Article 6: The right to a fair trial

Article 6 of the European Convention on Human Rights provides that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Summary

Article 6 provides that everyone has the right to a fair trial in both civil and criminal cases. A party to legal proceedings has the right to be heard by an independent, impartial tribunal, in public, and within a reasonable amount of time. Article 6 is not subject to any exceptions, though the procedural requirements of a fair trial may differ according to the circumstances.

Article 6 specifies some additional aspects of the right to a fair trial that apply in criminal cases: the accused should be informed promptly about the charges against them in language they understand; they should have sufficient time and facilities to prepare a defence; they should be able to defend themselves in person or through a lawyer of their own choosing; and they should be given legal aid if they cannot afford representation and the interests of justice require it. They should also be able to call and question witnesses in the same way as the defence.

The state is obliged to establish courts which give all those accused a fair trial, and to ensure that nobody is punished without a fair trial.

The key issues we address in this chapter are:

The use of closed material may compromise the right to a fair trial

'Closed material procedures' deal with cases involving the use of sensitive material which the government considers cannot be made public without damaging the public interest. This means that some evidence is heard in secret; neither the person involved in the proceedings nor their representatives are told what it is. Instead, a 'special advocate' – appointed by the Attorney General – examines the closed material and represents the interests of the person affected in closed sessions. After service of the closed material, any communication between the special advocate and the person whose interests they represent is prohibited without the permission of the court on notice to the government. This means that a case may be decided against someone, often with devastating effect, without that person ever finding out the reasons why.

The review shows that:

- The use of closed material means that the person affected is unlikely to know the case against him or her, which will almost certainly breach the right to a fair trial.
- Evidence derived from secret intelligence sources may not be as robust as that used by police in an open court process.
- The use of intercept evidence would increase the chances of successful prosecution of terrorist suspects while helping to ensure their right to a fair trial.
- The use of special advocates in closed hearings does not provide sufficient protection against the risk of an unfair trial.
- The use of closed material is expanding and is now used across a range of proceedings – and the government is proposing to expand it further.

Children may be at risk of Article 6 breaches when the justice system does not cater for the child's ability to understand and participate in court proceedings

There are various concerns about the treatment of children in the justice system, which suggest that breaches of Article 6 may be occurring.

The review shows that:

- The age of 10 for criminal responsibility in England and Wales is lower than international guidelines. Children with learning or communication difficulties may not receive sufficient 'special measures', or adaptations to court procedure, to ensure a fair trial.
- Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity.

Cuts to legal aid may compromise the right to a fair trial

Proposed changes to legal aid for civil law cases, by limiting people's access to legal advice and representation, may compromise rights to a fair hearing under Article 6(1) of the European Convention on Human Rights.

The review shows that:

- The current 'fixed fees' system can act as a barrier to those with complicated and unusual cases.
- Removing legal aid from areas of civil law may mean some people do not have access to a fair hearing.
- The policies aimed at mitigating the impact of legal aid cuts may not be sufficient to ensure that everybody has access to justice.
- Changes to contracts for criminal legal aid may have an impact on the quality and supply of criminal defence lawyers.

The UK's obligations under Article 6

Article 6 provides that everyone has the right to a fair trial in both civil and criminal cases. This gives an individual the right to be heard by an independent, impartial tribunal, in public and within a reasonable amount of time.

The right to a fair trial is a limited right and the procedural requirements of a fair hearing may differ according to the circumstances. For example, hearings should generally be open to the public so that justice can be seen to be done. Yet some or all of a trial may be held in private because it may involve children, or national security interests. Courts in countries that have signed the Convention are allowed to apply their own procedural rules so long as the outcome is a fair trial.

Article 6(1) applies both to cases involving 'civil rights and obligations' and to criminal cases. Through a series of judgments, the European Court of Human Rights has interpreted civil rights and obligations as including areas such as family law, employment law and commercial law. The principles contained in Article 6(1) may also apply to certain cases involving the relationship between the individual and the state, especially disputes involving money and property. Administrative decisions made by public bodies which are not courts or tribunals, such as a review by a local authority planning inspector, must be compliant with Article 6(1) unless there is a right of appeal to a court or tribunal that does comply with its requirements.[1]

Article 6(2) and 6(3) offer additional protection in cases where an individual is charged with a criminal offence. This is necessary because the sanctions for serious criminal offences are the potential loss of liberty. The presumption that a defendant is innocent until found guilty under the law is central to the principle of a fair criminal trial. People charged with a criminal offence need to be informed promptly and in detail about the case against them in a language that they understand. They need to have sufficient time and resources to prepare a defence; to be able to defend themselves in person or through a lawyer whom they choose; and to be given legal aid if they cannot afford a lawyer and this is necessary for

1 The test case for compliance with Article 6 is whether or not the tribunal will be adjudicating on civil rights or obligations.

the interests of justice.[2] Defendants in a criminal case have the right to examine and call witnesses.[3] They also have the right to a free interpreter if they cannot understand or speak the language used in court.

Article 6 imposes two different types of obligations on the state:

- **a negative obligation** not to punish anyone without a fair trial.
- **a positive obligation** to establish a court system which upholds this right – for example, by providing interpreters or legal aid in criminal proceedings.[4]

Relation to other articles

Article 6 is closely linked with Article 5, which protects the right to liberty and security. Together these Articles ensure that nobody can lose their liberty, which is a fundamental right, without access to a fair trial. Article 5(4) is particularly relevant. Together with Article 6, it guarantees the right to a fair hearing for anyone challenging the lawfulness of their detention by the state.

Article 6 is also connected with Article 7, which deals with retrospective punishment.[5] This provides that a person should only be convicted of a crime if the person's act or omission was a crime recognised in law when it occurred. The punishment for a crime should be no greater than that prescribed by the law at the time the crime occurred.

2 The European Court of Human Rights has held that legal aid should be granted in the interests of justice when a person risks deprivation of liberty: *Hooper v. the United Kingdom* [2005] 41 EHRR 1.

3 However, see *Al-Khawaja & Tahery v. the United Kingdom*, Application No. 26766/05 and 22228/06 [2011] ECHR 2127.

4 Council of Europe, Human Rights Education for Legal Professionals. Available at:http://www.coehelp.org/mod/glossary/showentry.php?courseid=75&concept=Positive+obligation. Accessed 16/02/12.

5 Article 7 of the ECHR sets out:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Finally, Article 6 is connected with Article 13, the right to an effective remedy. This sets out that the state must provide redress to anyone whose rights under the Convention are breached. Procedural obligations are also provided by other articles, such as Article 8, the right to a private and family life. For instance, a local authority would need to consult parents and provide full disclosure to them about reasons to place a child of theirs who was in care into adoption.[6]

6 Re M (Care: Challenging Decisions by Local Authority) [2001] 2 FLR 1300.

The development of Article 6 in Britain

The British legal systems are widely recognised internationally as fair and just. Almost everyone can expect a fair public hearing in a reasonable time in front of an independent court or tribunal. The principle of a fair trial has been central to the British legal systems for centuries. It has long been recognised as essential for the rule of law that people believe they will be fairly heard and judged in court. This principle was first documented in the Magna Carta which, in 1215, set out in the name of the king that, 'to no one will we sell, to no one will we refuse or delay, right or justice'.[7] An ancient principle of common law which roughly corresponds to Article 6 is 'natural justice', or the duty to act fairly. In 1689, the Bill of Rights set out a host of provisions and assurances in law, rescinding the power of the monarch to suspend laws without parliamentary approval, prohibiting excessive fines and bail, and protecting jury trial.

The precise definition of a fair trial has evolved over time. For example, before 1836 the prosecutor could address the jury to argue that a defendant was guilty. However, the defence counsel, if the defendant had one, was not permitted to address the jury to argue otherwise.[8]

An impartial judiciary, independent of government, is a vital element in guaranteeing a fair trial. Judicial independence is a fundamental check on the power of the state and has been protected by statute since the Act of Settlement in 1701. The Constitutional Reform Act 2005 provided further protection of this principle by requiring the Lord Chancellor, other ministers of the Crown, and all with responsibility for matters related to the judiciary to uphold its continued independence.[9]

7 British Library, *Treasures in full: Magna Carta*. Available at: http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html. Accessed 08/12/2011.

8 Bingham, T., 2011. *The Rule of Law*. Penguin. Page 91.

9 Constitutional Reform Act 2005. Part 2, Section 3. Available at: http://www.legislation.gov.uk/ukpga/2005/4/section/3. Accessed 08/12/2011.

Procedural standards are one important way in which fairness is protected. In civil cases, for example, parties are required as a general principle to disclose documents that they will rely on in court, as well as documents in their possession, even if these are detrimental to their case. They should also exchange the statements of the witnesses they wish to call in advance.[10] These requirements ensure that both parties know the facts of the case and can respond effectively to allegations against them. In criminal cases the prosecution has a duty to declare all its material but there is not an equivalent obligation for the defendant.

