already provides a reasonable level of regulation. Bloggers – whether their websites are read by 1 or 1m people – are subject to

[4] The barrister was also struck off for separate offences – see http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=75521

financial penalties for libel or quasi-criminal sanctions if they commit a contempt of court. See for example the case of Elizabeth Watson, referred to be below, who was sentenced to 9 months imprisonment (later suspended) for breaching a court order through information published on her personal website. That being said, I also note a 1 February 2012 report in *The Independent* that Mr Justice Peart has said in relation to an Irish case involving the *www.rate-your-solicitor.com* website that "*The civil remedies currently available have recently been demonstrated to be an inadequate means of prevention and redress*".

c. Self-regulation already exists: Blogging specifically and social media publishing more generally (notably Twitter) is to a large extent self-regulating. As lawyer and journalist David Allen Green put it in a recent *New Statesman* blog post:

> *"Regulation is just not about formal "black-letter codes" with sanctions and enforcement agencies. Regulation also means simply that things are done better than they otherwise would be: for example, when one "regulates one's own conduct". Bloggers and others in social media are willing and able to call out media excesses and bad journalism. The reaction is immediate and can be brutally frank. They are sometimes wrong, as are formal regulators. But they can take time and allow the media to produce better, more well-informed stories."*

I agree with this and would emphasise that bloggers and others in social media are particularly willing and able to "*call out*" each other's conduct too. The blogosphere and Twitter provide a vibrant, fast-moving and sometimes rather unforgiving arena for debate. As such, an enormous amount of self-regulation and correction already takes place.

This is to a large extent the whole point of *social* media. People enjoy observing a lively debate, and Twitter demonstrates the extent to which they are also enthusiastic to contribute. Moreover, the more prominent a blogger or blog post, the more it is likely to be the subject of comment and criticism. This is an efficient system as almost by definition the more influential a blog post, the more heavily it is peer-reviewed.

d. Significant risk of chilling effect: Notwithstanding the extreme practical difficulties with regulating blogs, the risk of doing so would be to limit the currently vibrant arena for freedom of expression which helps to keep journalists and politicians in check.

e. Already-existing regulation by other means: Some bloggers (such as lawyers and other professionals) are regulated by other means, thus bolstering the existing criminal and civil remedies available to victims of "bad blogging".

(9) Do you consider that victims of "bad blogging" should be able to seek redress?

27. Potentially the most damaging "bad blogging" is a personal attack posted online. As stated above, there is already an array of civil and criminal remedies by which victims of "bad blogging" can seek redress, and a relatively effective means of self-regulation through social media.

28. Practically speaking, I cannot see how victims of "bad blogging" could be given more effective forms of redress except by tweaking the current rules. A formal system of regulation simply would not work.

(10) Does/Can blogging act as a check on bad journalism?

29. Yes. The primary reason UKHRB was set up was to act as a corrective to bad journalism about human rights, and in under two years it has become

a trusted source of information for journalists, politicians, those in government and members of the public.

30. UKHRB operates alongside a number of other excellent legal blogs, run by lawyers, students and enthusiasts for free, which provide a similar service in respect of other areas of law. I would highlight, for example[5]:

    a. Nearly Legal housing law blog;
    b. UK Supreme Court Blog;
    c. Inforrm – media law;
    d. The Small Places – social welfare law;
    e. Head of Legal – general legal commentary
    f. Human Rights in Ireland
    g. Law Think
    h. Jack of Kent
    i. Charon QC
    j. Pink Tape – family law commentary by barrister Lucy Reed
    k. Eutopia Law
    l. Panopticon Blog

31. Human rights is an example of an area of law which is often misrepresented by the mainstream press.[6] This can be the result of a lack of legal expertise amongst journalists, but also represents some newspapers' editorial positions which are if not anti-human rights, then certainly anti-Human Rights Act. It is no coincidence, in my opinion, that the Human Rights Act is also widely considered to have bolstered privacy rights and as such threatens the celebrity news-driven business model of most newspapers.

