disorder or crime. The difference in aim affects the factors to be taken into account and the weight to be given to them. In particular, in deportation cases the person's criminal offending will be of greater relevance and weight, although the actual weight given depends on a context-specific assessment of the seriousness of the offending and all the circumstances in the case: at [17].

The view taken by Richards L.J. is to be welcomed. In focusing on a clear articulation of the legitimate aim pursued in criminal deportation cases it makes clear that criminal offending will be seen as a relevant and weighty factor. By confirming that the approach is the same as in ordinary removal cases though, without criminality necessarily being decisive, it ensures that settled migrants will have an opportunity for the courts to make an overall assessment of all the relevant circumstances in balancing respect for private and family life with the prevention of crime or disorder.

CLAIRE NIELSEN

STRASBOURG AND DEFENDANTS' RIGHTS IN CRIMINAL PROCEDURE

AN uneasy relationship exists between the European Court of Human Rights and the UK Supreme Court over criminal procedure. Like many UK politicians, the Supreme Court resents what it sees as "Strasbourg interference" in this area. And so it was that in *Horncastle* [2009] UKSC 14, [2010] 2 AC 373 the Supreme Court spectacularly refused to accept a ruling of the Fourth Section of the Strasbourg court which, if applied, would have curtailed the power of UK courts to convict on hearsay evidence. But when faced with a decision of the Grand Chamber (rather than a Section) the Supreme Court is usually prepared to knuckle under; as it did recently in *Cadder* v. *H.M. Advocate* [2010] UKSC 43, [2010] 1 W.L.R. 2601.

The issue there was the rule of Scots law that then denied the suspect the right to legal advice when detained by police for questioning. In *Salduz* v. *Turkey* (2008) 49 E.H.R.R. 421 the Grand Chamber had stated in uncompromising terms that the suspect's general right to a fair trial under Article 6 of the ECHR carries with it the right to legal advice when being interrogated by the police, and that if exceptions to this are sometimes justified, these do not justify the use of incriminating statements obtained at interviews where legal assistance has been denied, as prosecution evidence at trial. On the basis of this, Cadder argued that the Lord Advocate – the Scottish public prosecutor – could not properly use against him an incriminating statement he had made when interviewed under the prevailing Scottish rules. Having failed in

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Scotland, Cadder took the point as a "devolution issue" to the Supreme Court, where a panel of seven – led by the two Scottish justices – held unanimously in his favour and sent the case back to the High Court of Justiciary in Edinburgh for further consideration.

The effect of this was to undo the Scottish part of a deal reached in the 1980s whereby Parliament resolved an issue of major importance in different ways on different sides of the Border. South of the Tweed, the Police and Criminal Evidence Act 1984 gave the English police the power to detain suspects for questioning for long periods – 24 hours, extensible to 36 on the authority of a senior officer, and extensible to 96 on the authority of a magistrate – but subject to the suspect's right to a solicitor. North of the Tweed, the Criminal Justice (Scotland) Act 1980 gave the Scots police the equivalent power for six hours only, but with no obligation to allow the suspect access to a lawyer. With this apparently unfavourable deal the Scots police were well content: as was accepted by Lord Rodger in his judgment in *Cadder*, where he recognised that the effect of the decision would be "to tilt the balance, to some degree, against the police and prosecution". In reaction to this, the Scottish legislature has already rushed though a piece of legislation which guarantees the Scottish suspect's right to a solicitor, but in return now gives the Scots police the power to detain suspects for 12 hours, extensible by order of a senior officer to 24.

While all this was going on, judicial nails were being bitten to the quick about a case pending before the Grand Chamber which threatened to upset the rule, hallowed this time on both sides of the Border, to the effect that jury verdicts are delivered without reasons. In a line of cases dating back to the early 1990s the Strasbourg Court had held that the general right to a fair trial enshrined in Article 6 includes a specific right to a decision for which the reasons are identified, and in January 2009 the Second Section of the Strasbourg Court applied this so as to condemn Belgium in respect of a conviction returned by a *Cour d'assises* where, as was then the practice, a Belgian jury had convicted a defendant without giving reasons (*Taxquet* v. *Belgium*, case 926/05, 13 January 2009). At the instance of the Belgian government the case was referred to the Grand Chamber, and the UK, Ireland and France – all countries where juries give unreasoned verdicts – were given leave to intervene.