Criminal trials are generally held in public, unless it is necessary to employ 'special measures' to support vulnerable individuals or for national security reasons. While generally still held in public, this may offer individuals greater privacy or protection. For instance, rape victims can give their evidence in court from behind a screen, by live-link, or in private. If a victim has learning difficulties, they may be able to give their evidence by video or with the assistance of an intermediary.[11] Since June 2011, children and some other vulnerable people have been automatically eligible for such support without having to apply for it.[12]

The UK is a signatory to a number of international conventions protecting the right to a fair trial. These include the United Nations Convention on the Rights of the Child, which contains Article 40, covering juvenile justice, and the International Covenant on Civil and Political Rights (ICCPR), which also provides for a fair trial in Articles 9, 14 and 15.

The UK has developed domestic institutions which support and protect the right to a fair trial, most notably within the criminal and civil courts and tribunals. The Law Commission is an independent body which keeps the law under review and recommends reform where it is needed. Its aims are to ensure the law is as fair, modern, simple and cost-effective as possible. The Criminal Cases Review Commission is an independent body set up in 1997 to review possible

10 Civil Procedure Rules, Part 21. Available at: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part31.htm. Accessed 08/12/2011.

11 Youth Justice and Criminal Evidence Act 1999. Part II, Chapter I. Available at: http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/I. Accessed 08/12/2011.

12 Ministry of Justice, 2011. *More rights for children and vulnerable adults in court*. Available at: http://www.justice.gov.uk/news/press-releases/moj/newsrelease270611b.htm. Accessed 08/12/2011. The changes include: Giving child witnesses (under 18s) more choice about the way they give their evidence, allowing them to opt-out of giving video-recorded evidence and instead give evidence in court; giving victims of rape and serious sexual offences the opportunity to give evidence via video-recorded statements automatically – something currently limited to child witnesses; ensuring children and vulnerable and intimidated adults can have a supporter in the room when they are giving video-link evidence.

miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and may refer appropriate cases to the appeal courts. The Legal Services Commission (LSC) runs the legal aid scheme in England and Wales, providing funding to help ensure that people get a fair hearing. The LSC also runs the Community Legal Advice service which provides limited legal telephone advice to people. The Legal Aid, Sentencing and Punishment of Offenders Bill, currently before parliament, would abolish the LSC, transferring to the Lord Chancellor the administration of legal aid. The Lord Chancellor would have the power to issue directions and guidance on the operation of the legal aid scheme to a Director of Legal Aid Casework. Concerns have been raised about the proposed Director's apparent lack of independence from the government.[13]

Despite the strong legal and institutional framework supporting the effective implementation of Article 6, our evidence suggests that the UK may not be fully meeting its obligations in some areas. In each setting we look at whether there are adequate laws to comply with Article 6, and whether there are institutions and processes in place to protect and uphold the law. We draw conclusions about the key problems which must be tackled if the UK is to meet in full its human rights obligations under Article 6.

13 Joint Committee on Human Rights. 19 December 2011. Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill. HL Paper 237, HC 1717. Para 1.22.

The use of closed material compromises the right to a fair trial

How Article 6 applies in cases involving sensitive intelligence material

The basic principles of a fair hearing include that the person involved should be informed of the case against them. The case should also be heard in front of an independent and impartial court within a reasonable time.

A trial – or, in civil cases, a hearing – is usually heard in public so that justice can be seen to be done. In both civil and criminal cases, all parties are normally entitled to see the evidence of the other parties as a matter of basic fairness. In addition, the parties are required to disclose to one another any other material they have which either harms their case or helps the other side. A significant exception to the requirement to disclose additional, relevant material is when Public Interest Immunity (PII) is invoked. This allows a party to seek the permission of the judge to withhold certain additional information on the grounds that disclosure would be contrary to the public interest, including the interests of national security. In making a PII order, the judge must balance the public interest in the fair administration of justice with the public interest in maintaining the secrecy of certain material whose disclosure one party claims would be damaging. If the judge agrees, the additional material is withheld from the one party but the other party is also not allowed to use it in court.

In addition to PII, the judge may sometimes direct that part or all of a case may be heard *in camera* in order to protect national security or some other sensitive public interest. This means that the case will be heard with both parties present, but with the media and members of the public excluded. The caveat is that any decision to withhold evidence must be necessary and proportionate and not undermine the right to a fair trial. The integrity of the justice system depends on the public being able to see that trials are fair.[14]

14 Metcalfe, E., 2009. *Secret Evidence*. JUSTICE. Page 224. The need for a trial to not only be fair but also be seen to be fair is a fundamental principle of English law ('justice must be seen to be done'). It is also recognised under Article 6 (see, for example, *A.B. v. Slovakia*, Application no.41784/98, March 4, 2003, at [55]).

Since 1997, however, 'closed material procedures' have been introduced in certain types of cases involving the use of sensitive intelligence material. This is very different from how PII operates in a civil or criminal case. Under a closed material procedure, the person concerned and his or her legal team, as well as the public and media, are completely excluded from any part of the case in which closed material is heard. Crucially, the 'secret evidence', or closed material, provided by the authorities will still be considered as evidence in the case even though it is not disclosed to the person concerned or to his lawyer. Neither will know who the 'closed' witnesses are or have the opportunity to challenge them in the closed hearings. Instead, there will be a 'special advocate' appointed to represent the interests of the person who has been excluded from the case. The special advocate will be allowed to challenge the closed evidence, but after service of the closed material will not be permitted to communicate with the person whose interests they represent, without permission of the court on notice to the Secretary of State.

In a case such as this, therefore, the person affected is likely to be prevented from knowing the full case against him and may, therefore, receive an adverse decision, with potentially devastating effects, without ever finding out the full reasons why.

Origins of the 'closed material procedure'

Closed material procedures were introduced in the UK following the case of *Chahal v. the United Kingdom* at the European Court.[15] The case concerned a foreign national whose deportation the Secretary of State had deemed to be 'conducive to the public good'.[16]

Mr Chahal was held in immigration detention because the British government wanted to deport him on the ground of national security. Mr Chahal's original case had been considered in private by an advisory panel to which neither he nor his lawyers had access. The Court found that Mr Chahal's human rights had been violated because he was not given any opportunity to challenge the closed material against him, whether to dispute his detention (in breach of Article 5.4, the right to challenge the lawfulness of detention) or to dispute the decision to deport him (in breach of Article 13, the right to an effective remedy).

In response to the *Chahal* judgment, parliament passed the Special Immigration Appeals Commission Act 1997 which established the Special Immigration

15 *Chahal v. the United Kingdom* [1997] 23 EHRR 413.
16 Immigration Act 1971 3(5)(a).

Appeals Commission (SIAC). It enables foreign nationals subject to deportation on national security grounds, a right of appeal before an independent judicial tribunal that could assess the factual basis for the decision and, if necessary, overturn it. At the same time, SIAC's procedures have been designed to prevent the disclosure of sensitive information contrary to the public interest, including the interests of national security and international relations.

Before SIAC, sensitive material can be examined and taken into account in 'closed sessions' from which the appellant and his or her lawyers are excluded. The material considered in these hearings, known as 'closed material', is not disclosed to the applicant or his lawyers and has therefore been widely referred to as 'secret evidence'.

In order to reduce the unfairness caused by the use of closed material to the person affected, SIAC's procedures also provide for the use of 'special advocates'. These are independent lawyers appointed by the Attorney General to act on behalf of the appellants and represent their interests in closed sessions. They can examine the closed material, make submissions to the court and cross-examine witnesses.[17] Once the special advocate has seen the closed material, they cannot have any communication with the appellant, including taking instructions from him, unless SIAC authorises it.[18] SIAC, in turn, must notify the Secretary of State that the application has been made. This means that it is impossible for a special advocate to communicate with the person they represent in confidence once they have seen the closed material, although the Secretary of State does not see the person's reply. This issue is also the subject of consideration in the Justice and Security Green paper.

In some cases, special advocates have also complained that they have only received the closed material just before the hearing commences, limiting the time they have to scrutinise the evidence and mount a defence.[19]

17 Metcalfe, E., 2007. *The Future of Counter-terrorism and Human Rights*, JUSTICE. Page 12.

18 Rule 36 of the Special Immigration Appeals Commission (Procedure) Rules 2003 and duplicated in Rule 76.25 of the Civil Procedure Rules. The Special Advocate can seek instructions from the suspect without restriction before having sight of the closed material. However, after the Special Advocate has seen the secret material, the suspect can only send written instructions to the Special Advocate, and the Special Advocate has to seek permission from the Government and the Court or Tribunal to take instructions from the suspect. In practice, permission is rarely granted.

19 Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10. Paras 63-65.

