

This is a pre-copyedited, author-produced PDF of an article accepted for publication in the Human Rights Law Review following peer review. The definitive publisher-authenticated version [“With Cat-Like Tread’: Jury Trial and the European Court of Human Rights” (2014) 14(1) Human Rights Law Review 1-25] is available online at: <http://hrlr.oxfordjournals.org/cgi/reprint/ngt047?ijkey=ZI0kG3hGc6HzcL&keytype=ref>

‘With Cat-Like Tread’: Jury Trial and the European Court of Human Rights

Word count: 13,597

Mark Coen*

Abstract

This article critiques the impact of the European Convention on Human Rights, as interpreted in the jurisprudence of the Strasbourg court, on the criminal trial jury. It argues that thus far the Convention has had a limited effect on jury trial, and that the Court tends to proceed with undue caution when confronted with issues affecting the key attributes of this mode of trial. It further argues that this caution may be influenced by non-legal considerations which should have no place in human rights adjudication.

Keywords

Jury trial – European Court of Human Rights – United Kingdom – Human rights and public controversy – United Kingdom Bill of Rights

1. Introduction

Article 6 of the European Convention on Human Rights enumerates the requirements of a fair trial but does not stipulate any specific process for their achievement. Jury trial, ‘the defining institution of the English common law,’¹ is not

* Lecturer in Law, Durham Law School. The author wishes to thank Conor Noonan and the anonymous reviewer for their helpful comments on an earlier draft of this article.

mentioned. This is not surprising, when one reflects on the multifarious trial procedures which existed in the states which were the first signatories of the Convention.² Variation in criminal processes among parties to the Convention has increased as further states have signed and ratified the document. One might have thought that the British government would have sought the inclusion of ‘that revered ...institution, the jury’³ at the drafting stage, in the same way that the Irish government lobbied, albeit unsuccessfully, for a reference to ‘Christian civilisation’ in the text.⁴ However, no jury-related overtures were made by the United Kingdom delegation.⁵ As Dickson points out, the inclusion of jury trial would have been complicated even in the context of that jurisdiction alone, because ‘the vast majority of criminal offences were...then, as they still are, tried in magistrates’ courts without a jury.’⁶ A wording which would have explicitly embraced the divergences in criminal procedure among the signatories would have been inelegant, and any formula which appeared to favour one sort of system over another would have alienated states with other systems. Such approaches would also have hindered the future development of the Convention by tying its fair trial guarantee to particular types of procedures rather than to core values which could be pursued by a variety of means. In relation to mode of trial, the wording of Article 6 struck the note desired of the entire Convention by the drafters, namely that of underlining ‘unity rather than diversity.’⁷

¹ Langbein, ‘Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary’ in Brand and Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge: Cambridge University Press, 2012) 67 at 67.

² The first signatories of the Convention, on 4 November 1950, were Belgium, Denmark, France, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey, the United Kingdom, West Germany and Saar (incorporated into the Federal Republic of Germany on 1 January 1957). Greece and Sweden signed the Convention on 28 November 1950. Of these countries, Luxembourg, Turkey and the Netherlands had no jury system; Belgium, Ireland and the United Kingdom had entirely lay juries; Norway had both a collaborative system and an entirely lay system (the latter for serious appeals) and the remaining States had collaborative jury systems with panels composed of both lay jurors and professional judges. It is possible to draw further distinctions between the jury systems of the Convention states; compare the approach of the European Court of Human Rights in *Taxquet v Belgium* (2012) 54 EHRR 26 with that of the authors in Jackson and Kovalev, ‘Lay Adjudication and Human Rights in Europe’ (2006) 13 *The Columbia Journal of European Law* 83.

³ Mulholland, ‘Introduction’ in Mulholland and Pullan (eds), *Judicial Tribunals in England and Europe, 1200-1700* (Manchester: Manchester University Press, 2003) 1 at 10.

⁴ Schabas, ‘Ireland, the European Convention on Human Rights, and the Personal Contribution of Seán MacBride’ in Morison, McEvoy and Anthony (eds), *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007) 251 at 256.

⁵ Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford: Oxford University Press, 2010) at 206.

⁶ Ibid.

⁷ Schabas, *supra* n 4, at 256. For a detailed account of the drafting and development of the Convention, see Bates, *The Evolution of the European Convention of Human Rights: From Its*

In spite of this historical background, applicants have argued that jury trial is enshrined in the Convention. In *X and Y v Ireland*,⁸ the applicants' complaints, some of which related to their trial before the non-jury Special Criminal Court, were declared inadmissible by the Commission. In relation to mode of trial, the Commission stated: 'Article 6 does not specify trial by jury as one of the elements of a fair hearing in the determination of a criminal trial.'⁹ The Commission reiterated this position in the subsequent case of *Callaghan v United Kingdom*¹⁰ where the applicants argued unsuccessfully that new evidence which emerged after they had been convicted of murder should have been aired in a retrial before a jury rather than before the Court of Appeal.

The objective of this article is to critique and analyse the major decisions of the Strasbourg court touching on jury trial issues. It will do this under thematic headings, as the issues which arise are diverse and not suited to chronological treatment. Having conducted this analysis of seminal cases, the article will attempt to discern an overall approach and attitude of the Court to the traditional common law jury.

2. Jury impartiality

Impartiality constitutes one of the elements of the fair trial guaranteed by Art 6, and it is this aspect of jury trial on which decisions of the Strasbourg court have arguably had the most impact. As will be seen presently, the Court has intervened in this area in respect of intolerant statements by jurors, inappropriate interactions with non-jurors, and jury composition. The Court has consistently held that in order to comply with Art 6, a decision-maker must be impartial from both a subjective and objective perspective.¹¹

Inception to the Creation of a Permanent Court of Human Rights (Oxford: Oxford University Press, 2010). See also Bates, 'The Birth of the European Convention on Human Rights – and the European Court of Human Rights' in Christofferson and Rask Madsen (eds), *The European Court of Human Rights: Between Law and Politics* (Oxford: Oxford University Press, 2011) 17.

⁸ Application No 8299/78, Admissibility, 10 October 1980.

⁹ *Ibid.* at para 19.

¹⁰ Application No 14739/89, Admissibility, 9 May 1989.

¹¹ See, for example, *Hauschildt v Denmark* A 154 (1989); 12 EHRR 266.

Applicants who have argued that the Convention entitles them to a role in choosing the jury which will try them have not met with success. The Court has held that Art 6 does not entitle an accused person to a role in jury selection.¹² In America the process of *voir dire*, in which questions are put to prospective jurors about their opinions and exposure to media reporting, is credited with helping to reduce juror bias.¹³ In *Zarouali v Belgium*,¹⁴ however, the Commission declared inadmissible a complaint that the applicant's trial breached Art 6(1) because he was not permitted to investigate 'the political, religious and moral beliefs of the prospective jurors.'¹⁵ The Commission emphasised in particular the oath taken by jurors to try the case objectively. It is certain that if the Court were ever to find that Article 6 required a procedure akin to the American *voir dire*, it would be very controversial in jurisdictions such as England and Wales and Ireland, which historically have not endorsed such measures.¹⁶ In the pages which follow the impact of the Strasbourg court's case-law on jury impartiality will be analysed under discrete heads.

A. Juror Racism

Cases on racist comments by jurors were the Court's first significant foray into the world of the common law jury. The applicant in *Gregory v United Kingdom*¹⁷ was black. During jury deliberations at his trial for robbery, a juror passed a note to the judge stating that other jurors were being racist. In response, the trial judge called the jurors before him and reminded them of their duty to try the accused on the basis of the evidence, putting aside any bias. He did not mention racial bias specifically. The jury convicted the applicant by majority verdict of 10:2. The Court of Appeal

¹² *Kremzow v Austria* Application no 12350/86, Admissibility, 5 September 1990.

¹³ The *voir dire* is deeply embedded as a means of ensuring the accused is tried by the "impartial jury" referred to in the Sixth Amendment of the United States Constitution. *Voir dire* procedure differs significantly between the States, for example, in whether it is conducted by the advocates or the judge, or both, and in terms of the means employed to do it (oral questioning or written questionnaire, for instance). See Mize, Hannaford-Agor and Waters, *The State of the States Survey of Jury Improvement Efforts: A Compendium Report* (National Center for State Courts, 2007), available at: <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx> [last accessed 21 October 2013].

¹⁴ (1994) 78-B DR 97.

¹⁵ *Ibid.* at 106.

¹⁶ For judicial reference to the English position, see *R v Cornwall* [2009] EWCA Crim 2458 at para [24], *per* Leveson LJ. The Irish authorities on this point are *People (AG) v Lehman (No 2)* [1947] IR 137 and *People (DPP) v Haugh* [2000] 1 IR 184.