[5] There are now many similar legal blogs – for a full list see http://ukhumanrightsblog.com/2011/04/24/roll-up-roll-up/

[6] See UKHRB posts on poor reporting here: http://ukhumanrightsblog.com/category/blog-posts/poor-reporting/ - also reproduced in an annex to this statement

32. A few recent examples of bad human rights coverage which have been covered on and corrected by UKHRB[7]:

    a. **"Catgate"** [8] : This is the most famous example of the misrepresentation of human rights law in the past year, and perhaps ever. It involved the Home Secretary's claim at the Conservative Party Conference: "*We all know the stories about the Human Rights Act… The illegal immigrant who cannot be deported because – and I am not making this up – he had pet a cat."* This myth was initially propagated by the press in 2009, and despite being rejected by the judiciary's press office at the time, the story was repeated a few weeks prior to the Party Conference in the Sunday Telegraph, which is probably why it was included in the Home Secretary's speech. Moreover, despite the claim subsequently being rubbished by, amongst others, the Justice Secretary who called it a "*complete nonsense example*", the Daily Mail still reported (*Truth about Tory catfight: Judge DID rule migrant's pet was a reason he shouldn't be deported)* that the Home Secretary's claim was accurate (for that reason, I placed the newspaper on the "legal naughty step", a "regulatory" innovation by the excellent Nearly Legal housing law blog).

    b. ***"UK loses 3 out of 4 European human rights cases"*** On 12 January 2012 the Daily Mail (*Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals)* and Daily Telegraph (*Britain loses 3 in 4 cases at human rights court)* reported - entirely uncritically – a report written by a Parliamentary Aide and signed by 10 backbench MPs which claimed the UK lost 3 out of 4 cases in the European Court of Human Rights. This was a misleading statistic as it ignored the

[7] The posts referred to following five examples are reproduced as Appendices A to E of this statement

[8] See my posts at http://ukhumanrightsblog.com/2011/10/05/the-lessons-and-shaggy-dogs-and-catgate/ ; http://ukhumanrightsblog.com/2011/10/04/cat-had-nothing-to-do-with-failure-to-deport-man/ ; http://ukhumanrightsblog.com/2011/10/06/what-the-first-catgate-appeal-judgment-actually-says/

thousands of cases brought against the UK which are struck out at an earlier stage, which amounts for around 97% of all applications.

c. **"Britain can ignore Europe on human rights"** In October 2011 The Times' front page headline was "*Britain can ignore Europe on human rights: top judge*". Upon analysis, the headline bore no relation to Lord Judge's comments to the House of Lords Constitution Committee (see from 10:25). It is also based on a fundamental misunderstanding of how the European Convention on Human Rights has been incorporated into UK law.

d. "We must regain right to kick out foreign criminals": This 30 June 2011 Daily Express editorial comment in respect of a European Court of Human Rights deportiation decision was riddled with inaccuracies and misrepresentations of the specific case and human rights law generally.

e. **Human rights prevented deportation of Phillip Lawrence killer:** This claim is made regularly by newspapers which are seeking to reduce the European Convention on Human Rights' influence on deportation decisions – e.g. see Daily Telegraph, 4 October 2011: "*The Government had been prevented from deporting Chindamo to Italy, where he lived as a child, because of the Human Rights Act*." But Chindamo's case was not decided according to human rights law. As was widely reported at the time of the tribunal decision in 2007, Chindamo's arguments under the Human Rights Act played second fiddle to the main thrust of his case, which was founded on of EU freedom of movement law.