When SIAC was first set up, the question of whether its procedures were compatible with the right to a fair hearing under Article 6 did not arise. This is because immigration and asylum claims are not covered by Article 6.[20] Nonetheless, SIAC's model of closed hearings and special advocates has become the basis for all subsequent closed material procedures in UK courts and tribunals. In the Belmarsh case concerning indefinite detention of foreign nationals subject to immigration control, the European Court of Human Rights found that SIAC's procedures in cases involving deprivation of liberty were required to meet 'substantially the same fair trial guarantees' as Article 6 in criminal cases.[21]

In October 2011, the government published its Justice and Security Green Paper.[22] Among its key proposals is the extension of closed material procedures to be more widely available in civil proceedings, including the possibility of closed inquests. In a collective response to the Green Paper, serving Special Advocates said that the current closed material procedure does not deliver procedural fairness and there are no compelling reasons for giving the government a discretionary power to extend the procedures to any other civil proceedings.[23]

Key issues

1. The fact that the person is unlikely to know the case against him or her will almost certainly breach the right to a fair trial

One of the core principles of natural justice[24] and one of the fundamental parts of the right to a fair trial under Article 6 is the right to know the case against you.[25] Any use of closed material that prevents a person from knowing the case against them is therefore highly likely to lead to that person having an unfair trial and risks breaching Article 6.

20 See *Uppal and Singh v. the United Kingdom* [1979] 3 EHRR 391 (European Commission of Human Rights); *Maaouia v. France* [2001] EHRR 42 (European Court of Human Rights).
21 *A. and others v. the United Kingdom* [2009] EHRR 29, para 217.
22 Justice and Security Green Paper, Cm 8194, October 2011.
23 Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.
24 See, for example, the judgment of Lord Dyson in *Al Rawi and others v. Security Service and others* [2011] UKSC 34 at para 12; and the judgment of Lord Neuberger MR in *Al Rawi* [2010] EWCA 482 at para 68.
25 See, for example, *Ruiz-Mateos v. Spain* [1993] 6 EHRR 505 (civil proceedings) at para 63: 'The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party'; see also *Brandstetter v. Austria* [1991] 15 EHRR 378 (criminal proceedings).

Special advocates and closed material are now used in a far wider context than just deportation. They have most controversially been used in relation to control orders, and now Terrorism Prevention and Investigation Measures (TPIMs) notices which have replaced control orders (this is also discussed in the chapter on Article 5). A TPIM notice is issued by the Home Secretary to restrict an individual's liberty and movements for 'purposes connected with protecting members of the public from a risk of terrorism'. They are seen as particularly controversial because the evidence used to justify TPIM notices is largely derived from intelligence sources, meaning that these cases often rest heavily on closed material and closed sessions.

It was in the context of control orders that the fairness of the closed material system was challenged in a series of cases that culminated in *A.F. (No. 3)* in the House of Lords.[26] This case focused on the question of whether an individual subject to a control order has a right to know sufficient details of the allegations against him, or whether it is possible to have a fair trial without even that evidence being known.

Taking account of the then recent Strasbourg judgment in *A. and others v. the United Kingdom* in relation to the stringent control orders before them, the House of Lords concluded unanimously that in order to guarantee a fair hearing under Article 6, individuals in control order cases must be given 'sufficient information' about the allegations against them to enable them to give effective instructions to the special advocates representing their interests.

Although *A.F. (No. 3)* established this principle in control order proceedings, special advocates have indicated that in practice there remain significant difficulties in obtaining sufficient disclosure of relevant material.[27]

26 *Secretary of State for the Home Department v. A.F. (No. 3)* [2010] 2 AC 269.

27 Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10. See also Justice and Security Green Paper – Response to consultation from Special Advocates. 16 December 2011.

The Joint Committee on Human Rights (JCHR) recommended to the government that the legal framework governing the control order regime be amended to make explicit reference to the right to a fair hearing under Article 6. The government's reply was that this was not necessary because the Prevention of Terrorism Act must be read or interpreted in accordance with the Human Rights Act and the House of Lords decision in *A.F. (No. 3)* which requires the defendant to know the 'gist' of the case against him.[28] Special advocates have given evidence to suggest that in practice, individuals are still being given unnecessarily limited information, as the government continues to take an unduly 'precautionary' approach to disclosure.[29] The government, however, has denied this.

Since the introduction of control orders in 2005, a total of 52 people have been made subject to them.[30] As of December 2011, nine people were still subject to control orders.[31] In the intervening years, 13 control orders have been upheld by the Court at the review under section 3(10) of the 2005 Act and 16 have been quashed or revoked on direction of the Court.[32] Of the 16 that have been quashed or revoked, four were found to have been properly imposed but no longer necessary at the time of the hearing.[33] The figures for quashed control orders reflect in particular court decisions made in relation to early control orders when case law on Articles 5 and 6 was in its early stages. The Secretary of State now has a clearer idea where the parameters lie; this is illustrated by the fact that for control orders served between 2010 and 2011, three control orders were upheld by the courts and none were quashed (though not all proceedings have yet been completed).

28 Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

29 Joint Committee on Human Rights, 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

30 Lord Carlile of Berriew. February 2011. *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*. Page 7.

31 Control Order Powers, written answers and statements, 17 March 2011. Available at: http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/control-orders-111210-100311/?view=Standard&pubID=867763. Accessed 08/02/12.

32 Most recently in February 2012, the Court of Appeal ruled that a control order imposed under the Prevention of Terrorism Act 2005 was unlawful. *A.T. v. Secretary of State for the Home Department* [2012] EWCA Civ 42.

33 The combined total number of orders upheld, quashed and revoked is lower than the total number of individuals subject to control orders for reasons including the fact the first figure does not include cases where the hearing has yet to be heard; cases where the controlled individual either discontinued their proceedings or absconded from the control order before the hearing took place; or cases where the Secretary of State conceded that she could not make sufficient disclosure to comply with her obligations under Article 6 and so revoked the control order.

The Coalition government conducted a review that concluded that they should be replaced.[34] The Terrorism Prevention and Investigation Measures Act 2011 has repealed control orders and replaced them with new measures known as 'terrorism prevention and investigation measures' (TPIMs). In many ways these new measures mirror the current control order regime. The 2011 Act continues the use of special advocates. Although it provides for compliance with Article 6 in general terms, it relies on the government's legal teams and ultimately the courts to interpret the legislation in line with the requirements of the *A.F. (No. 3)* judgment that the individual must be given sufficient information about the allegations against him to be able to give effective instructions.

The fairness of the closed material process has been questioned by non-governmental organisations and has been challenged in domestic and international courts.[35] In the case of *A. and others v. the United Kingdom*,[36] the European Court of Human Rights unanimously found that the use of special advocates, closed hearings and the lack of full disclosure of evidence in relation to proceedings relating to the (now repealed) provisions of Part 4 of the Anti-Terrorism Crime and Security Act 2001 did not enable individuals to effectively address the charges against them and the lawfulness of their detention, in breach of the requirements of Article 5.4.

It was this case that the House of Lords followed in *A.F. (No. 3)* when it determined that in order to have a fair trial under Article 6, in the context of the stringent control orders before the House of Lords, the individuals needed to have sufficient information about the allegations against them.[37] Despite this clear finding in relation to control orders, the government has argued that the *A.F. (No. 3)* disclosure requirement does not necessarily apply in other contexts. This is the subject of ongoing litigation. In the employment tribunal case of *Tariq*, the Supreme Court upheld the government's position that the *A.F. (No. 3)* disclosure requirement did not apply in that context.

34 HM Government. January 2011. *Review of Counter Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004).

35 Human Rights Watch has increasingly criticised the 'inadequate procedural safeguards and reliance on closed material as a basis for issuing Control Orders. Likewise Liberty has called attention to the principle of open justice; Judges must be open to public scrutiny and closed courts do not facilitate this. (See From War to Law – Liberty's Response to the Government's Review of Counter-Terrorism and Security Powers 2010).

36 *A. and others v. the United Kingdom* [2009] 49 EHRR 29 concerned the detention without trial of foreign terrorist suspects prior to the introduction of control orders.

37 *Secretary of State for the Home Department v. A.F. (No. 3)* [2010] 2 AC 269.

In the case of *Bisher Al Rawi & 5 Others*, the government sought to extend closed procedures to ordinary civil trials in which sensitive material supported the government's case.[38] Mr Al Rawi and five others, including Binyam Mohamed, had been detained by foreign authorities at various locations including Guantanamo Bay on suspicion of terrorism-related activities. They claimed in civil proceedings that the UK shared responsibility for their torture and mistreatment in these locations (the case of Binyam Mohamed is also discussed in the chapter on Article 3).

In its defence, the government sought to rely on intelligence which it argued was too sensitive to be seen by the claimants. The Supreme Court noted that the principles of open justice and natural justice are fundamental features of common law trials. It concluded that a closed material procedure would depart from those principles so significantly that the measure could only be introduced by parliament. The Supreme Court noted that there was already a well-established and effective system in place for keeping sensitive material secret in the public interest: Public Interest Immunity (see above). In such cases a court order can be granted so that sensitive material that a party might otherwise be required to disclose is not made public, on the grounds that to do so would be against the public or national interest. Unlike closed material, if the evidence is withheld on PII grounds, it will not be used as evidence in the case.