¹⁷ 1997-I (1998); 25 EHRR 577.

refused the applicant leave to appeal, stating that while one juror had expressed unacceptable views there was no reason to suppose that he could not try the case impartially. The Strasbourg court focused on the positive effects of ‘a carefully worded redirection to the jury.’¹⁸ Somewhat dubiously, the Court also relied on the fact that no complaints of further racism were made after the redirection, deducing from this that it must have been effective. The Court distinguished the case from *Remli v France*,¹⁹ in which it had found a breach of Art 6(1). In that case the trial judge refused to investigate an allegation that a juror made a racist remark on the basis that the complaint related to a time before the trial had begun. By contrast, the judge in *Gregory* ‘took sufficient steps to check that the court was established as an impartial tribunal within the meaning of Article 6(1) of the Convention.’²⁰

In *Sander v United Kingdom*²¹ the applicant was an Asian man on trial for conspiracy to defraud. A juror sent a note to the judge indicating that at least two other jurors were making racist comments and jokes. In language similar to that used by the judge in *Gregory*, the judge reminded the jury of its obligation to return a verdict in accordance with the evidence, unaffected by prejudice. Subsequent to the redirection one of the jurors sent a note to the judge apologising for making racist jokes and denying racial bias. The jury convicted the applicant but acquitted a co-accused who was also Asian. The Court of Appeal rejected the applicant’s appeal, agreeing with the trial judge’s assessment that the test of a real risk of bias, derived from the case of *R v Gough*,²² was not satisfied. In marked contrast to its approach in *Gregory*, the Strasbourg court doubted the efficacy of redirecting the jury to come to a verdict unaffected by bias:

[I]n the present case the Court is not prepared to attach very much weight to the judge's redirection of the jury. The Court considers that, generally

¹⁸ Ibid. at 595.

¹⁹ 1996-II; 22 EHRR 253.

²⁰ Supra n 17 at 595.

²¹ 2000-V; 31 EHRR 44 1003.

²² [1993] AC 646. *Gough* no longer represents the English test for apprehended bias. In *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 the House of Lords held that the test should be changed to the reasonable observer’s perception of bias.

speaking, an admonition or direction by a judge, however clear, detailed and forceful, would not change racist views overnight. Although in the present case it cannot be assumed that such views were indeed held by one or more jurors, it has been established that at least one juror had been making racist comments. In these circumstances, the Court considers that the direction given by the judge to the jury could not dispel the reasonable impression and fear of a lack of impartiality, which were based on the original note.²³

Finding a breach of Art 6(1), the Court strongly implied that the jury in *Sander* should have been discharged. *Sander* could be distinguished from *Gregory*, according to the Court, on the basis that there was no admission of racist comments in *Gregory*. The implication that a confession by a juror is required before a conviction can be quashed on the ground of apprehended racial bias is out of step with the concept of objective bias. It is also unsatisfactory to predicate the availability of a remedy on admissions of wrongdoing by the jurors concerned. Lord Hope has commented that the decisions in *Gregory* and *Sander* do not 'sit easily with each other on the facts.'²⁴ One attempt to reconcile the cases argues that *Sander* illustrates the ineffectiveness ascribed by the Strasbourg court to a direction to disregard, at least where prejudicial comments are 'clear, precise and substantiated.'²⁵ It is unclear whether the only solution to a *Sander*-type scenario is to discharge the jury, or whether there are other solutions open to the judge under the Convention.²⁶

Several cases alleging juror racial bias have come before the English appellate courts since the decisions in *Gregory* and *Sander*.²⁷ Many of these have a similar factual matrix to those cases, namely a communication from an individual juror stating that others are being racist. The decision in *Gregory* has been cited by the Court of Appeal as authority for the proposition that 'vague and imprecise'²⁸

²³ Supra n 21 at 1010.

²⁴ *R v Mirza* [2004] UKHL 2; [2004] 1 AC 1118 at 1161.

²⁵ Quinn, 'Jury Bias and the European Convention on Human Rights: A Well-kept Secret?' [2004] *Criminal Law Review* 998 at 1003. See also Daly and Pattenden, 'Racial Bias and the English Criminal Trial' (2005) *Cambridge Law Journal* 678.

²⁶ Robertshaw, 'Responding to Bias Amongst Jurors' (2002) 66(1) *Journal of Criminal Law* 84 at 94.

²⁷ See, for example, *R v Momodou* [2005] EWCA Crim 177; [2005] 2 All ER 571 and *R v Heward* [2012] EWCA Crim 890.

²⁸ *R v Budai* [2011] EWCA Crim 186 at para 37, per Leveson LJ.

comments of a racist nature which come to light during the trial do not imperil a resulting conviction. In *R v Budai*²⁹ the Court upheld a conviction where one juror ran from the jury room in distress at a racist remark. Leveson LJ emphasised the fact that the juror who made the remark wrote to the judge the next day, describing it as uncharacteristic and stating that it had not been made in respect of the appellants or any aspect of the case. The Court of Appeal has also made it clear that a warning to the jury to cast aside prejudice and decide the case on the evidence may be the appropriate response to a complaint of bias by a jury member, at least where the facts are closer to *Gregory* than to *Sander*.³⁰ It is arguable that *Budai* is closer to *Sander* than *Gregory*, however, as the juror who made the racist remark admitted doing so.

Before leaving the cases of *Sander* and *Gregory* it is worth noting that those decisions would appear to be equally applicable to prejudicial statements by jurors on grounds other than race, for example if a juror made a homophobic remark about the accused or implied that she should be convicted on the basis of socio-economic or regional stereotyping.

B. Jurors with Links to the Case

The right to an impartial trial under Article 6 may also be imperilled in situations where a juror has an interest in the outcome of a case, knowledge of its particulars in advance of trial or links with the accused or other parties to the case. The latter issue arose in *Holm v Sweden*.³¹ The applicant was the subject of a number of statements which alleged that he was a member of neo-Nazi groups. The book in which these claims appeared was published by a company owned by a left-wing political party, the SAP. The question of whether a criminal defamation had occurred fell to be decided by a jury. Of the nine jurors which decided this issue, five were members of the SAP. The jury found against the applicant and he argued that its composition meant that it was not objectively impartial. He succeeded both before the European Commission on Human Rights and the Court. The Court emphasised the political

²⁹ [2011] EWCA Crim 186.

³⁰ *R v Hussain* [2005] EWCA Crim 2691.

³¹ A 279 (1993); 18 EHRR 79.

content of the statements in issue, the fact that the jurors were active members of the SAP and that the publisher of the book was owned by the SAP. Because of these factors, the jury's independence and impartiality 'were open to doubt'³² and Art 6 had been breached.

Links between a witness and a juror were at issue in *Pullar v United Kingdom*.³³ The applicant had been found guilty of corruption on the basis that he had sought money to secure planning permission for two men, McLaren and Cormack. Both men gave evidence for the prosecution at the applicant's trial. One of the jurors in the trial was employed by McLaren's firm. A majority of the Strasbourg court found that this did not breach the impartiality requirement of Art 6(1). In coming to this conclusion it took into account that the juror was a junior employee, had not been involved in the work involved in the case and had been made redundant days before the trial. In addition, it referred to the fact that the juror was one of 15,³⁴ all of whom had been instructed by a judge and taken an oath to act impartially. Four judges dissented in *Pullar*, emphasising that the applicant had been convicted by a majority, not unanimously.

One of the issues raised in *Ekeberg v Norway*³⁵ was that a juror had given a witness statement to the police about the case some years earlier. The matter came to light early in the trial and the defence requested that the jury be discharged and a new jury empanelled. This solution was not acceded to by the domestic Court, which decided that the discharge of the juror involved was sufficient to remedy any unfairness. In finding that no breach of Article 6 had occurred on that ground, the Strasbourg court emphasised the fact that the length of the trial meant that the jury did not deliberate and return its verdict for three weeks after the tainted juror was discharged. It also took into account that the statement was deemed not to be relevant and was not adduced in evidence, and that the jury were reminded that they must act impartially and disregard anything the discharged juror may have said to them about her statement. The Court observed that the case was 'markedly

³² Ibid. at 96.

³³ 1996-III; 22 EHRR 391.

³⁴ The trial took place in Scotland, where the number of jurors is 15. See Duff, 'The Scottish Criminal Jury: A very Peculiar Institution' in Vidmar (ed), *World Jury Systems* (Oxford: Oxford University Press, 2000) 249.

³⁵ Applications Nos 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04, Merits, 31 July 2007.

weaker'³⁶ than the cases of *Pullar*, *Sander* and *Gregory*, in which the objectionable jurors had taken part in the deliberations. However, arguably the appearance of impartiality of the jury in *Ekeberg* was irrevocably tainted. Both the impact of the discharged juror on the remaining jurors and on the perception of onlookers was unknowable and potentially far-reaching, and should have been treated as a serious infraction of trial fairness by the Court.

C. Juror Contact with Third Parties

Inappropriate contacts between jurors and other parties during the trial may taint the appearance of the jury's impartiality. In *Hardiman v United Kingdom*,³⁷ the European Commission on Human Rights declared inadmissible a complaint that a juror invited the barrister representing a co-accused of the applicant out for a drink. The applicant was unanimously convicted of murder while the co-accused was unanimously acquitted. The applicant argued that the juror who sent the note may have influenced the verdicts. The Commission observed that the note from the juror was polite, did not mention the case and 'contained no indication that the juror had any difficulty in forming a view on the evidence or that she had voted and encouraged others to vote in a particular way.'³⁸ The Commission was thus looking for blatant and explicit evidence of partiality, when it should have been assessing how the juror's actions appeared from an objective standpoint. It also took into account the unanimity of the decision against the applicant and in favour of his co-accused, but those outcomes do not of themselves indicate objective impartiality. In subsequent cases with similar facts to those in *Hardiman* the English courts have adopted a similarly *laissez-faire* approach to that of the Commission.³⁹

The vital importance of appropriate investigations into allegations that jurors have had inappropriate contact with other parties was emphasised in *Farhi v France*.⁴⁰ It was alleged that a number of jurors had a short discussion with the prosecution

³⁶ Ibid. at para 47.