Despite this, the claim has been repeated for years in order to support a campaign against the Human Rights Act. Lord Neuberger referred to this in a speech as an example of inaccurate reporting "*which may tempt some into thinking that it is hardly worth maintaining the State's inability to deny you a fair trial, to kill or*

torture you, and to preclude you enjoying freedom of expression". He referred to:

> *"the reporting of the issue of the attempted deportation of Learco Chindamo, who killed Philip Lawrence from the UK. He could not be deported, and, for some parts of the press, this was entirely the fault of Article 8 of the European Convention. Although the Tribunal which made the initial deportation ruling mentioned Article 8, the reason why he could not be deported had however nothing whatsoever to do with Article 8, but was based on the Immigration (European Economic Area) Regulations 2006. (So I suppose it was the fault of Brussels or Luxemburg, but not Strasbourg)"* – Emphasis added

33. A more comprehensive list of human rights myths which have been propagated by newspapers can be found here: http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/human-rights-act-myths/index.php.

34. In my view, there are a number of reasons why human rights law is often misreported, all of which can be applied equally to other poorly reported areas of law:

    a. Sloppy journalism: Journalists often write articles about court judgments without reading them first, or about trials which they have not personally attended. The latter is a particular problem in relation to family law – see e.g. His Honour Judge Bellamy's criticism at paragraph 193 of ***L (A Child: Media Reporting), Re*** [2011] EWHC B8 (Fam) of The Daily Telegraph's Christopher Booker's reporting of the case as *"unbalanced, inaccurate and just plain wrong",* a criticism supported by Sir Nicholas Wall in ***X, Y, and Z & Anor v A Local Authority*** [2011] EWHC 1157 (Fam) at paragraph 102.

This case has a very interesting history which highlights many of the legal complexities relating to the regulatory and legal sanctions which this Inquiry is investigating. Although the mother involved was ultimately found by Sir Nicholas Wall to be a fabricator who had coached her daughter to lie about being abused by her ex-partner, her case was taken up enthusiastically by journalists such as Mr Booker and also John Hemming MP, who chose (before Ms Haigh was exposed as a fabricator) to expose the "super-injunction" against her in Parliament. Elizabeth Watson, a "*private investigator*" who published allegations made by Haigh online, was subsequently sentenced to 9 months in prison (later suspended) for contempt of court arising from her blog about the case.

b. No links to primary sources: Newspapers rarely link to primary sources, in particular judgments, which means that online readers are unable to test claims for themselves. This is why UKHRB seeks to publish links to judgments and other primary materials almost as soon as they are available, and I seek to do the same via Twitter. I also campaign regularly for courts to publish more judgment summaries and press releases as the Supreme Court now does to great effect.

c. Lack of dedicated legal correspondents: Legal writer Joshua Rozenberg has told Legal Week that many national newspapers no longer have a designated legal correspondent, meaning that they "*don't provide the service they did*".

d. Merging of factual and opinion reporting: The boundary between "news" and "opinion" in newspapers has all but disappeared, and this is confusing for readers. Editorial positions often leak into "news" reporting: for example, reporting immigration decisions critically, quoting MPs with particularly strong views on one side of the debate and representatives of think tanks from only one side of the debate.

e. Wilful/reckless misrepresentation: Some newspapers have mounted campaigns against the Human Rights Act, which is their right, but those campaigns are sometimes bolstered by unbalanced reporting in "news" articles as well as opinion pieces and editorials. The merging of factual reporting with opinion is particularly damaging when reporting the law. Complex rulings are difficult enough to summarise when just sticking to the facts. Adding another slant to the multiplicity of opinions which are already sewn into the fabric of a legal judgment is dangerous and unnecessary.

35. The final factor mentioned above, willful/reckless misrepresentation, is the most insidious. It is also the area where social media can and do help create balance through a free market for ideas. UKHRB regularly criticises articles about law in the mainstream media, as well as "naming and shaming" journalists, and enough journalists read the blog (many subscribe by email or Twitter) for this to have some impact. For example, the Daily Telegraph's Christopher Booker responded directly to my post asking whether journalists need to attend court to report on trials:

> *"I was again attacked last week by a prominent legal blogger, for reporting on cases where the system appears to be going tragically wrong, without having sat for days in court to hear "both sides of the story".*

(11) Anything else which you would consider will assist the Chairman to arrive at considered conclusions on any aspect of the Terms of Reference.