In making a PII order, the courts must balance the public interest in the administration of justice with the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging. The integrity of the justice system depends on the public being able to see that trials are fair.[39]

Despite the Supreme Court finding that the introduction of a closed material procedure into civil proceedings was unnecessary and could undermine the right to a fair hearing, the recent Justice and Security Green Paper argues that the current system of PII is flawed because it renders 'the UK justice system unable to pass judgment on [national security] matters: cases either collapse, or are settled without a judge reaching any conclusion on the facts before them'.[40] A similar argument was dismissed by the Supreme Court in *Al-Rawi*.

38 *Bisher Al Rawi & 5 Others v. Security Service, SIS, the Foreign and Commonwealth Office, Home Office, Attorney General* [2010] EWCA Civ 482.

39 Metcalfe, E., 2009. *Secret Evidence*, JUSTICE. Page 224.

40 Justice and Security Green Paper, Cm 8194, October 2011. Page 7.

The Commission considers that the Green Paper's criticisms of the current PII system are not justified, and its proposals are flawed both because they encompass far too wide a category of material and because they fundamentally fail to recognise the flaws in the closed material procedure.[41]

2. Evidence derived from secret intelligence sources may not be as robust as that used by police in an open court process

Much of the closed evidence used in cases which concern national security is heavily reliant on information from secret intelligence sources. This is a concern because such evidence may contain second- or third- hand testimony or other material which would not normally be admissible in ordinary criminal or civil proceedings.[42] In addition, the standard of proof in most types of cases in which closed material is used is typically much lower than in civil and criminal cases. In control order cases, for instance, there only needs to be a 'reasonable suspicion' of involvement in terrorist-related activity,[43] which is a far lower standard of proof than either the civil standard ('the balance of probabilities') or the criminal standard ('beyond a reasonable doubt').

More generally, a number of senior judges have noted that closed material is likely to be less reliable than evidence produced in open court because it has not been tested by thorough cross-examination. In the Supreme Court case of *Al Rawi*, for example, Lord Kerr warned that: 'Evidence which has been insulated from challenge may positively mislead'.[44] Although special advocates are able to cross-examine a witness in closed hearings, they are prohibited from discussing their questions orally with the person they are representing after service of the closed material. For this reason, Lord Bingham described the task of special advocates as 'taking blind shots at a hidden target'.[45]

41 Equality and Human Rights Commission January 2012. Response of the Equality and Human Rights Commission to the Justice and Security Green Paper. Available at: http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/commissions-response-to-consultation-justice-and-security-green-paper/. Accessed 07/02/12.

42 See for example, paragraph 17(4) of the Special Advocates' response to the Green Paper on Justice and Security, referring to the use of 'second or third hand hearsay … or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings'. The test now in the TPIM Act is 'reasonable belief'.

43 Section 2, Prevention of Terrorism Act 2005.

44 *Al Rawi*, para 93. See also e.g. Sedley, L.J. in *A.F. and others v. Secretary of State for the Home Department* [2008] EWCA Civ 1148 at paras 113 and 117.

45 *Roberts v. Parole Board* [2005] UKHL 45 at para 18.

3. The use of intercept evidence would increase the chances of successful prosecution of terrorist suspects while helping to ensure their right to a fair trial

Critics of the control order regime – including the Joint Committee on Human Rights[46] – have called for the current ban on the use of intercept evidence (evidence gained from intercepting communications, particularly telephone conversations) in criminal proceedings to be lifted.[47] This would increase the chances of successful prosecutions against those suspected of involvement in terrorism and, in so doing, reduce the need to rely upon such exceptional measures as control orders. It would also help to ensure that terrorist suspects are provided with the full procedural protection of Article 6. At present, intercept material can only be used in closed hearings and not in open court, as it is in countries such as the US, France, Germany and Israel.

In response to these criticisms the previous government agreed to set up first a Privy Council review, which reported in January 2008 and agreed with the use of intercept as evidence in principle. However, it also identified a series of nine operational tests that had to be met in order to ensure 'that the ability to safeguard national security or protect the public was not harmed'.[48] Subsequently, a Home Office-led work programme sought to find ways to implement the Privy Council recommendations and reported on this in December 2009.[49]

In January 2011, the Home Secretary told parliament that the government was continuing 'a programme of work' that 'will focus on assessing the likely balance of advantage, cost and risk of a legally viable model for use of intercept as evidence compared to the present approach.'[50] Most recently, the Justice and Security Green Paper was published in October 2011, but the use of intercept as evidence in civil proceedings was left out of the consultation.

46 See Joint Committee on Human Rights, 2006. *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, Twenty-fourth Report of Session, 2005-06, and Joint Committee on Human Rights. 2007. Counter-Terrorism Policy and Human Rights: 28 days, intercept and post – charge questioning, Nineteenth Report of Session 2006-07.

47 See, for example, Liberty's 2007 evidence to the Joint Committee on Human Rights on this subject. Available at: http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf. Accessed 08/02/12.

48 Privy Council Review of Intercept as Evidence, Intercept Evidence: A Report, CM7760. 2009. Para 208.

49 Privy Council Review of Intercept as Evidence, Intercept Evidence: A Report, CM7760. 2009.

50 Written Ministerial Statement, 26 January 2011, Column 9WS. Available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110126/wmstext/110126m0001.htm. Accessed 08/06/12.

In any event, the main obstacle to lifting the statutory ban appears to be the operational tests identified by the Privy Council review in 2008, which critics have suggested give too much weight to the concerns of the security and intelligence services.[51] They point out that the safeguards required by the Privy Council are unnecessary when compared to those found in other common law and EU jurisdictions.

4. The use of special advocates in closed hearings does not provide sufficient protection against the risk of an unfair trial

Although special advocates were originally introduced in SIAC in order to offset the obvious unfairness caused by the use of closed material, their effectiveness has been heavily criticised by a wide range of bodies at both the national and international level.[52]

In *Al Rawi*, for instance, several senior judges noted the serious shortcomings of the special advocate system: Lord Neuberger described them as 'a particularly poor substitute for the claimant's own advocate in an open hearing' and that their use 'cannot be guaranteed to ensure procedural justice';[53] Lord Dyson referred to 'the limitations of the special advocate system' and the criticisms of the Joint Committee of Human Rights in its 2010 report;[54] while Lord Kerr said that the use of special advocates 'should never be regarded as an acceptable substitute for the compromise of a fundamental right'.[55]

Most notably, serving special advocates themselves have been especially critical of the government's claims in the recent Green Paper on Justice and Security as to their supposed effectiveness.[56] Describing closed material procedures as 'inherently unfair',[57] they identify a number of inherent problems with the current

51 See, for example, JUSTICE, October 2007. *Freedom from Suspicion*. Para 137.

52 See, for example, the European Court of Human Rights noted in *A. and others v. the United Kingdom* [2009] 49 EHRR 29 at para 199, referring to criticisms of special advocates by including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. The Court noted in particular the submission of 13 serving special advocates to the House of Commons Constitutional Affairs Committee in 2005: 'the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented'.

53 [2010] EWCA 482 at paras 55 and 57.

54 UKSC 34 at para 27.

55 Ibid., at para 94.

56 Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

57 Ibid., para 15.

system including (1) the prohibition on any direct communication with the person they represent, 'other than through the Court and relevant government body', after the special advocate has received the closed material; (2) the inability to effectively challenge non-disclosure; (3) the lack of any practical ability to call evidence; (4) the lack of any formal rules of evidence to prevent poor quality material being admitted.

As the special advocates themselves note, less restrictive rules on communication between security-cleared counsel and affected persons exist in other countries which have used closed procedures, for example, military commissions in the US and the original procedures before the Security and Intelligence Review Committee in Canada.[58] In light of these problems, the Joint Committee on Human Rights (JCHR) has therefore recommended a system of greater communication between the special advocate and the party concerned.[59] Although the Justice and Security Green Paper suggests some potential improvements to the system by providing further training and support to special advocates,[60] the changes it proposes to the current procedures for communication are extremely limited and will not make any difference to the ability of special advocates to discuss closed material with the person whose interests they represent.[61]

In addition to concerns over their lack of effectiveness, the special advocate system has also been criticised for its lack of accountability. While the professionalism of those appointed as special advocates has not been questioned, there are concerns that their appointment is technically a matter of discretion for the Attorney General – the government's chief Law Officer, rather than the decision of a court. Further, special advocates are explicitly not responsible to the person whose interests they are appointed to represent; unlike lawyers, they are not required to take instructions from the person affected nor do they need that person's consent. The system of special advocates has also been criticised as not being an 'effective substitute for a legal counsel of choice'.[62]

58 See Forcese and Waldman, August 2007. *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings*. Canadian Centre for Intelligence and Security Studies.

