



Ministry of
JUSTICE

Responding to human rights judgments

Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011–12

September 2012



Responding to human rights judgments

Report to the Joint Committee on Human Rights
on the Government's response to human rights
judgments 2011–12

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

September 2012

© Crown Copyright 2012

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at humanrights@justice.gsi.gov.uk or by ringing 020 3334 3734.

This publication is available for download at www.official-documents.gov.uk and from our website at www.justice.gov.uk

ISBN: 9780101843225

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2508611 09/12

Printed on paper containing 75% recycled fibre content minimum.

Contents

Introduction	3
General Comments	4
European Court of Human Rights judgments	4
Declarations of incompatibility	5
Wider developments in Human Rights	6
Commission on a Bill of Rights	6
Reform of the European Court of Human Rights and the UK Chairmanship of the Committee of Ministers of the Council of Europe	6
Universal Periodic Review	8
Reporting to United Nations Treaty Monitoring Bodies	8
The UK's approach to the implementation of human rights judgments	10
Coordinating the implementation of human rights judgments	10
Access to information on the implementation of judgments	10
Judgments in cases against the UK between 1 August 2011 and 31 July 2012	12
The UK's record on the implementation of European Court of Human Rights judgments	14
Consideration of significant judgments that became final in the past twelve months (1 August 2011 – 31 July 2012)	16
Right to a fair trial – Tahery	16
Prisoner voting – Scoppola v Italy, Hirst and Greens & MT v UK	17
Risk of torture and ill treatment (removal to Somalia) – Sufi & Elmi	19
Deportation an interference with right to private life – AA	20
Right to a fair trial – Hanif & Khan	21
Right to a fair trial (removal to Jordan) – Othman (AKA Abu Qatada)	23
Right to an effective remedy – Reynolds	25
Consideration of other significant judgments that became final before 1 August 2011 and which are still under the supervision of the Committee of Ministers	26
Retention of DNA profiles and cellular samples (S & Marper)	26
Overseas detention – Al Jedda	27
Extra-territorial effect of the Convention – Al Skeini	28
Interference with a prisoner's medical correspondence	30
Terrorism stop and search powers – Gillan & Quinton	32
Interference with Article 8 rights in eviction decisions – Kay & McCann	35

Responding to human rights judgments

Fees in defamation cases and freedom of expression – MGN Ltd	36
Other significant decisions	37
First UK case to be rejected using the new “no significant disadvantage” criterion – Heather Moor & Edgecomb Ltd	37
Unilateral Declaration – Brady v the United Kingdom	38
Domestic cases – new declarations of incompatibility in the previous twelve months	39
Annex A: Declarations of incompatibility	40
Annex B: Statistical information on the UK’s record on the implementation of adverse European Court of Human Rights judgments	58

Introduction

This is the latest report in a series of broadly annual papers to the Joint Committee on Human Rights (the Joint Committee) setting out the Government's position on the implementation of adverse human rights judgments from the European Court of Human Rights and the domestic courts. The previous report¹ was followed by an evidence session² on 20 December 2011 at which the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, were questioned by the Joint Committee on the Government's human rights policy and human rights judgments.

This paper is divided into three main sections:

- general introductory comments, including **wider developments in human rights and the process for implementation of adverse judgments**;
- **the UK's record on the implementation of judgments of the European Court of Human Rights** and a two part **overview of significant European Court of Human Rights judgments that have become final in the previous twelve months** and that **became final earlier and are still under the supervision of the Committee of Ministers**; and
- information about **declarations of incompatibility in domestic cases**.

The aim of the report is to keep the Joint Committee up-to-date with the Government's response to human rights judgments and any significant developments in the field of human rights. The report covers the period 1 August 2011 to 31 July 2012.

The Government welcomes any correspondence from the Joint Committee should it require further information on any points made in this report.

¹ <http://www.justice.gov.uk/downloads/publications/moj/2011/responding-to-human-rights-judgments.pdf>

² http://www.parliament.uk/documents/joint-committees/human-rights/Corrected_Oral_evidence_201211.pdf

General Comments

The main focus of this paper is on two particular types of human rights judgments:

- **judgments of the European Court of Human Rights** in Strasbourg against the United Kingdom under the European Convention on Human Rights; and
- **declarations of incompatibility** by United Kingdom courts under section 4 of the Human Rights Act 1998.

A common feature of these judgments is that their implementation usually requires changes to legislation,³ policy or practice, or a combination thereof.