36. I would counsel against the idea that in future only accredited journalists should be provided with access to certain places or information privileges (as proposed by Paul Dacre in his evidence to the Inquiry on 6 February 2012). Although I understand the rationale – providing an incentive to journalists not to lose their press card by way of a disciplinary sanction –

this could have a significant detrimental effect on the work of non-professional "citizen" journalists.

37. It is also hard to see the justification for rewarding journalists with additional privileges whilst punishing bloggers etc. by removing privileges given that it is the poor ethical conduct of *professional journalists* which has led to the need for an inquiry into the ethics of the press.

38. The legal blogs mentioned above help to correct bad legal journalism but also improve public understanding of the law. The sheer number, range and quality of legal blogs is in my opinion an excellent example of the public utility which blogging and citizen journalists can provide.

39. Of course, there are bad blogs too. But any proposed system of regulation which could effect all blogs must be considered very carefully indeed as it risks having a significant chilling effect on the excellent work that many bloggers currently do.

40. In conclusion, in respect of the problems with legal journalism, I agree with Lord Neuberger, who has said:

> *"It is a sign of a healthy democracy that there are different views within society and that the outcome of individual cases, and the balance struck between individual rights, can be vigorously debated. But such debates must be based on fact not misconception, deliberate or otherwise. Persuasion should be based on truth rather than propaganda. It is one thing to disagree with a judgment, to disagree with a law and to campaign to change the law, but it is another thing to misstate what was said in a judgment, or to misstate the law."*

Statement of Truth

I believe the facts stated in this witness statement are true.

DATED the 7th day of February 2012

SIGNED

ADAM WAGNER

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APPENDIX A

What the first #catgate appeal judgment actually says

October 6, 2011 by Adam Wagner |

Updated | **I have been sent the first appeal judgment in the political frenzy which has been termed "Catgate". I had promised myself not to do any more Catgate posts or use any more cute pictures of kittens, but I have now broken that promise.**

Having read the short, 6-page judgment dated 9 October 2008 by Immigration Judge JR Devittie – reproduced here by Full Fact – I will quote from it at length (apologies for any transcribing errors) and say the following.

First, on any reading, the judgment does not support the proposition the Home Secretary made in her speech: "*The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat.*" For similar reasons, it does not support the Daily Mail's headline from this morning: *Truth about Tory catfight: Judge DID rule migrant's pet was a reason he shouldn't be deported.* Back on to the legal naughty step, Daily Mail.

Secondly, this is not the final judgment in the case. I have already linked to and summarised that judgment in this post. Legally speaking, the fact that the judgment was superseded by a second appeal means that has very little, if any, relevance at all. An imperfect analogy would be retaking an exam – once you have the result of the second exam, it would be odd for you to refer to a previous, inferior grade.

The fact that, as I have explained, the judge in the second appeal rejected the Home Office's appeal, and for entirely separate (to the human rights claim) reasons relating to the UK Border Agency's failure to follow its own policy, means that the cat issue did not have to be considered and was therefore rendered wholly irrelevant to the final decision not to deport the man.

Thirdly, Judge Devittie does happen to mention Maya the cat. The reason he did so is that the Home Office had, in their initial consideration, made a sarcastic-sounding determination to the effect that

Although you have a cat called Maya she is considered to be able to adapt to life abroad with her owners. Whilst the cat's material quality of life in Bolivia may not be at the same standard as in the United Kingdom, this does not give rise to a right to remain in the United Kingdom.

The judge even refers to some Canadian case law which emphasises, in unlawful animal killing cases, the

increasing recognition of the significance that pets occupy in family life and of the potentially serious emotional consequences pet owners may suffer when some unhappy event terminates the bond they have with a pet... the Canadian courts have moved away from the legal view that animals are merely chattels.