59 Joint Committee on Human Rights, 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

60 Justice and Security Green Paper, Cm 8194. October 2011. Page xiv.

61 See Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

62 Amnesty International, August 2010. *United Kingdom: Time to End the Control Orders Regime, August 2010*. Endnote 43.

5. The use of closed material is expanding and is now used across a range of proceedings – and the government is proposing to expand it further

From its origins in deportation cases, the use of closed material has gradually extended across the legal system. Legislation has been passed permitting it in new areas, including terrorist asset freezing proceedings, employment tribunals, and even planning inquiries. The government's Green Paper on Justice and Security proposes extending the use of closed proceedings to any civil case in which a government minister certifies that it involves sensitive material that should not be disclosed in the public interest.[63] The proposals have been widely criticised by leading QCs,[64] special advocates,[65] and Non-governmental organisations.[66]

The JCHR has raised concerns about the increasing numbers of different contexts in which closed material is used. In recent evidence to the JCHR, the government has identified 14 different contexts in which the special advocate system has been provided for in legislation in civil proceedings.[67] However, there are also a number of situations in which special advocates have been appointed on a non-statutory basis, for example, their use before the Security Vetting Appeals Panel. Accordingly, the government has no accurate figures of how many special advocates have been appointed since 1997.[68]

For example, the House of Lords agreed that the Parole Board could use closed evidence in order to decide whether it is safe to release a prisoner on parole. This was permitted even though there was no explicit provision for the use of closed procedures in the law governing the Parole Board. More recently, the Supreme Court recently upheld the use of a closed material procedure in the employment tribunal in *Tariq v. Home Office*.[69]

63 Para 2.7 of the Green Paper. The Secretary of State's decision would be reviewable by the trial judge on 'judicial review principles', but any challenge to this decision would itself necessarily involve closed proceedings.

64 See, for example, memorandum of Dinah Rose QC to the Joint Committee on Human Rights, 24 January 2012, at para 14: 'the Green Paper is fundamentally incompatible with our system of civil justice'.

65 See Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

66 See, for example, responses of JUSTICE, Liberty, Amnesty International, and the Bingham Centre for the Rule of Law. Available at: http://ukhumanrightsblog.com/2012/01/31/more-secret-trials-no-thanks/.

67 Memorandum submitted by the Ministry of Justice to the Joint Committee on Human Rights, 28 November 2011.

68 See the Freedom of Information Act requests referred to in JUSTICE, 2009. *Secret Evidence*. Para 359.

69 *Tariq v. Home Office* [2011] UKSC 35.

Parliament twice resisted attempts by the previous government to introduce closed inquests: first, as part of the Counter-Terrorism Act 2008 and subsequently under the Coroners and Justice Act 2009. Despite this, the government argued during the 7/7 London bombing inquests that closed hearings should be used because open hearings would involve disclosure of top secret intelligence files. This was vigorously resisted by many of the families of victims, nor was it supported by the Metropolitan Police. The coroner ruled that she had no power to adopt closed procedures, and that furthermore it would be unnecessary to do so.[70] On appeal the court upheld the coroner's ruling.[71] In the end the public were excluded from the inquest, but 'interested persons', including the relatives of the 52 victims of the London bombings and their legal representatives, were admitted.

As a result of the court's ruling, families and victims were able to cross examine a witness from the Security Service. Significant evidence emerged about its effectiveness. The Security Service was criticised by the coroner for how it investigated and prioritised suspects, for poor record-keeping, and for inadequate procedures to ensure the 'supergrass' informant was shown the best possible images of a suspect.[72]

If the families and victims had been excluded these findings might not have emerged. The fact that the closed material procedure was rejected does not seem to have presented any risk to the public. Nevertheless, as part of its recent Justice and Security Green Paper, the government has invited responses on whether various measures could be adopted to protect sensitive material from being disclosed in inquests, including the adoption of closed material procedures.[73]

70 See page 22 of the ruling of Hallett, L.J. dated 3 November 2010 in which she cited the judgment of the Court of Appeal in *Al Rawi* and her conclusion at page 28 that 'with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened'.

71 *R. (Secretary of State for the Home Department) v. Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098.

72 See the concluding remarks of Lady Justice Hallett. 6 May 2011.

73 Justice and Security Green Paper, Cm 8194, October 2011. Paras 2.10-2.19.

Children may be at risk of Article 6 breaches when the justice system does not cater for the child's ability to understand and participate in court proceedings

How Article 6 protects children in the justice system

Like adults, children are entitled to a fair trial. The state has an additional obligation to ensure the justice system takes into account the age, level of maturity and intellectual and emotional capacity of child defendants.[74] The trial process should allow a child defendant to participate effectively in the trial, to follow the proceedings and to give instructions, where necessary, to their lawyer.[75]

The UN Committee on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') emphasise that courts must be seen to take account of a child's age and respond accordingly.[76] They stress that in order to participate effectively in a trial, a child needs to 'comprehend the charges, and possible consequences and penalties'.[77] The proceedings 'should be conducted in an atmosphere of understanding to allow the child to participate and to express himself or herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.'[78]

74 'Minors are entitled to the same protections of their fundamental rights as adults but ... the developing state of their personality – and consequently their limited social responsibility - should be taken into account in applying Article 6.' *Nortier v. Netherlands* [1993] 17 EHRR 273. See also *T. v. the United Kingdom* and *V. v. the United Kingdom* [1999] 30 EHRR 121.

75 *T. v. the United Kingdom and V. v. the United Kingdom* [1999] 30 EHRR 121.

76 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985.

77 UNCRC, 25 April 2007. Committee of the Rights of the Child, General Comment No. 10 (2007) CRC/C/GC/10.

78 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') adopted by General Assembly resolution 40/33 of 29 November 1985.

As a signatory to the UN Convention on the Rights of the Child (UNCRC) the UK is obliged to ensure that in its courts, the best interests of the child shall be of primary consideration.[79] Every year, around 96,500 children aged under 18 are tried in British courts. Most cases in which the defendant is a child will be dealt with by a youth court, which is a specialised form of magistrates' court. In youth courts, unlike adult courts, only people connected with the case, such as the victim, lawyers and family, may attend the hearing. While members of the press can be present in the court, they face some reporting restrictions; for example, they are not usually allowed to mention the child's name. Magistrates are trained to handle the children who come before them, and modifications will be in place to help children participate.

Under certain circumstances, where the alleged offence is very serious, or where the co-defendants are adults, children can appear in adult magistrates' courts.[80] In England and Wales, a child can also be tried in a Crown Court for a grave or indictable offence, including burglary, sexual assault, grievous bodily harm with intent, firearms offences and manslaughter.[81] However, to protect a child's right to a fair trial, courts are obliged to ensure that each child can understand and participate in the proceedings.

The UK has taken many steps to satisfy these obligations. A child under 18 will normally be tried in a youth court in England and Wales.[82] A practice direction for magistrates and Crown Courts emphasises that children and young people under 18 should be treated as vulnerable defendants and that:

> 'All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends. Regard should be had to the welfare of a young defendant.'[83]

79 United Nations Convention on the Rights of the Child, Article 13, entered into force September 1990.

80 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 33.

81 NACRO, September 2004. *Youth Crime Briefing. The grave crimes provisions and long term detention*.

82 96,500 children between the ages of 10 and 17 proceeded through the youth/magistrate courts in 2010. Ministry of Justice, May 2011. Criminal Justice Statistics, *Quarterly Update to December 2010 Ministry of Justice Statistics bulletin*. Page 36, table 3.5.

83 Part III: Further Practice Directions Applying in The Crown Court And Magistrates' Courts, section 30.

Key issues

1. The age of criminal responsibility in England and Wales is lower than international guidelines and should be raised to minimise the risks of an unfair trial

In England and Wales the age of criminal responsibility is set at 10 years old. This is the age at which a person can be charged, and be found guilty, of committing a criminal offence. Any child below the age of 10 is not considered to have the capacity to distinguish right from wrong and be held liable for a criminal act.

The age of criminal responsibility in England and Wales is lower than many countries: in Scotland it is 12 years, in China, Russia and Germany it is 14 years, and in France and Brazil it is 18 years.[84] The UN Committee on the Rights of the Child has stated that setting the age of criminal responsibility below 12 is 'not acceptable'.[85] In its concluding observations in 2008, it urged the UK to raise the age limit accordingly.[86] The Council of Europe Commissioner for Human Rights has also recommended that the government should increase the age 'to bring it in line with the rest of Europe, where the average age of criminal responsibility is 14 or 15'.[87]

Other jurisdictions respond to offences committed by children by adopting a welfare-based approach which regards children in trouble with the law as children first and foremost. This approach seeks to address the causes of their crime, which are likely to stem from neglect and abuse, rather than prioritising an adversarial system of proving guilt and innocence.[88] As a 2009 study of vulnerable defendants observed:

84 Prison Reform Trust, June 2011. Bromley Briefings Factfile. Page 34.

85 CRC Committee, 2007. *General Comment No. 10: children's rights in juvenile justice*, UN document CRC/C/GC/10. Para 32.