³⁷ Application No 25935/94, Admissibility, 28 February 1996.

³⁸ Ibid. Paragraph numbers are not provided.

³⁹ See, for example, *R v Cunningham* [2003] EWCA Crim 1769; *R v Alexander* [2004] EWCA Crim 2341; *R v Cort* [2011] EWCA Crim 1597.

⁴⁰ Application No 17070/05, Merits and Just Satisfaction, 16 January 2007.

during the trial of the applicant for rape and immigration offences. The applicant objected at trial to the interaction involving the jurors and counsel for each side were permitted to make representations to a panel of judges investigating the incident. The panel found no violation of the French Code of Criminal Procedure. The applicant argued that the adversarial panel procedure was ill-suited to investigating whether the forbidden contact with jurors had in fact occurred. The Court agreed, stating: '[O]nly a hearing of the jurors would have been likely to shed any light on the nature of the remarks exchanged and the influence they might have had, if any, on their opinions.'⁴¹ The Court added that the panel's decision that no irregularity had occurred was not accompanied by information supporting that conclusion and thus interfered with the applicant's ability to appeal. In those circumstances, there was a breach of Article 6(1). The Court did not address what would have happened if it had been verified that the alleged contact had taken place. However, its judgment suggests that such a finding would not have caused the automatic abandonment of the trial. This can be inferred from the Court's reference to a proper inquiry discovering the content of any exchange and its effect on the jurors. This is in conflict with the Court's consistent emphasis on the importance of objective as well as subjective impartiality. The appearance of bias is immediately created once it is found that an exchange of this nature has occurred between jurors and a person who occupies the partisan position of prosecution counsel. In cases such as this, the preservation of public confidence in the criminal process requires the immediate cessation of the trial, and a retrial with a different jury. Nor should this principle be narrowly construed; the objective impartiality of a decision-maker, whether lay, professional or mixed in composition, is destroyed by contact with a party that gives the impression that they may favour that party.⁴² It is difficult to countenance any measure which could undo that impression once created.

The European Court of Human Rights was confronted with a juror bias case involving a policeman in *Szypus v United Kingdom*.⁴³ The applicant was convicted of attempted murder after a fight in a street. The prosecution case was heavily reliant

⁴¹ Ibid. at para 29.

⁴² The Court of Appeal did not take this approach on contact between a trial judge and a policeman who was a prosecution witness in *R v Russell* [2006] EWCA Crim 470.

⁴³ Application No 8400/07, Merits, 21 September 2010.

on CCTV evidence. At trial, this evidence was shown on a machine operated by a policeman that permitted advanced viewing, pausing and replaying of the videos. When the jury retired to consider its verdict and wanted to see the videos again, the Court was cleared and only the jury and the policeman operating the machine were present. The applicant argued that the presence of a policeman in this situation undermined the impartiality of the jury. The policeman concerned was a member of the investigating team involved in the case. He also had given evidence about receiving the CCTV tapes and taking a mouth swab of another accused.

The Strasbourg court agreed that the presence of the video operator alone with the jury was a cause for concern because of 'his status as a police officer and his resultant association with the prosecution.'⁴⁴ The Court then looked for the existence of other safeguards of impartiality. It identified them in the oaths sworn by the jurors and the direction given to them by the judge to try the case on the basis of the evidence. Further, specific instructions had been given to the jurors about the presence of the policeman; they were only to communicate with him to indicate what portions of the CCTV footage they wished to see and were not to deliberate in his presence. The officer had also been instructed not to do or say anything except show the video segments requested by the jury. Objective bias analysis is almost absent from the judgment. The measures relied upon to cure bias were criticised by Judge Thór Björgvinsson in his dissenting judgment, with which Judge Garlicki concurred. In the view of the former: 'None of the safeguards relied upon by the majority, taken individually or collectively, was sufficient to counterbalance the procedural irregularity that occurred.'⁴⁵ His judgment also emphasises the status of the video operator as 'a member of the police investigation team who was a witness for the prosecution'⁴⁶ and the impression created by the two hours he spent alone with the jury, points noticeably underplayed in the majority judgment.

D. Juror Occupation Affecting Impartiality

⁴⁴ Ibid. at para 82 of the judgment of the majority.

⁴⁵ Ibid. at para 11 of the dissent.

⁴⁶ Ibid. at para 13 of the dissent.

The final area of jury trial in which the Strasbourg court's bias jurisprudence has had an effect is that of jury composition. In England and Wales the Criminal Justice Act 2003 provides that judges, lawyers, the police and employees of the Crown Prosecution Service may undertake jury duty.⁴⁷ The reforms have resulted in a steady stream of domestic case-law in which accused persons have argued that their trials were unfair because of the presence of persons connected with the administration of justice on the juries which convicted them.⁴⁸

In *R v Khan*⁴⁹ the Court of Appeal upheld the appellants' conviction for conspiracy to supply heroin. A juror was a police officer who had worked with one of the police witnesses on a different case a couple of years previously. One of the appellants gave evidence that he carried a passenger in his car who made incriminating comments on a mobile phone belonging to the appellant. The policeman known to the juror gave evidence that he had been keeping the appellant under surveillance and that the appellant did not have a passenger in the car at the time. The Court of Appeal, in line with the decision of the House of Lords in *R v Abdroikov*,⁵⁰ held that the juror could not be objected to on the basis that he was a policeman. In relation to the conflict of evidence, the Court described the evidence of the appellant about the existence of a passenger as 'farcical'⁵¹ and his evidence in general as marred by 'significant inconsistencies'.⁵² The Court's negative view of his testimony appeared to inform its conclusion that the reasonable observer would not have been concerned by the presence of the police officer on the jury. The applicants took their case to Strasbourg where the Court found a breach of Article 6. The basis for that decision was stated thus:

[W]here there is an important conflict regarding police evidence in the case and a police officer who is personally acquainted with the police officer witness giving the relevant evidence is a member of the jury, jury directions

⁴⁷ Section 321 and Schedule 33 of the Act, amending the Juries Act 1974.

⁴⁸ See, for example, *R v Burdett* [2009] EWCA Crim 543; *R v Yemoh* [2009] EWCA Crim 930; *R v Ali* [2009] EWCA Crim 1763; *R v L* [2011] EWCA Crim 65.

⁴⁹ [2008] EWCA Crim 1112; [2008] 2 Cr App R 161.

⁵⁰ [2007] UKHL 37; [2007] 1 WLR 2679.

⁵¹ *Ibid.* at 174, *per* Lord Phillips CJ.

⁵² *Ibid.*

and judicial warnings are insufficient to guard against the risk that the juror may, albeit subconsciously, favour the evidence of the police.⁵³

One commentator identifies a general unhappiness with the English reforms in the judgment, perhaps amounting to an invitation for an applicant to challenge their compatibility with Article 6.⁵⁴ In terms of the effect of the judgment, Ashworth states: 'At a minimum, the judge must be informed of the presence of a police officer on the jury, and must be able to question that juror in order to ascertain what links there are, if any, with officers due to give evidence in the case.'⁵⁵

3. Jury secrecy

Until the case of *Seckerson v United Kingdom*⁵⁶ the European Court of Human Rights had not given detailed consideration to the compatibility of the jury secrecy rule with the European Convention on Human Rights. The secrecy rule provides that jurors may not divulge the contents of their deliberations at any time, even after the conclusion of the trial. It is a long-established common law rule,⁵⁷ and also has a statutory dimension in section 8 of the Contempt of Court Act 1981 which makes it an offence to 'obtain, disclose or solicit' any information pertaining to jury deliberations. The Strasbourg court had fleetingly approved of the rule in *Gregory*. Noting that the judge could not 'question the jurors about the circumstances which gave rise to the note'⁵⁸ because of the secrecy rule,⁵⁹ the Court observed: '[T]he rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which

⁵³ *Hanif and Khan v United Kingdom* Applications (2012) 55 EHRR 16 at para 148.

⁵⁴ The applicants' challenge was limited to the compatibility of the jury which tried them with the Convention. Hungerford-Welch, 'Police Officers as Jurors' [2012] *Criminal Law Review* 320 at 338.

⁵⁵ Ashworth, 'Human Rights: Hanif and Khan v United Kingdom' [2012] *Criminal Law Review* 295 at 296.

⁵⁶ (2012) 54 EHRR SE19.

⁵⁷ *Ellis v Deheer* [1922] 2 KB 113; *R v Armstrong* [1922] All ER 153.

⁵⁸ (1998) 25 EHRR 577 at 594.