This is pretty uncontroversial. People love their pets. They consider them to be part of their family lives. If we were looking for evidence of judges taking account of "real" public attitudes, this could be one of them. It was not, however, the basis on which the man's case was decided.

Fourthly, reminding ourselves that the key question here is whether the Bolivian could not be deported " *because... he had a pet cat",* the answer in this ruling is here:

11. In considering proportionality I must focus on the question whether the appellant's removal would have sufficiently serious consequences to render his removal disproportionate having regard to the public interest in the removal of persons whose residence in the UK is unlawful.

12. I do not consider that it would be reasonable for the appellant's partner to move to Bolivia to live with him. There are several considerations that justify this conclusion. The appellant's counsel addressed these matters in his submissions. The most important perhaps is the condition of the appellant's partner's father. The evidence of this appellant's partner and his siblings is that their father is in a condition that he is not expected to recover from. They stated that a family decision has been taken to give their father collective support as a family and that the support as a family and that the support that the appellant's partner would give is an integral part of that effort. It would be

distressing to the appellant's partner's [sic] if he were to have to leave the United Kingdom having regard to his father's condition.

13. I have not lost sight of the respondent's observations in respect of the quality of family life between the appellant and his unmarried partner. I find however that the evidence of the appellant's friends and of his partner's siblings is persuasive and telling. In my view it attests to the strong quality of the relationship between the appellant and his partner.

[...]

16. The evidence also shows that the appellant is well integrated into the larger family that his partner has with his siblings and parents. He attends family functions with his partner and is regarded as a member of the family.

17. The parties have lived together for about four years. The quality and strength of the relationship has been amply demonstrated. I have found it would not be reasonable to expect the appellant's partner to return to live with him in Bolivia... I also take into account that the appellant appears to meet the requirements of policy DP3/96. In particular, his relationship and cohabitation predates enforcement action for two years.

[emphases added]

That was the reasoning behind the decision. Aside from the poor apostrophe use (which is probably the transcriber's, not the judge's), it sounds eminently sensible. As to the cat:

... the evidence concerning the joint acquisition of Maya by the appellant and his partner reinforced my conclusion on the strength and quality of the family life that the appellant and his partner enjoy.

So, finally, the most that can be said about Maya is that the evidence about the cat added a bit of colour to the thrust of the decision, in which the immigration judge quite rightly assessed the quality and strength of the man's relationship with his partner according to evidence from the couple and their friends and relatives.

To conclude: this ruling is of little or no legal relevance. This is because when

it was appealed, the more senior immigration judge reminded the Home Office counsel that irrespective of the article 8 ECHR arguments and the emphasis or otherwise on the cat, the appeal failed due to the Home Office's own failure to follow its policy.

In any event, looking again at the judgment as the senior immigration judge would have if it had been necessary to substantively reconsider it (which it was not), Judge Devittie rightly attached little or no relevance to the cat, which was at most a distraction from the main thrust of the evidence.

So the answer to the question of whether this is a case where an"*illegal immigrant… cannot be deported because… he had a pet cat*" appears to be no. I am with the Justice Secretary on that one. As to the Daily Mail's "*Judge DID rule migrant's pet was a reason he shouldn't be deported*", the reason he was not deported was because he successfully showed he had a relationship with another person lasting over two years, not that he had a pet cat.

APPENDIX B

UK loses 3 out of 4 European human rights cases? More like 1 in 50, actually

January 12, 2012 by Adam Wagner

It is rightly said that 95% of statistics are made up. Today's Daily Mail front page headline contained a typically exuberant statistical claim: *Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals.* According to journalist James Slack "*Unelected Euro judges*" are mounting a "*relentless attack on British laws laid down over centuries by Parliament*".

The Telegraph's Andrew Hough and Tom Whitehead chime in with *Britain loses 3 in 4 cases at human rights court*. But are they right? To add a bit of spice to this statistical journey, I will aim to use at least one analogy involving a popular TV singing contest.