On 16 November 2010 the Grand Chamber reaffirmed the condemnation of Belgium, but in terms which presumably left the intervenants with feelings of relief. Whilst stating that the need for reasoned decisions applies even with lay juries, the Grand Chamber accepted that it could be met in other ways than by requiring the jury to provide a reasoned judgment in the same way as a professional judge. One possible way, it said, was by giving the jury a set of "precise,

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unequivocal questions" to answer, so providing "a framework on which the verdict is based". In France this already happens, at least in some cases, but this had not been done in Belgium in the case in hand. Another way, it said, was by "directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced", which is of course what happens in the UK and in Ireland.

In those two countries the likely reaction will be to say "Hooray! Strasbourg is off our backs, jury trial in its present form is fine, and we can carry on as we have always done!" But this is not a view this commentator shares.

A reasoned decision, surely, is indeed a vital safeguard, in particular for innocent defendants. And even if the Grand Chamber were prepared to say that the combination of a judicial direction and the utterance by the foreman of the jury of the words "Guilty" or "Not Guilty" is equivalent to one, in reality it is not. If the first place, there is no means of telling whether the jury have understood what the judge in his direction told them: a serious matter, since a substantial body of research suggests that juries frequently do not. And secondly, there is no guarantee that, assuming they did understand it, they followed it – and based their conviction on the direction and the evidence, and not by reasoning (for example) that the defendant must have done something bad or he would not be there, or that he is untrustworthy because his eyes are set too close together.

It was with this in mind that, in his *Review of the Criminal Courts*, Sir Robin Auld proposed a reform under which judges should give juries a written questionnaire in which the intellectual route to a conviction or acquittal would be spelt out step by step, and their eventual verdict would have to be based upon it, and consistent with it: a revival, in effect, of the "special verdict", which was common once upon a time, but in recent years has fallen quietly into disuse.

The objection that is usually made to this is that the unreasoned verdict is "all part of the deal" of jury trial; a viewpoint put in florid language by the Irish government in its submission to the Grand Chamber, where it claimed "the system of jury trial in Ireland was the unanimous choice of accused persons and of human rights advocates", and added that "to require juries to give reasons for their decisions would alter the nature and the very essence of jury trial as operated in Ireland."

The underlying fear here is that requiring juries to give reasons would put an end to "jury equity": the present ability of a jury to acquit a defendant in the teeth of the judge's direction because they are sorry for him, or disapprove of the law the prosecution was intended to enforce – the *locus classicus* of which is the case of Henriette Caillaut, acquitted in 1914 by a French jury of murdering, in the coldest of cold

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blood, the editor of *Le Figaro*, to stop him waging a disgraceful vendetta against her husband, the Minister of Finance.

But if this "jury equity" is truly a blessing rather than a bane, it should surely be a one-way street. If it is right for juries to be able to acquit guilty defendants who attract their sympathy, they should not be free to convict innocent ones who attract their hatred or disgust, despite the fact that the evidence against them did not convince them. And this, at present, they are just as free to do, thanks to the unreasoned verdict. Surely the Auld proposal should be implemented, at least to the extent of requiring guilty verdicts to be justified by a chain of reasoning, even if the jury's right to pronounce an acquittal without reasons were retained.

Both the *Salduz* and *Taxquet* cases, and their legal aftermaths in the UK, are developments that are helpful to defendants; but in truth it is only guilty ones who stand to profit from the second.

J.R. SPENCER

CLOSED CIVIL PROCEEDINGS OUTLAWED AT COMMON LAW

IN *Al Rawi* v. *Security Service* [2010] EWCA Civ 482; [2010] 3 W.L.R. 1069 the Court of Appeal held that there is no common law power to permit a civil action to proceed on a "closed" basis. In the court's opinion, to recognise such a power would be both contrary to fundamental principle and inconsistent with the Civil Procedure Rules.

This powerful endorsement of common law "due process" values arose from the following notorious allegations. The six claimants alleged that the British security agencies had assisted in violation of their civil rights during detention, including periods spent at the USA's detention centre, at Guantanamo Bay, Cuba. The various causes of action pleaded included false imprisonment, trespass to the person, and conspiracy to injure and torture. The defendants wished to defend this action by adopting a parallel system of open and closed proceedings. As for the latter, the court would receive evidence, oral or documentary, and consider representations, without the claimants or their lawyers. Instead the interests of justice would be supported by use of special advocates, although they would not be instructed by the claimants. The process would culminate in two judgments: one which was available for public consumption and a closed judgment available only to the defendants' lawyers and the special advocates.

The present question, posed as a preliminary issue in this action, was whether it is possible for the court to adopt such a procedure, in

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