86 UNCRC, October 2008. Committee on the rights of the Child, Concluding Observations, CRC/C/GBR/CO/420. Para 78.

87 Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom (5-8 February and 31 March-2 April 2008), *Rights of the child with focus on juvenile justice*, CommDH (2008) 27, Strasbourg, 17 October 2008.

88 Scotland Children's Hearing System take most of the responsibility from courts for dealing with children and young people under 16, and in some cases under 18, who commit offences or who are in need of care and protection. This is based on the principle that children who commit offences and children who need care and protection are often the same children. This system seeks ways to support the child and move them away from re-offending. Where a decision is made to prosecute a child in a court, the hearing system can advise the court on how best to support the child in the process. This offers additional safeguards to support the child.

> 'A welfare-based approach to offending by children does not imply that the harms caused by the offending should be overlooked, but seeks to address harmful behaviour by responding to the child's welfare needs – on the assumption that these needs are likely to be at the heart of the offending behaviour.'[89]

The Joint Committee on Human Rights (JCHR) has also criticized the government's approach, noting:

> 'We are not persuaded by the Minister's response [to not increasing the age of criminal responsibility] ... Whilst we do not underestimate the effects on communities of the offending of some very young children, we do not believe that the UK's current response is consistent with its international obligations to children. Indeed, we consider that resort to the criminal law for very young children can be detrimental to those communities and counter-productive.'[90]

2. Children with learning or communication difficulties often do not receive sufficient 'special measures', or adaptations to court procedure, to ensure a fair trial

A quarter of children in the youth justice system have been identified as having special educational needs. This may mean they have problems reading, writing and understanding information, expressing themselves or understanding what others are saying. Nearly a quarter (23 per cent) have very low IQs of below 70.[91] While an IQ of less than 70 does not necessarily mean that the child has learning disabilities, their language ability is likely to be less than that expected of their chronological age. They may therefore have difficulty understanding and responding to ordinary questions and especially legal questions. In addition, they may have greater difficulty recalling and processing information; be acquiescent and suggestible when responding to questions; and, under pressure, may try to appease the questioner.

89 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 61.

90 Joint Committee on Human Rights, 20 November 2009. *Children's Rights*, Twenty-fifth Report of Session 2008–09, HL Paper 157 HC 318. Para 66.

91 Prison Reform Trust, June 2011. Bromley Briefings Factfile. Page 41.

Clearly, children with learning and communication difficulties require extra help if they are to fully understand and participate in their trial. In *R.(T.P.) v. West London Youth Court* concerning a case of a 15-year-old boy with a low IQ, charged with robbery and attempted robbery, the judge set out the minimum requirements of a fair trial.[93] This included that defendants had to understand what they had done wrong; what, if any defences were available to them; have the opportunity to make representations; and have the opportunity to consider what representations they wanted to make once they had understood the issues involved. The judge also set out ways to help achieve these requirements, including keeping questions short and clear, and ensuring that the claimant had support to sufficiently understand the issues.

To identify whether a child defendant has special needs, the child should be assessed before the trial begins and appropriate measures taken. A failure to do this risks breaching that child's Article 6 rights.[94] Youth offending teams do not, however, routinely assess children in this way.[95] The 'Asset' programme used by the Youth Justice Board aims to assess through a structured interview the factors contributing to a young person's offending, and to 'highlight any particular needs or difficulties the young person has, so these may be addressed'.[96] However, Asset does not look specifically at learning disabilities or communication difficulties.[97] HMI of Court Administration found that because procedures to identify young people with learning difficulties are ad hoc, the difficulties only came to light on the day of the hearing, or in some cases, did not come to the attention of the court at all:

> 'The variety of personal support needs across the range of learning difficulties through to learning disabilities is vast and there is limited understanding of this by court staff (and other agencies). Without an understanding of the depth of the problem and therefore, the likely effect on behaviour and understanding, court staff cannot be expected to make appropriate provision or communicate effectively.'[98]

92 *R.(T.P.) v. West London Youth Court* [2005] EWHC 2583 (Admin).

93 *R.(T.P.) v. West London Youth Court* [2005] EWHC 2583 (Admin).

94 Jacobson, J. and Talbot, J., 2009.*Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 44. A Joint Inspection by HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011. *Not Making Enough Difference: A Joint Inspection of Youth Offending Court Work and Reports*. Para 3.5.3.

95 Ministry of Justice. Asset – Young Offender Assessment Profile: http://www.yjb.gov.uk/engb/practitioners/Assessment/Asset.htm.

96 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 44.

97 HM Inspectorate of Court Administration, *HMICA thematic inspection of Youth Courts, Implementation of the Youth Court Good Practice Guide 2001*, March 2007. Page 12.

98 HM Inspectorate of Court Administration, *HMICA thematic inspection of Youth Courts, Implementation of the Youth Court Good Practice Guide 2001*. March 2007. Page 12.

The Inspectorate also noted that youth offending teams expressed concern that a child with some learning difficulties might not be able to 'give good account of themselves' in court proceedings. In consequence, the child's right to a fair trial might be affected.[98] In 2011, a joint inspection of youth offending court work in six areas of England and Wales found no evidence of a screening process to identify learning and communication difficulties and disabilities.[99]

Even when a court has identified that a child needs support to help understand legal proceedings, such assistance may not always follow. In 2011, for instance, a High Court judge quashed an earlier decision by the Crown Court to refuse to allow the defendant, a boy with attention deficit hyperactivity disorder, the benefit of a registered intermediary. An intermediary is an advocate for the child, who explains issues to them and speaks on their behalf.

A psychiatrist's report stated that the intermediary would 'enable him to give his best evidence and receive a fair trial'. The judge found that without the intermediary 'the risk that this claimant would not receive a fair trial would be real'.[100]

The European Court of Human Rights has found the UK in breach of Article 6 when a court made insufficient adaptations to cater for a defendant's learning disability.

In *S.C. v. the United Kingdom* [2004], the Crown Court tried an 11-year-old boy for attempting to steal a bag from an elderly woman causing her to fall and fracture her arm. The boy was assessed before the hearing and found to have a significant degree of learning delay. The court allowed measures to enable the boy to participate; for example, he was accompanied by a social worker and given frequent breaks.

The European Court of Human Rights still found a breach of his Article 6 rights, because the defendant did not understand that he might be given a custodial sentence. Once the sentence had been imposed, he still expected to go home with his foster father.

99 A Joint Inspection by HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011. *Not Making Enough Difference: A Joint Inspection of Youth Offending Court Work and Reports.* Para 3.5.3.

100 *R. v. Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin).

The Court concluded that the boy's age and low intellectual ability meant he was unable to participate effectively because the special measures were insufficient. It recommended that he should have been tried by a specialist tribunal which could make proper allowances for his difficulties and enable him to have a general understanding of the process and its potential outcomes.[101]

3. Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity

Children accused of serious offences such as burglary, sexual assault, grievous bodily harm with intent, firearms offences and manslaughter, can be tried in Crown Courts. In 2009 and 2010, 2,886 children under 18 were tried in this way. Nearly half of these cases (1,426) resulted in a custodial sentence.[102]

Conditions in Crown Courts do not always uphold a child's Article 6 rights. In 2008, the UN Committee on the Rights of the Child recommended that in the UK:

> '...children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts, irrespective of the gravity of the crime they are charged with.'[103]

The government has not implemented this recommendation. However, over the last two decades it has introduced measures to improve the experience of children tried in adult courts. This was largely in response to a European Court of Human Rights ruling on the 1993 Jamie Bulger case, in which two 11-year-old defendants were found guilty of murdering a two-year-old. The Court did not query the verdict, but found that the defendants had not received a fair trial:

In *T. v. the United Kingdom and V. v. the United Kingdom*,[104] the European Court of Human Rights found that the two defendants in the Bulger case had not been able to fully understand and participate in their trial, in breach of Article 6. The Crown Court had introduced some special measures: for example, the trial procedure was explained to the defendants, they were taken to see the court room in advance, and the hearing times were shortened. Nevertheless, the European Court of Human Rights ruled that the formality and ritual of the

101 *S.C. v. the United Kingdom* [2004] 40 EHRR 121 (60958/00).

102 Information provided to the Equality and Human Rights Commission by the Youth Justice Board. September 2011. It notes: *'The figures below have been drawn from administrative IT systems, which, as with any large scale recording system, are subject to possible errors with data entry and processing and may be subject to change over time.'*

103 Convention on the Rights of the Child, October 2008. Committee on the Rights of the Child, 49th session, CRC/C/GBR/CO/4.