The "*explosive research*" is a report by Robert Broadhurst, a Parliamentary legal researcher for a group of Conservative MPs. The headline grabbing figures are in this paragraph:

Between when it first signed up to the Court's jurisdiction in 1966 and the end of 2010, the UK faced over 350 rulings from the judges in Strasbourg… In about three-quarters of these judgements the Court ruled that the UK had breached a Convention right.

This is simply misleading. Only counting final judgments of the court obscures the reality of how it operates. In fact, the number of claims which are brought to the court is enormous compared to the amount which reach full hearings. This is because the vast majority are struck out at an early stage, and those strike outs are effectively victories for the UK.

Judges consider the case and decide that it is "manifestly unfounded"; similar to when a domestic court finds that a claim has no reasonable prospects of success. This is a very high bar, which means that the vast majority of claims don't reach it. Some of these will be not worth the paper they are written on,

but many are genuine claims and to ignore them when considering the court statistics is to miss most of what the court does.

Broadhurst's figures are taken from the European Court of Human Rights' own document, which reveals that since 1966, out of a total of 443 judgments against the UK, in 271 there was a finding of at least one violation of the European Convention on Human Rights. This is compared to 86 finding no violation.

But this is just the tip of the iceberg. As demonstrated by the rather nice pie diagram in another of the court's own reports, since 1966 97% of cases against the UK were declared inadmissible, that is they were struck out. This means that in reality, of all the claims brought before the court against the UK (in the region of 15,700, by my calculation), only 3% made it to full hearings, and a – let's face it miniscule – 1.7% succeeded.

So, not three quarters, as the Mail suggests, but under one in fifty cases brought before the court against the UK were successful. As it happens, the Strasbourg court is good at publishing statistics, but perhaps could have been clearer with these, for example by including the total number of claims brought in its Violations by State table.

But in any case there is no excuse for a significant report – signed and prefaced by 10 MPs – making such a hash of its statistics (and I haven't even mentioned the Mail's "unelected" judges, who are actually elected).

Presenting the figures in this way is a bit like watching X-Factor from the live finals, which begin with 12 contestants, and extrapolating that since one of them wins in the end, therefore almost 10% of X-Factor applicants ultimately win the contest. In reality tens of thousands apply, so only a tiny percentage of them "win", but most are "struck out" as being bad singers in the months before the finals.

The high proportion of finally decided cases which are successful is interesting, but it hardly represents a court which is mounting a "relentless attack" on the British laws. Indeed, there are so few fully heard cases that any

statistical analysis is fairly meaningless anyway.

In fact, what the statistics do reveal is that the European Court hears a tiny amount of cases against the UK each year; just under 30. The success rate for the lucky few Claimants is quite high, but it is about the same the success rate across all states, and is probably is more a reflection of the high "manifestly unfounded" bar the court sets for Claimants than any "relentless attack" on British justice. In other words, only good cases get through, so a lot of those ultimately win.

So, legal researcher Robert Broadhurst can pop up on to the legal naughty step for disservices to statistics, and the Daily Mail and Telegraph journalists can join him for their gleefully unquestioning acceptance of his statistical sleight of hand.

APPENDIX C

Can Britain "ignore Europe on human rights"?

October 23, 2011 by Adam Wagner

Headlines are important. They catch the eye and can be the only reason a person decides to read an article or, in the case of a front page headline, buy a newspaper. On Thursday The Times' front page headline was "Britain can ignore Europe on human rights: top judge".

But can it? And did Lord Judge, the Lord Chief Justice, really say that?

To paraphrase another blog, no and no. The headline, which I am fairly sure was not written by Frances Gibb, the Times' excellent legal correspondent and writer of the article itself, bears no relation to Lord Judge's comments to the House of Lords Constitution Committee (see from 10:25). It is also based on a fundamental misunderstanding of how the European Convention on Human Rights has been incorporated into UK law.