⁵⁹ The subsequent decision of the House of Lords in *R v Mirza* [2004] UKHL 2; [2004] 1 AC 1118 demonstrated that English trial judges could in fact investigate allegations of wrongdoing during deliberations, as long as those allegations are brought to the judge's attention before the delivery of the verdict.

they have heard.’⁶⁰ While the Court resolved the case on a basis other than the compatibility of the secrecy rule with the Convention, it clearly indicated that it supported its rationale.⁶¹ A challenge alleging that section 8 of the Contempt of Court Act violated the Convention squarely arose in *Seckerson*.

In *Attorney General v Seckerson*⁶² the foreman of a jury and *The Times* newspaper were prosecuted for breaching section 8. *The Times* had published the misgivings of the foreman about the manslaughter conviction of Keran Henderson, a child-minder convicted of killing a baby by shaking. Part of the juror’s concerns related to the way in which his fellow jurors had assessed the expert evidence in the case and the role that had played in the conviction. He also stated that a vote had been taken early in deliberation which revealed a 10:2 split in favour of conviction, after which ‘there was no going back.’⁶³ Pill LJ found that ‘general comments on the strength of the evidence for the prosecution’⁶⁴ made by the foreman did not contravene section 8. However, his revelations of the votes cast by the jurors and his criticism that they reasoned by reference to common sense were clear breaches. In addition, his other comments ‘crossed the line between general comment on the reliability of expert evidence...and disclosures of the deliberations of this particular jury in this particular case.’⁶⁵ They thus also amounted to a section 8 contempt. The foreman was fined £500 and *The Times* was fined £15000.

Both parties argued before the European Court of Human Rights that their convictions were incompatible with Article 10 of the Convention.⁶⁶ They contended that the reported disclosures related to a matter on which there was public debate and concern, namely expert medical evidence. They further argued that the restriction entailed by section 8 represented a disproportionate interference with their freedom of expression. The Court noted that it was not called upon to decide

⁶⁰ (1998) 25 EHRR 577 at 594.

⁶¹ The statement of the Strasbourg court in *Gregory* was relied on in *R v Mirza* [2004] UKHL 2; [2004] 1 AC 1118 by the majority of the House of Lords in support of the proposition that the common law secrecy rule complied with the Convention.

⁶² *AG v Seckerson* [2009] EWHC 1023 (Admin).

⁶³ *Ibid.* at para 7.

⁶⁴ *Ibid.* at para 57.

⁶⁵ *Ibid.* at para 58.

⁶⁶ *Seckerson v United Kingdom* (2012) 54 EHRR SE19.

whether the effect of section 8 in curtailing jury research or the investigation of miscarriages of justice was compatible with the Convention. It then justified the secrecy rule on a similar basis to the previous domestic decisions: '[R]ules imposing requirements of confidentiality as regards judicial deliberations play an important role in maintaining the authority and impartiality of the judiciary, by promoting free and frank discussion by those who are required to decide the issues which arise.'⁶⁷ It also referred to its approval of the secrecy rule in *Gregory*. The applicants were not prohibited by section 8 from contributing to the public debate on expert evidence, according to the Court. It held that the finding of contempt and the imposition of fines were not disproportionate 'to the legitimate aim of maintaining the authority and impartiality of the judiciary.'⁶⁸ The Court also took into account that it was necessary for penalties imposed for violations of section 8 to have 'a deterrent effect.'⁶⁹

In *Seckerson* the Strasbourg court took a narrow view of the applicants' argument that their disclosure and publication of the information relating to the trial was necessary in order for them to contribute to public debate. In effect the Court's decision means that a general discussion of jury-related issues may be held, but it may not be informed by evidence from real trials. As was seen above, the Court justified this restriction on freedom of expression by invoking the traditional rationales for jury secrecy.⁷⁰ The most intriguing and tantalising aspect of the judgment is the statement that the Court was not deciding on issues pertaining to the disclosure of deliberation information for research purposes or in order to remedy miscarriages of justice. As the Law Commission has noted, this leaves open the possibility that in future the Court might find that absolute bans on disclosure in these contexts represent violations of the Convention, in particular the right to a fair trial.⁷¹ There is a particularly compelling case for a finding that English law on the investigation of miscarriages of justice is in breach of the Convention. In *R v Mirza*⁷² the majority of the House of Lords held that allegations of juror misconduct made subsequent to the

⁶⁷ Ibid. at para 43.

⁶⁸ Ibid. at para 48.

⁶⁹ Ibid. at para 47.

⁷⁰ See Jaconelli, 'Some Thoughts on Jury Secrecy' (1990) 10 *Legal Studies* 91 at 96-103.

⁷¹ Law Commission, *Contempt of Court: A Consultation Paper* (London: Consultation Paper No 209, 2012) at 82.

⁷² [2004] UKHL 2; [2004] 1 AC 1118 at 1161.

delivery of the verdict cannot be investigated because the courts are then bound by the common law rule of non-disclosure. In a forceful dissent, Lord Steyn characterised the majority decision thus: '[I]n the interests of maintaining the efficiency of the jury system the risk of occasional miscarriages of justice may acceptably be tolerated.'⁷³ In an admirably clear passage, he stated: 'A jury is not above the law. As a judicial tribunal it must comply with the requirements of article 6(1) of the European Convention on Human Rights.'⁷⁴

A future Strasbourg finding that the *Mirza* rule contravened the Convention would not be in conflict with its decision in *Seckerson* because disclosures by jurors to the media are qualitatively different to those which would be made in the course of an official investigation into a potentially unfair trial. A climate in which jurors were free to speak to the media or disclose deliberation information on the internet would be destabilising for the administration of justice, and on that basis the decision in *Seckerson* is unobjectionable. However, the question remains as to whether the Strasbourg court will recognise that an iron-clad secrecy rule which prohibits research and makes the investigation of jury wrongdoing difficult is inimical to justice and at odds with the right to a fair trial.

4. Prejudicial publicity

It has long been accepted that the media has the capacity to imperil the fairness of criminal trials, and that this danger is particularly acute in jury trials.⁷⁵ In the words of Sotomayor J in *Skilling v United States*⁷⁶: '[A]s the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury.'⁷⁷ The courts in England and Wales rely on the disinfectant effect of judicial directions instructing jurors to disregard prejudicial publicity. However, empirical studies have

⁷³ *Ibid.* at 1130.

⁷⁴ *Ibid.* at 1131.

⁷⁵ For historical examples, see Bentley, *English Criminal Justice in the Nineteenth Century* (London: The Hambledon Press, 1998) at 44.

⁷⁶ (2010) 130 S Ct 2896.

⁷⁷ *Ibid.* at 2948.

raised questions about the efficacy of such directions.⁷⁸ The English courts have also invoked the so-called ‘fade factor’, in other words that the effect of hostile media coverage diminishes over time, as a jury safeguard.⁷⁹ Prejudicial media coverage has not arisen much in Strasbourg case-law. Thus far the Court’s approach in this area has been very deferential to domestic courts.

The appellant in *R v Abu Hamza*⁸⁰ was the Imam of a mosque and had been convicted of soliciting to murder, possession of a document likely to be useful to terrorists and offences relating to the stirring up of racial hatred. One of the grounds of appeal was that the Crown had delayed in prosecuting him, which in turn had permitted prejudicial publicity relating to his trial to flourish. Most of the offences with which he was charged were alleged to have occurred between 1997 and 2000. His trial took place in 2006. Part of the delay was caused by a stay of the prosecution which was granted by the trial judge to allow time to elapse between the trial and the London bombings of July 2005. Lord Phillips set down the relevant principles:

It is customary where there has been publicity prejudicial to a defendant that may have been seen by members of the jury for the court to proceed on the presumption that a jury, if properly directed, will disregard such publicity. Only where the effect of the publicity has been so extreme that it is not possible to expect the jury to disregard it will it be appropriate to stay a trial on the ground of abuse of process.⁸¹

Lord Phillips then referred, with approval, to the following statement of Lord Judge in *In Re Barot*,⁸² another adverse publicity case, where he stated:

⁷⁸ See Studebaker, Robbennolt, Pathak-Sharma and Penrod, ‘Assessing Pretrial Publicity Effects: Integrating Content Analytic Results’ (2000) 24(3) *Law and Human Behavior* 317 at 321. See also Lieberman and Arndt, ‘Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence’ (2000) 6(3) *Psychology, Public Policy and Law* 677 at 684-685; Fulero, ‘Afterword: The Past, Present, and Future of Applied Pretrial Publicity Research’ (2002) 26(1) *Law and Human Behavior* 127 at 128.

⁷⁹ See, for example, the comments of Kennedy LJ in *R v Stone* [2001] EWCA Crim 297 at para 62.

⁸⁰ [2006] EWCA Crim 2918; [2007] QB 659.

⁸¹ *Ibid.* at 679.

⁸² [2006] EWCA Crim 2692.

There is a feature of our trial system which is sometimes overlooked or taken for granted....[J]uries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial...The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court...[This is] because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair.⁸³

Dismissing the appeal, the Court stated that there was no reason to believe that the jury had not tried the issues objectively and impartially. His Lordship does not appear to have considered that the secrecy rule and the unreasoned nature of the jury verdict would render it exceptionally difficult to determine on what basis the jury reached its verdict. Lord Phillips also referred to the fact that the jury had acquitted the applicant on some charges as providing evidence of the impartiality with which the jurors approached their task. This reasoning has been resorted to in English apprehended bias case-law⁸⁴ and has been subject to criticism.⁸⁵ Acquittal on some counts does not indicate that counts on which the jury convicted were the product of conscientious or impartial decision making.