104 [1999] 30 EHRR 121.

Crown Court would be incomprehensible and intimidating to an 11-year-old child. Some of the modifications to the court room actually increased their sense of discomfort; in particular the raised dock, designed to allow the defendants to see what was going on, left them feeling exposed to the scrutiny of the press and public.

Psychiatric evidence found that, at the time of the trial, both applicants were suffering from post-traumatic stress disorder, and found it impossible to discuss the offence with their lawyers. They had found the trial distressing and frightening and were unable to concentrate.

The European Court of Human Rights concluded that it was highly unlikely that either applicant would have felt able, either in the court room or outside, to co-operate with their lawyers and give them information for the purposes of their defence.

The government subsequently amended its rules for trial procedures in Crown Courts, to enable child defendants to understand and participate more effectively in the court process.[105] The amended rules, introduced in November 2009 and most recently updated in October 2011, try to make the Crown Court as similar as possible to a youth court. For example, a Crown Court judge can remove his or her robe and wig, and instruct barristers to do so as well; choose a court where all participants are on the same, or nearly the same, level and allow the child to familiarise him or herself with the court room beforehand.[106] There is also an emphasis on clear and simple language.[107] There is, however, still no automatic consideration of special measures for child defendants – this is left to the court's discretion.[108]

105 *The Consolidated Criminal Practice Direction Part III.30: Introduced in November 2009 and last updated in October 2011.*

106 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 16.

107 *The Consolidated Criminal Practice Direction Part III.30.12*. Last updated October 2011.

108 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a reviewof provision for adults and children*. Page 50. Plans to develop a 'young defendants pack' to assist children in understanding the court procedures and their rights was not implemented (Ibid., page 34); Vizard, E. Dr, Child Defendants, March 2006. Occasional Paper OP56, Royal College of Psychiatrists. Page 9.

Amended trial rules are guidance only, not statutory provisions. There is consequently a risk that guidance to support vulnerable defendants may not always be followed, particularly as lawyers and judges may have received little, if any, training in youth justice or child-welfare legislation.[109]

109 See for example, JUSTICE and The Police Foundation, January 2011. *Time for a new hearing, A comparative study of alternative criminal proceedings for children and young people*. Pages 35-36; O'Neill, S., 2009. *Should we retain the present court system for young defendants?* Available at:http://www.michaelsieff-foundation.org.uk/content/Report%207%20-%20Sally%20O'Neill's%20Speech.pdf. Accessed 08/02/12.

Cuts to legal aid may compromise the right to a fair trial

How Article 6 protects people's access to justice

Article 6 includes the provision that anyone charged with a criminal offence should be given free legal assistance if they do not have sufficient means to pay for it themselves, when this is required in the interests of justice. This provision aims to minimise the possibility that innocent people may be wrongly convicted or even lose their liberty because they do not have the financial means to defend themselves.

There is no parallel provision for civil cases. Article 6(1) merely requires a fair and public hearing within a reasonable time by an independent and impartial tribunal. However, in certain situations, for example where a case is very complex or a litigant has particular difficulty in representing themselves, and legal aid has not been available, the European Court of Human Rights has found violations of Article 6(1).

In *Airey v. Ireland* [1979][110] a victim of domestic violence had been trying to gain a judicial separation from her husband on the grounds of alleged physical and mental cruelty to her and her four children. She had been refused legal aid, and could not afford a lawyer.

The European Court of Human Rights stated that Convention rights must be 'practical and effective' to safeguard an individual. It added that this was particularly important 'in view of the prominent place held in a democratic society by the right to a fair trial.'[111]

The Court found that while there is no general right to legal aid in civil cases, legal aid is required when legal representation is compulsory, because of the complexity or nature of the proceedings or the ability of an individual to represent him or herself.

110 *Airey v. Ireland* [1979] 2 EHRR 305.
111 *Airey v. Ireland* [1979] 2 EHRR 305.

The refusal of criminal legal aid has been the subject of successful challenges against the UK in the European Court of Human Rights.[112] In the cases of *Benham v. the United Kingdom* [1996] and *Perks and others v. the United Kingdom* [1999] the Court found a breach of Article 6 where legal aid was not granted even though the deprivation of liberty was at stake.[113] In *Ezeh and Connors v. the United Kingdom* [2003] it found a breach of Article 6 when prisoners had no access to legal aid for disciplinary hearings which could extend their imprisonment.[114]

The Court has also found breaches in relation to the refusal of legal aid in civil cases.

In *Steel and Morris v. the United Kingdom* [2005] the Court held that the lack of civil legal aid in that case was a violation of Article 6.[115] The case concerned libel proceedings brought by the fast food chain McDonalds against the two applicants, who had distributed a leaflet severely criticising McDonalds' practices and food.

Having been refused legal aid, the defendants represented themselves through the trial which, at 313 court days, was the longest case in English legal history. The Court noted that the case was factually and legally complex, and that the volunteer lawyers and the extensive judicial assistance and latitude granted to the defendants did not substitute for counsel experienced in libel law.

The Court held that 'equality of arms' was central to the concept of a fair hearing. Absolute 'equality of arms' was not required, provided both sides have a reasonable opportunity to present their case effectively. Access to legal aid for a fair hearing should depend on what was at stake for the individual, the complexity of the law and procedure and the person's ability to represent themselves.

112 In *Bonner v. the United Kingdom* [1995] 19 EHRR 246 the European Court of Human Rights found a breach of Article 6(3)(c) because the accused needed the services of a lawyer to argue his grounds for appeal, given the fact that he faced an eight-year sentence if convicted.

113 *Benham v. the United Kingdom* [1996] 22 EHRR 293 and *Perks and Others v. the United Kingdom* [1999] 30 EHRR 33.

114 (203) All ER 164.

115 *Steel and Morris v. the United Kingdom* [2005] 41 EHRR 22.

Key issues

1. The current 'fixed fees' system can act as a barrier to those with complicated and unusual cases

It is more difficult for the government to cap costs in criminal cases, because it is obliged by Article 6(2) to provide legal aid where necessary. However, the government has introduced measures to reduce expenditure on legal aid for civil and family work.

For example, in 2007, fixed fees were introduced for advice under the Legal Help scheme in areas of social welfare law. The fixed fees payment scheme operates through standard payments for legal advice based on 'average' case lengths, so that solicitors and advisers normally receive a set amount to advise a client, regardless of the actual length or complexity of the case. Only cases that pass an 'exceptional cases' threshold (three times the average case length) are remunerated on the basis of the time taken.[116]

A study published in 2009, by the Ministry of Justice recognised that the providers who had the greatest difficulty with the fixed fee system were those who dealt mainly or exclusively with more complex cases.[117] Many respondents pointed out that the fixed fee scheme creates a number of 'perverse incentives' for organisations to 'cherry pick' shorter, more straightforward cases and to delegate casework to junior and less experienced advisers. These findings have clear implications for access to civil justice, particularly for people with complex or unusual cases.

2. Removing legal aid from areas of civil law may mean some people do not have access to a fair hearing

In November 2010, the government published a Green Paper, Proposals for the Reform of Legal Aid in England and Wales, which recommended removing half a million cases per year from the scope of the civil legal aid scheme.[118] Following a public consultation, the Ministry of Justice published its final proposals alongside the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-2011.[119] This reform package narrows the scope of legal aid, by excluding

116 Legal Help is publicly funded advice and assistance; it does not cover the cost of representation in court, which requires a full legal aid certificate.
117 Ministry of Justice, June 2009. *Study of Legal Advice at Local Level.*
118 Ministry of Justice, November 2011. *Proposals for the Reform of Legal Aid in England and Wales.*
119 Ministry of Justice, June 2011. *The Reform of Legal Aid in England and Wales: the Government Response.*

family cases where no domestic violence is involved, as well as many areas of civil law including clinical negligence, employment disputes, criminal injuries compensation, and some debt and housing cases where the home is not at risk.

The reform proposals would also establish a mandatory telephone gateway to access civil legal aid services, which would initially cover relevant debt cases, disputes about the provision of education for children with special needs, discrimination law cases and community care cases. It also tightens the financial eligibility rules for civil legal aid, makes certain adjustments to legal aid remuneration for criminal cases, and imposes an across-the-board reduction of 10 per cent for all civil and family work.[120]

There are serious human rights issues regarding the removal of certain areas of law from the scope of civil legal aid. For example, disallowing publicly-funded legal help for employment advice could block the most accessible route to advice for victims of workplace discrimination cases, even though such cases would technically remain in scope. Removing legal aid for complex employment cases in the higher courts could be in breach of Article 6(1) where the individual would have great difficulty representing themselves.

There are similar issues about the decision to exclude welfare benefits cases from legal aid. Family and housing law cases potentially raise issues under Article 8, which covers the right to private and family life. In this context, it can be argued that the state has an obligation to provide effective access to justice for these civil law disputes. Although legal aid in family cases will be available where domestic violence is involved, this will depend on very strict evidential tests. The government has indicated that it will only accept specified types of evidence as proof that domestic violence has taken place.