For the record, this is the relevant bit of Lord Judge's evidence:

Strasbourg should not always win… There is yet a debate to happen, it will have to happen in the Supreme Court, about what we really do mean in the Human Rights Act, what Parliament means… when it said that the courts in this country must take account of the European Court of Human Rights. I myself think it is at least arguable that having taken account of the decision of the court in Strasbourg our courts are not bound by them. Give them due weight and in most cases follow them, but not necessarily.

What was he referring to? A very interesting debate about the extent judges need to pay attention to European Court of Human Rights rulings. The Human Rights Act (HRA), which incorporated the European Convention on Human Rights into UK law, made clear in section (2)(1)(a) that courts "*must take into account*" any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.

Not "follow" or "ignore", but "take into account".

The wording was chosen carefully by Parliament. A key aim of the HRA was to "bring rights home". This meant rather than having to go to the European Court of Human Rights in Strasbourg, people in the UK could enforce their rights in domestic courts. And, just as importantly, UK judges could begin to develop their own case law on human rights and so not have to rely on Strasbourg and its impartial understanding of UK social issues.

Parliament never intended for Strasbourg to be a final court of appeal for our own courts, and some, including former law lord Lord Hoffmann and the Bill of Rights Commission, have legitimately questioned whether the court has therefore exceeded its proper role.

So, courts only have to take Strasbourg decisions into account. This means they cannot ignore decisions, and sometimes – but not always – will probably have to follow them, which is exactly what Lord Judge said and Frances Gibb reported. There is an important legal question (see, for example, the Supreme Court's decision in *Horncastle)* as to what "take into account" means, as reflected by Lord Phillips' and Lord Judge's fairly minor quibble at the committee, but it certainly does not mean "follow", or for that matter "ignore".

In any case, as interesting as the "take into account" debate is, that is not what the Times' headline referred to. It said not the courts but "Britain" can ignore Europe on human rights. This is simply wrong.

Because of Article 46 of the European Convention on Human Rights, the government must "abide by", that is, it must follow – not ignore or take into account – final decisions of the European Court of Human Rights. The UK Parliament willingly signed up to Article 46.

This is why the prisoner voting decision has caused such a political problem. The court made an unpopular ruling which Parliament has to follow, unless it withdraws from (or ignores) its own commitment to abide by decisions of the court.

It may seem odd (as I have said before) that Parliament must follow what our courts need only take into account, but it does reflect the very different role of the courts and Parliament, and one which Parliament has explicitly chosen. To

understand human rights law, you really have to understand the abide by / take into account dynamic.

Therefore, the most that can be taken from Lord Judge's comments is that "British courts can, sometimes, choose not to follow Europe on human rights, but Britain has to abide by it". Not as catchy a headline, but right.

And for that reason, The Times goes on to the legal naughty step. Theresa May prefaced her now famous cat immigration story with "I am not making this up". There are plenty of valid and important debates to be had about human rights law, but making things up will only skew them and spread more misinformation.The Times should know better.

APPENDIX D

Failure to deport Philip Lawrence killer was not about human rights

November 29, 2010 by Adam Wagner

It has been widely reported that Learco Chindamo, who was convicted of killing headmaster Philip Lawrence in 1995, has been rearrested only months after being released from jail. The story has reopened a debate over the Human Rights Act, on the basis that it prevented Chindamo from being deported to his native Italy. But did it?

In fact, what the case really highlights is that the unpopularity of the Human Rights Act is in part due to inaccurate media reporting of human rights cases, even 10 years after it came into force.

The Telegraph reported at the end of last week that Frances Lawrence, Philip Lawrence's widow, has urged the prime minister to act on his previous pledges to scrap the Human Rights Act, as

The Government had been prevented from deporting Chindamo to Italy, where he lived as a child, because of the Human Rights Act. He was freed in July and allowed to live in Britain.