The applicant appealed the Court of Appeal decision to the European Court of Human Rights, arguing that the publicity which attended his trial violated his right to a fair trial under Article 6 of the Convention. The Court was acutely conscious of the need to avoid reaching a decision which would mean that 'the greater the notoriety of a crime, the less likely that its perpetrators will be tried and convicted.'⁸⁶ It emphasised that it would determine compliance with Article 6 in the realm of adverse publicity by investigating 'whether there are sufficient safeguards to ensure that the proceedings as a whole are fair.'⁸⁷ Judicial direction was the main safeguard

⁸³ Ibid. at para 31.

⁸⁴ See, for example, *R v Momodou* [2005] EWCA Crim 177; [2005] 2 All ER 571 at 596, *per* Judge LJ.

⁸⁵ McGowan, 'Jury Deliberations: Secrecy' (2006) 70(1) *Journal of Criminal Law* 19 at 21.

⁸⁶ *Mustafa (Abu Hamza) (No 1) v United Kingdom* (2011) 52 EHRR SE11 at para 39.

⁸⁷ Ibid.

identified by the Court: '[I]n the majority of cases the nature of the trial process and, in particular, the role of the trial judge in directing the jury will ensure that the proceedings are fair.'⁸⁸ It recognised that in some exceptional cases adverse publicity would be such that a stay of proceedings would be required, but said domestic courts were better placed to make this determination. However, the Court found that in this case the directions to disregard given by the trial judge constituted sufficient safeguards to uphold the right to a fair trial.

The judgment is very deferential to the findings and approach of the domestic court, even echoing that acquittals on certain charges reflected well on the integrity of the jury's verdict. One can appreciate the concern voiced by the Court that a more stringent approach to prejudicial publicity might mean that the more heinous the crime the less chance it would get to trial. However, that is a separate issue to the question of whether directions to disregard are an effective safeguard.

In the subsequent case of *Beggs v United Kingdom*⁸⁹ the Court emphasised the mitigating effect of a lapse of time of almost two years between 'a virulent and prejudicial press and media campaign'⁹⁰ against the applicant and the date of his trial. The Court also took into account that although some of the material from this campaign was available on the internet, it could not be found by simply entering the applicant's name in a general search engine, and would instead have required a search of specific online newspaper archives. The implication that more easily accessible internet content might raise a Convention issue will no doubt be invoked in future cases, and it will be interesting to see how the Court engages with such arguments.

5. The unreasoned verdict

The compatibility with the Convention of jury verdicts unaccompanied by reasons (referred to as 'unreasoned verdicts' for the sake of brevity) was queried by

⁸⁸ Ibid.

⁸⁹ Application No 15499/10, Admissibility, 16 October 2012.

⁹⁰ Ibid. at para 125.

commentators and advocates over a number of years.⁹¹ In *Saric v Denmark*⁹² the Second Section tersely dismissed the applicant's argument that an unexplained verdict violated Article 6, stating: 'The absence of reasons in the High Court's judgment was due to the fact that the applicant's guilt was determined by a jury, something which cannot in itself be considered contrary to the Convention.'⁹³ Similarly, in *Papon v France*,⁹⁴ the Court held that the duty to give reasons had to be read subject to 'any unusual procedural features,'⁹⁵ including the fact that jurors do not give reasons. As discussed earlier, the Strasbourg court referred approvingly to the secrecy rule, which is strongly linked with the absence of reasons, in the case of *Gregory*. The case of *Taxquet v Belgium*⁹⁶, which will now be discussed, represented a break with the previous case-law of the Commission and the Court.

The applicant in *Taxquet* was charged with the 1991 murder of an honorary government minister, André Cools, and the attempted murder of his partner. Taxquet was tried before the Liège Assize Court and was one of eight co-accused. After listening to witness depositions and the submissions of the prosecutor and the defence, four questions relating to Mr Taxquet were put to the twelve person jury by the presiding judge. The first question asked if the applicant was guilty of the intentional homicide of Mr Cools, enumerating alternative types of involvement (committing the crime, assisting in its perpetration or inciting others to commit it) which would constitute the offence. The second question asked if the offence referred to in the first question was premeditated. The third and fourth questions asked if the applicant was guilty of the attempted intentional homicide of Mr Cools' partner, and if that offence was premeditated. The jury replied in the affirmative to all four questions and, as was then the practice in Belgium, did not disclose their grounds for so doing. Having failed in an appeal to the Court of Cassation, the applicant initiated a case before the Strasbourg court. One of his arguments was that

⁹¹ See, for example, Blom-Cooper, 'Article 6 and Modes of Criminal Trial' (2001) *European Human Rights Law Review* 1. A series of cases in which the point was argued were declared inadmissible by the European Commission of Human Rights. See, for example, *R v Belgium* Application No 15957/90, Admissibility, 30 March 1992; *Zarouali v Belgium* Application No 20664/92, Admissibility, 29 June 1994; *Planka v Austria* Application No 25852/94, Admissibility, 15 May 1996.

⁹² Application No 31913/96, Admissibility, 2 February 1999.

⁹³ Ibid. There are no paragraph numbers in the judgment.

⁹⁴ Application No 54210/00, Admissibility, 15 November 2001.

⁹⁵ Ibid. There are no paragraph numbers in the judgment.

⁹⁶ Application No 926/05, Merits, decision of 13 January 2009.

the failure of the jury which convicted him to provide reasons explaining its decision was in breach of Article 6.

In defence of its mode of trial, the Belgian Government relied on cases such as *Zarouali v Belgium*,⁹⁷ from which the unreasoned verdict had emerged unscathed. There the Commission had emphasised the role played by the questions put to the jury in providing a framework for the verdict. However, in *Taxquet*, the Court referred to 'a perceptible change'⁹⁸ both in its own case-law and in the legislation of the Contracting States, since that judgment had been given. In relation to the latter, the Court elaborated: '[C]ertain States, such as France, have made provision... for the publication of a statement of reasons in assize court decisions.'⁹⁹

The general position on the provision of reasons is clearly stated in the decision: 'In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.'¹⁰⁰ The court stated that the provision of reasons is more important at first instance than on appeal, and that this is particularly so in respect of criminal matters. This corresponds with one of the main rationales for the duty to give reasons,¹⁰¹ namely the idea of enabling the person affected either to accept the decision or to consider an appeal.

The Court in *Taxquet* noted that the same questions had been put to the jury in relation to each of the eight co-accused. The failure to tailor such questions to the situation of each individual had been held to violate Article 6 in a previous case.¹⁰² However, the Court identified a further problem with the procedure in the case before it. In a strongly-worded passage it condemned the one-word answers yielded by the questions:

⁹⁷ Application No 20664/92, Admissibility, 29 June 1994.

⁹⁸ *Supra* n 96 at para 43.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ See, for example, Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] *Public Law* 56.

¹⁰² *Goktepe v Belgium* Application No 50372/99, Merits and Just Satisfaction, 2 June 2005.

The Court considers that such laconic answers to vague and general questions could have left the applicant with an impression of arbitrary justice lacking in transparency. Not having been given so much as a summary of the main reasons why the Assize Court was satisfied that he was guilty, he was unable to understand – and therefore to accept – the court's decision.¹⁰³

The Court referred to the importance of reasoned verdicts for a number of stakeholders in the criminal process, namely the person being tried, the appellate courts and the public at large. The provision of reasons was perceived as vital, not only for the accused but also for the maintenance of confidence in the administration of justice:

It is...important, for the purpose of explaining the verdict both to the accused and to the public at large – the 'people' in whose name the decision is given – to highlight the considerations that have persuaded the jury of the accused's guilt or innocence and to indicate the precise reasons why each of the questions has been answered in the affirmative or the negative.¹⁰⁴

Significantly, the court added that the absence of such reasons meant that the Court of Cassation was unable to conduct 'an effective review,'¹⁰⁵ including the identification of 'any insufficiency or inconsistency in the reasoning.'¹⁰⁶ The court concluded that the fair trial rights of the applicant under Article 6(1) had been breached.

Daly notes that the Court's departure from its previous case-law was 'indicated with...brevity.'¹⁰⁷ Given its potential for far-reaching changes to criminal procedure in many countries, the tone of the judgment is surprisingly low-key and its lack of detail striking. However, although the reasoning in the judgment of the Second Section

¹⁰³ Supra n 96 at para 48.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. at para 49.

¹⁰⁶ Ibid.