The Legal Aid Bill proposes to retain judicial review cases (the vehicle for many cases involving human rights) within the scope of legal aid.[121]

120 Although the reductions in the scope of legal aid are primarily focused on civil law, Clause 12 of the Bill paves the way for secondary legislation to introduce a means and merits test to limit access to legal advice for those held in a police station. However, the Minister for Legal Aid has publicly denied that the government plans to seek to use the clause.

121 Other claims against public authorities (typically for damages) will only be eligible for legal aid where they concern a significant breach of human rights, or an abuse of position or power.

However, many clients could remain unaware that they had a potential judicial review claim if no legal aid were available for first-stage advice on the underlying legal dispute. This could happen, for instance, in cases concerning housing or community care. There is a danger that these changes will compromise the effectiveness of remedies under the Human Rights Act 1998, and potentially breach Articles 6(1) and 13 which cover the right to an effective remedy.[122]

Removing Asylum Support cases (apart from cases involving accommodation) from the scope of legal aid could lead to destitution for asylum seekers with valid claims for support.[123] The urgency of such cases, where the client is already facing – or will soon experience – severe hardship means that they are ill-suited for the delays likely to be involved in making an application for exceptional legal aid funding. This point is discussed below.

3. The policies aimed at mitigating the impact of legal aid cuts may not be sufficient to ensure that everybody has access to justice

The Legal Aid Bill confirms proposals about exceptional funding put forward in the earlier Green Paper, 'Proposals for the Reform of Legal Aid in England and Wales'. It provides that exceptional funding should be made available in cases where the failure to do so would be likely to result in a breach of the individual's rights under domestic and international legal obligations, including those under Article 6(1). This may not provide sufficient protection because clients may still be deterred from seeking advice in the first place, or be turned away by advisers, if their problem appears to be outside the scope of the legal aid scheme. It could also lead to delayed decision-making about funding.[124] Many clients would need expert legal help in preparing an application for exceptional funding. The Ministry of Justice has made no commitment to making legal aid available to pay for this expert help.

122 Article 13 of the European Convention on Human Rights sets out the right to an effective remedy: *'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'*

123 *R. v. SoS Home Department ex parte Limbuela* [2005] UKHL 66. Article 3 of the Convention states: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'* The denial of support to an asylum seeker under section 55 of the Nationality, Immigration and Asylum Act 2002 may leave him destitute and the question then arises whether this consequence amounts to a breach of his rights under Article 3.

124 See Joint Committee on Human Rights, 19 December 2011. *Legislative Scrutiny – Legal Aid, Sentencing and Punishment of Offenders Bill*. Para 1.31.

The proposal for a mandatory telephone gateway for access to advice, initially in four areas of civil law, has human rights implications. Research suggests that a telephone service is not suitable for all clients.[125] The proposal could have a particularly negative impact on clients with poorer mental health,[126] as well as those with learning or cognitive impairments, on older and disabled people using community care services, as well as being indirectly discriminatory in relation to disability.

The government has offered reassurances that adaptations and other adjustments will be put in place to assist disabled callers.[127] However, it remains unlikely that the telephone service will meet all adjustment needs and it could still deter some clients from seeking advice.

Requiring disabled clients to use a mandatory telephone gateway could in some circumstances amount to a breach of Article 14 (enjoyment of rights without discrimination) in conjunction with Article 6(1) in relation to disability. The requirement could also be in breach of Article 5 of the Convention on the Rights of Persons with Disabilities (non-discrimination) when read with Article 13 (access to justice).

The telephone gateway would be staffed by unqualified operators who would be expected to offer advice on issues that may be factually and legally complex.[128] The operators would work by following a script and would be trained to identify key words and issues from a client's description of their problem. However, this approach is based on a mistaken assumption that all clients will understand the questions put to them, and that in setting out their problem, they will use the key words. If clients fall short in either instance, important legal issues might be overlooked.

In December 2011, the government announced it was delaying the implementation of the reforms to civil legal aid until April 2013. This includes the introduction of the mandatory telephone gateway.[129]

125 Hobson, J. and Jones, P., 2004. *Report on evaluation research on alternative methods of delivery,* Legal Services Commission.

126 Pearson, J. and Davis, L., 2009. *Civil law, social problems and mental health; Legal Services* Research Centre; Pearson J.; Davis L. 2002. *The Hotline Assessment Study Final Report – phase III: full-scale telephone survey*; Centre for Policy Research.

127 Ministry of Justice, June 2011. Reform of Legal Aid in England and Wales: the Government Response. Page 171.

128 Ministry of Justice, June 2011. *Reform of Legal Aid in England and Wales: the Government Response*.

129 Written Ministerial statements, 1 Dec 2011: 1 Dec 2011: Column 74WS-75WS. Available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/wmstext/111201m0001.htm#11120140000008. Accessed 18/01/12.

4. Changes to contracts for criminal legal aid may have an impact on the quality and supply of criminal defence lawyers

The current provision of criminal legal aid is reasonably compliant with Article 6(3)(c) and still responds to demand rather than being capped. Net criminal legal aid expenditure was around £1.1 billion in 2009/10, compared with total legal aid expenditure of £2.2 billion net.[130]

Under pressure to make savings in the Criminal Defence Service budget, the Ministry of Justice has tried to curtail expenditure. For example, it has introduced fixed legal fees for magistrates' court and police station work, and taken steps to contain fees for higher cost criminal cases. The government intends to introduce competitive tendering for criminal defence contracts, with the first contracts taking effect in April 2015.[131] This development may have a negative impact on the quality and supply of legally aided criminal defence work, because lawyers will be competing for the lowest price. Competitive tendering is likely to reduce substantially the number of firms doing criminal defence work, with provision consolidated into a small number of large firms, thus reducing client choice.[132] Such an outcome could have an impact on people's rights under Article 6(2), which will need to be kept under close review.

130 Legal Services Commission Annual Report 2009-2010.

131 Written Ministerial statements, 1 Dec 2011: 1 Dec 2011: Column 74WS-75WS. Available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/wmstext/111201m0001.htm#11120140000008. Accessed 18/01/12.

132 House of Commons Constitutional Affairs Committee, May 2007. Implementation of the Carter Review of Legal Aid, Third report of session 2006-2007.

Case study: Youth Justice Liaison and Diversion project

‘Oliver’ talked of an impulse to shoot people for what he termed the “greater good” after he was charged with assault and criminal damage.

When a psychologist assessed Oliver, it quickly became apparent that this 14-year-old boy suffered from psychosis and required urgent psychiatric support. Oliver may have entered an adult court system without proper support for his mental health condition. Instead, the troubled youngster was given the assistance he required at an early stage in the judicial process thanks to a scheme that aims to promptly identify juvenile offenders with health and social vulnerabilities. The scheme, called Youth Justice Liaison and Diversion (YJLD), reduces the likelihood of breaches of Article 6 of the Human Rights Act by adopting a welfare based approach based on early intervention. It ensures that the court understands and manages the mental health needs of young people who commit serious crimes. It also tries to prevent further offending by tackling the emotional and social problems that have led young people into trouble.

“In some cases youngsters were not getting support until perhaps two to three years after first becoming known to the police,” explains Lorraine Khan, national programme manager at the Centre for Mental Health. “Early intervention means we can improve a young person’s mental health prospects or their engagement with school, which means they may avoid custody and offending again and have a greater chance of gaining employment.”

This approach could deliver additional economic and social benefits. Imprisonment is expensive, and male youths who go to jail are six times more likely to be become young fathers and 15 times more likely to contract HIV than their peer group.

"In some cases youngsters were not getting support until perhaps two to three years after first becoming known to the police..."

"We work closely with the police and screen under-18-year-olds entering the justice system for a range of problems," says Dr Rebecca Morland, a manager and consultant psychologist, who has worked in one site area. "For those with less complex needs, we liaise with parents and help young people to get the necessary assistance. Where there are more complex needs, the children have access to a specialist mental health worker who can rapidly assess them and refer them to other services."

Oliver's mental health problems had not been picked up and by the time he came to YJLD's attention he was 'very ill'. Oliver described suffering increasingly frequent and intense delusions and hallucinations over the previous year. He also claimed to have easy access to a gun which posed grave concerns for the safety of himself and others. YJLD immediately put in place a safety plan to ensure that Oliver received the psychological and psychiatric support he required. A report by YJLD regarding Oliver's mental health was considered by the magistrate, who gave him an 'absolute discharge'. Oliver, who continues to receive support, might well have gone to prison without YJLD. Without the report, a court may not have had the necessary information to ensure it reached a fair and appropriate decision.

The Department of Health and the Centre for Mental Health set up YJLD in 2009, and it is now operating in 37 areas.