The newspaper repeated the claim in an editorial arguing that Britain must make its own human rights laws. The story was subsequently picked up elsewhere. In an article entitled Human Rights are all wrong, Fiona McIntosh of the Mirror said that Chindamo "will not be deported back to his native Italy because of his "human rights". Now Frances Lawrence "is facing up to a lifetime haunted by her husband's killer because his "human rights" are considered more important than her own."

But Chindamo's case was not really about human rights at all. As was widely reported at the time of the tribunal decision in 2007 , Chindamo's arguments under the Human Rights Act played second fiddle to the main thrust of his case, which was centred on of EU freedom of movement law: namely, the Citizens' Directive 2004.

Article 28 of the 2004 Directive, which the UK implemented into its domestic law by way of the Immigration (European Economic Area) Regulations 2006, provides protection for union citizens against expulsion. It ensures that certain factors are taken into account before a union citizen is expelled from another member state, and ensures that a state cannot expel a union citizen who has been resident there for over ten years unless on "imperative grounds of public security". Moreover, a state cannot expel a union citizen who has a right of permanent residence there "except on serious grounds of public policy or public security".

With its attention focussed on the 2004 Directive, the Asylum and Immigration Appeal Tribunal ruled in LC v Secretary of State for the Home Department that, despite having been in the UK for 19 years, Chindamo had "resided" in the UK within the meaning of the Directive for less than 10 years, as 10 of those years had been spent in prison.

However, he had acquired a right of permanent residence in the UK after 5 years, and as such the secretary of state had to show the expulsion decision could be justified on grounds of public policy. Ultimately, the tribunal was unconvinced. The fact that he had been convicted of murder did not, on its own, justify expulsion, and the tribunal concluded, taking into account a number of different factors including the life he had built in the UK, "that there do not exist grounds of public policy in this case which justify exclusion" (paragraph 96).

The tribunal did go on to consider whether the expulsion would have constituted a breach of Chindamo's Article 8 (private and family life) rights under the European Convention on Human Rights. Only in exceptional circumstances will Article 8 be engaged by the relationship between an adult appellant, his mother and grown-up siblings. However, this was such an exceptional case and the expulsion of a 26-year-old who had lived in the UK since he was age 6 would be a breach of his rights.

So although human rights were considered in Chindamo's case, and he succeeded in his arguments, even if he had lost on human rights grounds the UK would still have been prevented from deporting him because of EU

freedom of movement law. Moreover, despite saying it would at the time, the secretary of state appears not to have appealed the decision. It almost certainly would have had the case been fought and won solely on the basis of the Human Rights Act, since the right to family life aspect of the decision was unusual and may well have been overturned if it reached the court of appeal. But it is likely that the government realised it would be much more difficult to overturn the main thrust of the decision, the 2004 Directive.

To be fair to the Telegraph, an in-house blogger has argued since the original story that the HRA had little bearing on the Chindamo case, but she missed the central point: that Chindamo's right to family life argument was secondary to his main case, and if he had lost on that point he would still have won the appeal.

The Human Rights Act has prevented some people being deported to other countries, the most notorious recent example being two suspected terrorists who could not be sent back to Pakistan as there was a real risk they would be tortured. Some may argue that such men should be automatically expelled, despite risks of torture. Or that at least convicted murderers such as Chindamo should be expelled without impunity. But the Chindamo case shows that if they are European Union citizens, European freedom of movement law, which the UK has willingly signed up to, would simply not permit automatic expulsion of the kind recently legislated in non-EU Switzerland. For Chindamo, human rights were relevant, as they are in all expulsion cases, but they were peripheral.

The case demonstrates how inaccurate reporting of emotive cases involving human rights often serves only to fuel the act's unpopularity. It is unfortunate but perhaps unsurprising that cases are misreported in the hours after long and complicated rulings are released. But there can be no excuse three years after the event. There are legitimate debates over the costs and benefits of the Human Rights Act, but accurate reporting would at least ensure that the debate remains fair.

Leveson Inquiry into the Culture, Practice and Ethics of the Press

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