¹⁰⁷ Daly, 'An Endangered Species? The Future of the Irish Criminal Jury System in Light of *Taxquet v Belgium*' (2010) 20(2) *Irish Criminal Law Journal* 34 at 36.

was brief, it was unambiguous. The only reasonable interpretation of the decision was that it required ‘juries in all contracting parties to the Convention...to provide a reasoned basis for their verdicts.’¹⁰⁸ Writing extra-judicially, the then Chief Justice of Ireland criticised ‘the opacity of the court’s reasoning’¹⁰⁹ and its ‘inadequate analysis’¹¹⁰ of the issues. In addition, he took issue with what he perceived to be the court’s reliance on an emerging consensus that juries should provide reasons. While the court referred to a trend to that effect among the contracting States, it might be overstating it to describe that as the identification of a consensus. It emerged subsequently that the Court’s reference to a French reform which mandated reasoned jury verdicts was misleading, because although such a reform had been proposed in a Bill, it was never enacted.¹¹¹ However, it is important to note that the judgment did not say that Belgium was out of line with the dominant practice among the parties to the Convention. The mistake in relation to French practice, while regrettable, does not fatally undermine the reasoning of the court. The true kernel of the court’s reasoning was present in its normative statements about the importance of openness, accountability and clarity.

In terms of the ramifications of the decision, the then Chief Justice of Ireland observed that it could give rise to ‘profound implications for juries across Europe.’¹¹² An English commentator wrote that ‘judicial nails were...bitten to the quick’¹¹³ in its aftermath. An *Irish Times* headline proclaimed: ‘Court ruling could lead to end of jury trial system.’¹¹⁴ Daly considered potential reforms of the Irish jury system to ensure compatibility with the Convention, including the giving of reasons, the adoption of the mixed jury system and the abolition of jury trial altogether.¹¹⁵ The Belgian Government requested that *Taxquet* be referred to the Grand Chamber, and Daly

¹⁰⁸ Murray, ‘The Influence of the European Convention on Fundamental Rights on Community Law’, (2010) 33(5) *Fordham International Law Journal* 1388 at 1409. While Murray opined: “[T]he meaning of the...judgment is not entirely clear” (Ibid. at 1409), in light of his overall comments he appeared to be referring to the means by which the contracting parties would respond to the decision rather than the content of the decision itself.

¹⁰⁹ Ibid. at 1410.

¹¹⁰ Ibid. at 1420.

¹¹¹ Ibid. at 1410.

¹¹² Ibid. at 1409.

¹¹³ Spencer, ‘Strasbourg and Defendants’ Rights in Criminal Procedure’, (2011) 70 *Cambridge Law Journal* 14 at 15.

¹¹⁴ Coulter, ‘Court ruling could lead to end of jury trial system’, *The Irish Times*, 6 February 2010.

¹¹⁵ Daly, *supra* n 107, at 37-40.

noted the potential for its decision to ‘foist fundamental and far-reaching...reform’¹¹⁶ on the jury systems of the States subject to the Convention.

Prior to considering the decision of the Grand Chamber, it should be noted that Belgium changed its domestic law in the aftermath of the Second Section decision. Under the reform the presiding judge helps the jury to set out the main reasons for its decision.¹¹⁷ Permission to make submissions before the Grand Chamber was given to Ireland, the United Kingdom and France. As Roberts has noted, those countries had a greater interest in the outcome than Belgium, given the reform that had already been effected in that jurisdiction.¹¹⁸

Before the Grand Chamber, the United Kingdom submitted that a margin of appreciation applied in relation to the procedures used to provide a fair trial. Both Ireland and the UK emphasised the potential for the judge’s summing up to provide a ‘chain of reasoning’¹¹⁹ for the deliberating jury. The language employed by the Irish Government in its submission has been described as ‘florid.’¹²⁰ In a rather laughable passage the Government stated: ‘There has never been a complaint that the system lacks transparency.’¹²¹ Even the most ardent supporter of jury trial could not claim that it involves open or publicly-explained decision-making. On the contrary, the secrecy rule and the unreasoned verdict ensure the opacity of its internal processes. The Irish Government emphasised that the secrecy of deliberations was contingent on the absence of reasons, but made no effort to explain why absolute secrecy was desirable or necessary.¹²² Deploying the oft-used argument about ending total secrecy, Ireland argued that a requirement of a reasoned verdict would ‘undermine the whole essence of a trial by jury.’¹²³ In relation to this tired and illogical point, McHugh had observed years before: ‘[P]ublic confidence in the jury system will be undermined by more being known about jury deliberations only if the system

¹¹⁶ Ibid. at 40.

¹¹⁷ Roberts, ‘Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?’ (2011) 11(2) *Human Rights Law Review* 213 at 222.

¹¹⁸ Ibid.

¹¹⁹ (2012) 54 EHRR 26 at para 74.

¹²⁰ Spencer, *supra* n 113 at 16.

¹²¹ *Third Party Observations of the Government of Ireland, Taxquet v Belgium*, 25 September 2009 at 4, para 8.

¹²² See, for example, *ibid.* at 7, para 21.

¹²³ *Ibid.* at 6, para 19.

deserves to be undermined.¹²⁴ In outlining the *raison d'être* of the jury, the Irish Government stated: 'The essential feature of a jury trial is to interpose, between the accused and the prosecution, people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused.'¹²⁵ However, its submission failed to explain how that crucial aspect of the jury would be compromised by the provision of reasons. For its part, France stressed the diversity of trial processes among the Contracting States, and urged the Court not to impose uniform rules upon them.¹²⁶

The Grand Chamber acknowledged the diverse range of criminal trial methods among the member states of the Council of Europe, referring to those which had no jury system (14), those with a collaborative jury (24) and those with an entirely lay jury system (10).¹²⁷ The Court further noted the diversity of practice within those countries with the latter system, referring to disparities in relation to the numbers of jurors and whether or not a judge summed up or presented the jury with a list of questions. The Court stated that the Contracting States were free to choose their systems of criminal trial, provided they were in compliance with the Convention.

The Grand Chamber reviewed the case-law prior to the decision of the Second Section. In a critical passage, it stated: 'It follows from the case-law cited above that the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict.'¹²⁸ It is thus clear that unreasoned jury verdicts are not automatically contrary to the Convention. The Court continued: 'Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.'¹²⁹ The Court advocated that all aspects of a procedure should be analysed to determine if it complies with Article 6. In conducting

¹²⁴ McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt' in Findlay and Duff (eds), *The Jury Under Attack* (London: Butterworths, 1988) 56 at 70.

¹²⁵ Ibid. at 4, para 10.

¹²⁶ Supra n 119 at paras 81–82.

¹²⁷ Ibid. at paras 45-47. There are 47 member states of the Council of Europe. Norway has both a collaborative system and an entirely lay system (the latter for serious appeals).

¹²⁸ Supra n 119 at para 90.

¹²⁹ Ibid.

this analysis in the case before it, the Court identified its task as determining whether ‘the proceedings afforded sufficient safeguards against arbitrariness and made it possible for the accused to understand why he was found guilty.’¹³⁰ The Court thus appeared to be placing a high value on transparency, albeit in a context where it had said that this did not have to be achieved by a reasoned verdict. The safeguards enumerated by the court as alternatives to a reasoned verdict were judicial summing up, ‘unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based’¹³¹ and appellate remedies. On the facts, the court found that Belgium was in breach of Art 6 because the questions put to the jury by the judge did not sufficiently differentiate between the applicant and his co-accused.

The judgment of the Grand Chamber is disappointing. It purports to emphasise the importance of transparency in criminal justice decision-making but engages in sophistry by presenting processes such as summing up as accountability safeguards. Judicial directions to a jury play an important role in a trial on indictment, but they do not enlighten the public, the accused or appeal courts as to why a particular accused was convicted.¹³² It is disingenuous to pretend that they do so. Spencer argues that reasoned verdicts are particularly important for innocent defendants, and that guilty ones will be the only beneficiaries of the Grand Chamber judgment.¹³³ Presumably this is because the traditional verdict may mask unmeritorious acquittals and the conviction of the innocent. The Grand Chamber wore kid gloves when it engaged with the issue of the unreasoned verdict, apparently reluctant to do anything which would remould domestic trial procedures of long standing. When one considers the strong arguments made by the Second Section for greater clarity and the advantages of accountability more generally, the Grand Chamber’s approach is difficult to defend. As Roberts has noted: ‘The European Court of Human Rights cannot afford to be so respectful of, or hidebound by, states parties’ procedural traditions.’¹³⁴ Given the Court’s mandate in standardising human rights compliance among the Contracting States, its deferential

¹³⁰ Ibid. at para 93.

¹³¹ Ibid. at para 92.

¹³² See Spencer, *supra* n 113, at 16.

¹³³ Ibid.

¹³⁴ Roberts, *supra* n 117, at 221.

attitude, and consequent illogical reasoning in relation to transparency safeguards, is noteworthy. The Court has shown no such timidity in confronting highly contentious procedural issues on previous occasions. Examples include the Court's finding that detained suspected terrorists are entitled to information enabling them to refute the allegations against them¹³⁵ and its ruling that the procedures used in the trial of the killers of James Bulger were not sufficiently tailored to their age and were thus in violation of their rights.¹³⁶ Yet when faced with the jury, a legal institution weighed down by national identity, culture and history, the Court faltered.

Speaking extra-judicially on the day on which the Grand Chamber judgment was handed down, Lord Judge stated with evident satisfaction:

My immediate impression is that the Grand Chamber has understood the essential features of the jury system as it operates in our jurisdiction and, for that matter, in the Republic...What seems to me to be clear from the judgment is that a properly structured summing up followed by a verdict of the jury, which is confined to the verdict, provides an ample understanding to the defendant, and the public, of the reasons why the jury decided that the case against the defendant has been proved.¹³⁷

It is unclear from *Taxquet*, however, whether a comprehensive summing up alone will satisfy the accountability requirements of Article 6, or whether the other safeguards mentioned, including appellate remedies, will also be scrutinised. Ashworth points to the use of the word 'and' rather than 'or' by the Grand Chamber when listing the safeguards of judicial directions and unequivocal questions.¹³⁸ However, he concludes the Grand Chamber did not intend to 'overthrow the British system by a side-wind.'¹³⁹ Duff, writing from a Scottish perspective, argues that

¹³⁵ *A v United Kingdom* (2009) 49 EHRR 29.

¹³⁶ *V v United Kingdom* 1999-IX; (2000) 30 EHRR 121.

¹³⁷ Judge, 'Jury Trials', Judicial Studies Board Lecture, Belfast, 16 November 2010, available at: <http://www.judiciary.gov.uk/media/speeches/2010/speech-by-lcj-jsb-lecture-jury-trials> [last accessed 21 October 2013].

¹³⁸ Ashworth, 'Taxquet v Belgium' [2011] *Criminal Law Review* 236 at 238.

¹³⁹ *Ibid.*

‘relatively full’¹⁴⁰ judicial directions will need to be accompanied by a greater willingness to allow appeals on the basis of verdict perversity.¹⁴¹ In relation to England, Roberts states that the Court of Appeal is often perceived as approaching jury verdicts with undue deference.¹⁴² The reluctance of the Irish courts to intervene on the basis of verdict perversity has also been noted.¹⁴³ Nevertheless, the appeal mechanisms against jury verdicts found in Ireland and the United Kingdom are more extensive than those found in Belgium, where as the Grand Chamber noted in *Taxquet*, an appeal can only be made on a point of law.¹⁴⁴ It is probable that a system of summing up, combined with the avenues of appeal available to persons convicted by a jury in Ireland and the United Kingdom, are sufficient to ensure compliance with the Grand Chamber judgment.

The fact that the traditional common law jury will not be forced into transparency by *Taxquet* – obvious from the Grand Chamber decision itself – was reinforced in *Judge v United Kingdom*.¹⁴⁵ There the Strasbourg court refused to admit a case challenging the unreasoned verdict of a Scottish jury, citing the ‘framework’ which is in place to guide the jury, including counsels’ arguments and the judge’s charge. The Scottish appellate system, which looks at whether a jury verdict is logically inconsistent or irrational, was also approved as a safeguard against arbitrariness.

6. Caution, the jury and the potential for controversy

The dominant characteristic of the cases analysed in this article is restraint. The European Court of Human Rights has avoided making any finding which would interfere with or challenge core characteristics of jury trial. It came closest to doing

¹⁴⁰ Duff, ‘The Compatibility of Jury Verdicts with Article 6: *Taxquet v Belgium*’ (2011) 15(2) *Edinburgh Law Review* 246 at 250.

¹⁴¹ Ibid. at 250-251.

¹⁴² Roberts, *supra* n 117, at 224.

¹⁴³ O’Malley, *The Criminal Process* (Dublin: Round Hall, 2009) at 927. Inconsistency as between verdicts delivered in respect of the same incident is another ground of challenge. Ibid. at 550. In *R v Dhillon* [2008] EWCA Crim 1577 Elias LJ stated: “It is notoriously difficult successfully to challenge a jury’s verdict on the grounds that inconsistent verdicts have been returned.” Ibid. at para 33.

¹⁴⁴ *Supra* n 119 at para 99.

¹⁴⁵ Application No 35863/10, Admissibility 8 February 2011. See also *Patterson v United Kingdom* Application No 19923/10, Admissibility, 22 May 2012; *Beggs v United Kingdom* Application No 15499/10, Admissibility, 16 October 2012 and *Lawless v United Kingdom* Application No 44324/11, Admissibility, 16 October 2012.

so in *Taxquet*, but ultimately engaged in a poorly-reasoned retreat from its initial position. Decisions such as *Sander* and *Hanif and Khan* are examples of instances in which the Court has found that jury trial procedures were in breach of the Convention, but the defects in issue did not concern fundamental aspects of the jury system. Strasbourg may well be influenced by policy concerns in this area, where the potential to enrage the United Kingdom by interfering with an institution regarded as quintessentially British,¹⁴⁶ is considerable.

It is true, however, that the European Court has not been chary about making decisions which have provoked outrage from British politicians and media commentators in recent years. The popular press is openly hostile to the Court and its decisions¹⁴⁷ and media reporting on them is often inaccurate.¹⁴⁸ Cases in which the Court has held that prisoners have a right to vote¹⁴⁹ and that a notorious terrorism suspect could not be deported because of the risk that evidence extracted by torture would be used at his trial in Jordan¹⁵⁰ are among those which have precipitated calls for a re-evaluation of Britain's relationship with the Court and indeed its total withdrawal from the Convention. In *R v Horncastle*¹⁵¹ the United Kingdom Supreme Court trenchantly rejected criticisms of the law of hearsay in England and Wales which the Strasbourg court had made in *Al-Khawaja v United Kingdom*.¹⁵² This tense exchange was attenuated, at least in part, by the subsequent

¹⁴⁶ For an historical perspective on this issue, see Vogler, 'The International Development of the Jury: The Role of the British Empire' (2001) 72 *Revue Internationale de Droit Pénale* 525.

¹⁴⁷ See, for example, Wilson, 'Court of Human Frights', *The Sun*, 26 January 2012, available at: <http://www.thesun.co.uk/sol/homepage/news/politics/4087040/David-Cameron-news-PM-attacks-European-Court-of-Human-Rights-after-ban-to-deport-Abu-Qatada.html> [last accessed 21 October 2013]; Doughty, 'Illegal Immigrant and Failed Asylum Seeker Handed £24,000 by Human Rights Judges after "British Law Failed to Protect her from Slavery"', *The Daily Mail*, 13 November 2012, available at: <http://www.dailymail.co.uk/news/article-2232483/Illegal-immigrant-failed-asylum-seeker-handed-24k-EU-Human-Rights-judges.html> [last accessed 21 October 2013]; 'Victory for Evil', *The Sun*, 10 July 2013, available at <http://www.thesun.co.uk/sol/homepage/news/politics/5005765/Victory-for-evil-as-EU-judges-declare-that-whole-life-sentences-are-inhumane.html?OTC-RSSATTR=Politics> [last accessed 21 October 2013].

¹⁴⁸ See, for example, 'May warns UK may pull out of EU Convention to "fix human rights laws"', *The Guardian*, 1 October 2013.

¹⁴⁹ *Hirst v United Kingdom (No 2)* 2005-IX; 42 EHRR 41; *Greens and MT v United Kingdom* Applications Nos. 60041/08 and 60054/08, Merits and Just Satisfaction, 23 November 2010.

¹⁵⁰ *Othman (Abu Qatada) v United Kingdom* Application No 8139/09, Merits and Just Satisfaction, 17 January 2012.

¹⁵¹ [2009] UKSC 14; [2010] 2 AC 373.

¹⁵² *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

decision of the Grand Chamber in *Al-Khawaja*.¹⁵³ The Supreme Court has subsequently indicated that it will only depart from Grand Chamber decisions in exceptional circumstances, particularly where there is more than one Grand Chamber decision to the same effect.¹⁵⁴

The former British President of the European Court of Human Rights, Sir Nicholas Bratza, has referred to ‘a crescendo of criticism’¹⁵⁵ of the Court in his home country. While the hostility has become more marked under the Conservative/Liberal Democrat coalition government, the Court’s judgments were sometimes disparaged under the previous Labour administration also.¹⁵⁶ In this febrile atmosphere academics and judges have entered the fray to contribute to the discourse on the role of the Convention and its Court in British law.¹⁵⁷ In December 2012 the Conservative MP Richard Bacon introduced the Human Rights Act 1998 (Repeal) Bill in the House of Commons. Although ultimately defeated, seventy-one Conservative MPs supported the Bill. One might invoke the increasingly fraught relationship between the United Kingdom and Strasbourg as evidence that the European Court does not take into account the potential for political backlash when determining the cases which come before it. However, the Court’s decisions in relation to core aspects of the jury system have always been characterised by an unusual degree of reticence. This may be contrasted with its more robust approach to other questions and suggests that it is influenced by the possible official or public reactions which would greet closer scrutiny of jury trial. Indeed, Fenwick argues that

¹⁵³ *Al-Khawaja and Tahery v United Kingdom* (2011) 54 EHRR 23. For a discussion of the difficulties which remain between the United Kingdom and Strasbourg on the law of hearsay after the Grand Chamber judgment, see Coen, ‘Hearsay, Bad Character and Trust in the Jury: Irish and English Contrasts’ (2013) 17(3) *International Journal of Evidence and Proof* 250 at 266.

¹⁵⁴ *R(Chester) v Secretary of State for Justice* [2013] UKSC 63.

¹⁵⁵ Rozenberg, ‘Judicial Dialogue? Straw and Bratza Deliver Choice Words on Strasbourg’, *The Guardian*, 14 November 2012, available at: <http://www.guardian.co.uk/law/2012/nov/14/straw-bratza-strasbourg> [last accessed 21 October 2013].

¹⁵⁶ Fenwick, Masterman and Phillipson, ‘The Human Rights Act in Contemporary Context’, in Fenwick et al. (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) 1 at 3.

¹⁵⁷ See, for example, Fenwick et al. (eds), *ibid*; Donald, Gordon and Leach, *The UK and the European Court of Human Rights* (Equality and Human Rights Commission Research Report 83, 2012), available at: http://www.equalityhumanrights.com/uploaded_files/research/83_european_court_of_human_rights.pdf [last accessed 21 October 2013]; O’Cinneide, *Human Rights and the UK Constitution* (The British Academy, 2012), available at: <http://www.britac.ac.uk/policy/Human-rights.cfm> [last accessed 21 October 2013]. For a judicial perspective, see B Hale, ‘Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12(1) *Human Rights Law Review* 65.

the hostile reaction which some of the Court's decisions have engendered in recent years is beginning to affect its jurisprudence by causing it to become less interventionist generally.¹⁵⁸ The threat of UK withdrawal from the Convention is an important background factor.¹⁵⁹ While the Court may have been taken aback by the depth of media and political criticism of some of its judgments, it appears to have a long-standing awareness of the uproar which might be occasioned by condemning the essential attributes of jury trial. The jury exercises a deep-seated and emotive hold over the British imagination, and has long done so. In 1844 it was said that one would have difficulty getting 'the British bosom into a sufficiently tranquil state to discuss this great subject,'¹⁶⁰ while in 1979 the discourse on jury trial was condemned as 'hysterical'¹⁶¹ and 'bitter.'¹⁶² A court popularly regarded as 'foreign' would be ill-advised to fatally condemn an institution so singularly associated with a nation's history and identity. In the words of Zander: 'There is no institution that more expresses the philosophy of the English justice system than the jury.'¹⁶³ The extent to which the jury retains its mesmeric appeal may be seen in the discourse on whether there should be a United Kingdom Bill of Rights.¹⁶⁴

The fact that jury trial is not protected in the Convention has been called in aid by some, notably the Conservative Party, as a reason for the enactment of a Bill to

¹⁵⁸ See Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' available at: <http://ukconstitutionalallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/> [last accessed 21 October 2013].

¹⁵⁹ See, for example, Rozenberg, 'UK human rights convention exit "would be disastrous"', available at <http://www.bbc.co.uk/news/uk-22754866> [last accessed 21 October 2013]. The Council of Europe Commissioner for Human Rights has issued a memorandum about UK non-compliance with the Strasbourg decisions on prisoner voting, in which he states that it is preferable for a state to withdraw from the Convention rather than to selectively comply with decisions of the Court. The memorandum is available at

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2365759&SecMode=1&DocId=2062696&Usage=2> [last accessed 21 October 2013].

¹⁶⁰ à Becket, *The Comic Blackstone* (London, 1844) at 187. Cited in Marshall, 'The Judgement of One's Peers: Some Aims and Ideals of Jury Trial' in Walker (ed) *The British Jury System: Papers Presented to the Cropwood Round-Table Conference December 1974* (Cambridge: Institute of Criminology, 1975) 1 at 1.

¹⁶¹ Baldwin and McConville, *Jury Trials*, (Oxford: Clarendon Press, 1979) at 1.

¹⁶² Ibid.

¹⁶³ Zander, *A Matter of Justice: The Legal System in Ferment* (Oxford: Oxford University Press, 1989) at 209.

¹⁶⁴ For a general discussion of that issue, see Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72(6) *Modern Law Review* 883. For an earlier consideration of the issue, see Jaconelli, *Enacting a Bill of Rights* (Oxford: Clarendon Press, 1980).

protect British rights. In a 2006 speech the current Prime Minister described the lack of protection given to the jury system in the Human Rights Act 1998 as one of its failures.¹⁶⁵ In 2008 the parliamentary Joint Committee on Human Rights published a report advocating the creation of a Bill of Rights.¹⁶⁶ In relation to the question of whether jury trial should be included in the document, the Committee recognised that the value and status of this mode of trial divided opinion. It concluded in favour of a compromise provision which would protect a right to jury trial in serious cases, but would be subject to 'demonstrably justifiable restrictions.'¹⁶⁷ By contrast, a Green Paper published by the Labour Government in 2009 to initiate discussion about a Bill of Rights did not favour the inclusion of a guarantee relating to jury trial. It noted that while it was 'deeply entrenched'¹⁶⁸ as the means by which serious crime is tried in the United Kingdom, it was by no means perfect. In support of this contention it raised the question of its suitability in complex cases and the unreasoned nature of its decisions.¹⁶⁹ More recently, this issue has arisen in the context of the publications of the United Kingdom Commission on a Bill of Rights. The Commission was established in March 2011 to assess if a United Kingdom bill of rights should be created. Part of its work involved consideration of the types of rights and guarantees such an instrument would protect. The Law Society of England and Wales was among 40 respondents to the Commission's consultation process who argued that a right to jury trial should be included in any United Kingdom Bill of Rights.¹⁷⁰ In its Consultation Paper the Commission was mindful of the complexities of formulating a guarantee relating to jury trial which would fit easily into the three separate jurisdictions of the United Kingdom.¹⁷¹ Like the 2009 Green Paper, it also referred to the possibility that jury trial might not be the best mode of trial, and mentioned the

¹⁶⁵ See Cameron, 'Balancing freedom and security – A modern British Bill of Rights', speech to the Centre for Policy Studies, 26 June 2006. The full text of the speech is available at <http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution> [last accessed 21 October 2013].

¹⁶⁶ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (London: The Stationery Office, 2008).

¹⁶⁷ *Ibid.* at 38.

¹⁶⁸ *Rights and Responsibilities: Developing our Constitutional Framework* (London: Cm 7577, 2009).

¹⁶⁹ *Ibid.* at 37.

¹⁷⁰ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: Volume 1, 2012) at 156.

¹⁷¹ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: Volume 2, 2012) at 58.

unreasoned verdict and complex cases in this regard.¹⁷² Ultimately the Commission's conclusions focussed on the broad issue of whether the United Kingdom should adopt a Bill of Rights rather than on the content of any such document.¹⁷³ However, its publications confirm O'Cinneide's observation that jury trial is one of the perceived "native" rights¹⁷⁴, the Convention's omission of which is seized upon by British critics as evidence of its flawed priorities. The Strasbourg court is no doubt aware of this context when deciding on jury-related cases, and it would be surprising if it did not sometimes influence decisions, such as the *volte face* of the Grand Chamber from the Second Section decision in *Taxquet*.

A decision heralding significant changes to jury trial could encounter a less than enthusiastic welcome in any of the Contracting States to the Convention which uses such a mode of trial.¹⁷⁵ However, the United Kingdom response would undoubtedly be hostile in the extreme, both because of the prevailing anti-Strasbourg feeling, and the ingrained sense of the jury as a "distinctively British"¹⁷⁶ institution. This background should not inform decisions of the Court, but arguably has done so. Proponents of jury trial sometimes regard it as immutable, whereas it has evolved and changed throughout its long history. It has changed from an all-male group of property owners who had to reach a unanimous verdict in order to convict to an institution which should be representative of the community and may bring in a majority verdict of guilty. It can evolve in the future in order to accommodate developing human rights standards.

¹⁷² Ibid. at 59.

¹⁷³ A majority of the Commission favoured such a Bill, arguing that there was "a strong argument for a fresh beginning." Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1, December 2012) at 176. A minority of the members argued against such innovation, suggesting that some of the majority viewed it as "a path towards withdrawal from the European Convention." Ibid. at 178. For a critique of the Commission's conclusions, see Elliott, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights' (2013) *European Human Rights Law Review* 137.

¹⁷⁴ O'Cinneide, *supra* n 157 at 40.

¹⁷⁵ See main text accompanying *supra* n 127.

¹⁷⁶ Williams, *The Proof of Guilt*, 2nd edn (London: Stevens & Sons, 1958) at 218.

7. Conclusion

This article has endeavoured to provide a comprehensive analysis of the impact of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, on the institution of trial by jury. It has been argued that although the Convention has had an influence on the conduct of jury trials, particularly on certain issues affecting juror impartiality, it has not fundamentally changed the essence of the common law jury. The secrecy rule and the publicly unreasoned verdict remain intact, in spite of pressing human rights arguments in favour of their amendment. It was suggested that non-legal considerations may underlie the Strasbourg court's reluctance to intervene forcefully in such areas. The cultural and emotional attachment to traditional conceptions of jury trial in the United Kingdom, viewed against the backdrop of anti-Convention sentiment in that jurisdiction, is an important lens through which to analyse the caution of the Court in this sphere.

Insufficient weight has been accorded by the European Court to the rights of persons tried by jury. Both the Court and the Contracting States need to realise that traditional attributes of jury trial can be amended without denuding the institution of its main feature, namely the involvement of lay people in the administration of justice. If this principle were accepted, decisions necessitating changes to established practices could be accommodated within the jury system, instead of being viewed as threatening assaults on national customs and traditions. A less deferential approach is required by the Court, unhindered by political or diplomatic concerns. There must be recognition of the fact that jury trial, like all human processes, contains the potential for injustice and abuse.