European Court of Human Rights judgments

The United Kingdom is obliged to implement judgments of the European Court of Human Rights under Article 46 of the European Convention on Human Rights. The implementation, or “execution” as it is described in the Convention, of judgments of the European Court of Human Rights is overseen by the Committee of Ministers of the Council of Europe (the Committee of Ministers). This oversight also derives from Article 46.

The Committee of Ministers is a body on which every Member State of the Council of Europe is represented. As part of the Interlaken reform process, the Committee has now introduced a new two-track working system. Under this system, first applied at the March 2011 meeting of the Committee, consideration is prioritised for cases subject to ‘enhanced supervision’.⁴

The Committee of Ministers is advised by a specialist Secretariat⁵ in its work overseeing the implementation of judgments.

³ Whether primary legislation (i.e. Acts of Parliament) or subordinate legislation (e.g. statutory instruments).

⁴ ‘The criteria for a case to be subject to ‘enhanced supervision’ include:

- the judgment requires urgent individual measures;
- pilot judgments (in which the European Court of Human Rights has singled out one or a small number of applications for priority treatment and adjourns all other applications until the pilot case has been decided);
- judgments requiring major structural and/or complex problems as identified by the Court or by the Committee of Ministers;
- interstate cases;
- other judgments which for special reasons require such supervision.

⁵ The Department for the Execution of Judgments.

There are three parts to the implementation of a Strasbourg judgment:

- the payment of *just satisfaction*, a sum of money awarded by the Court to the successful applicant;
- other *individual measures*, required to put the applicant so far as possible in the position they would have been had the breach not occurred; and
- *general measures*, required to prevent the breach happening again, or to put an end to breaches that still continue.

Declarations of incompatibility

Under section 3 of the Human Rights Act 1998, legislation must be read and given effect, so far as it is possible to do so, in a way which is compatible with the Convention rights.⁶ If a higher court⁷ finds itself unable to do so in respect of primary legislation,⁸ it may make a declaration of incompatibility under section 4 of the Act. Such declarations constitute a notification to Parliament that an Act of Parliament is incompatible with the Convention rights.

Since the Human Rights Act came into force on 2 October 2000, 27 declarations of incompatibility have been made, of which 19 have become final (in whole or in part) and none of which are subject to further appeal. There have been no new declarations of incompatibility in the period covered by this report.

A declaration of incompatibility neither affects the continuing operation or enforcement of the Act it relates to, nor binds the parties to the case in which the declaration is made.⁹ This respects the supremacy of Parliament in the making of the law. Unlike for judgments of the European Court of Human Rights, there is no legal obligation on the Government to take remedial action following a declaration of incompatibility, or upon Parliament to accept any remedial measures the Government may propose.

Remedial measures in respect of both declarations of incompatibility and European Court of Human Rights judgments may, depending on the provisions proposed in any particular case, be brought forward by way of a remedial order under section 10 of the Human Rights Act.

⁶ The rights drawn from the European Convention on Human Rights listed in Schedule 1 of the Human Rights Act 1998.

⁷ Of the level of the High Court or equivalent and above, as listed in section 4(5) of the Act.

⁸ Or secondary legislation in respect of which primary legislation prevents the removal of any incompatibility with the Convention rights other than by revocation.

⁹ Section 4(6) of the Human Rights Act.

Wider developments in Human Rights

Commission on a Bill of Rights

The Government remains committed to the European Convention on Human Rights, and to giving effect to the Convention in domestic law. However, as it made clear in the Coalition Agreement,¹⁰ the Government wants to look afresh at how human rights are protected in the United Kingdom to see if things can be done better and in a way that reflects our traditions.

To this end, a Commission was established in March 2011 to investigate the creation of a Bill of Rights that incorporates and builds on all of our obligations under the European Convention on Human Rights, ensures these rights continue to be enshrined in British law, and protects and extends our liberties. It will consider ways to promote a better understanding of the true scope of these obligations and liberties.

Previously, information on the Commission's remit and operation has been provided to the Joint Committee. Further information on its terms of reference, composition and the work it has done so far is available from the Commission's website.¹¹

The Commission is due to report to the Lord Chancellor and Secretary of State for Justice and the Deputy Prime Minister by the end of this year and the Government looks forward to receiving the Commission's final report.

Reform of the European Court of Human Rights and the UK Chairmanship of the Committee of Ministers of the Council of Europe

The Government values the European Court of Human Rights as a vital part of the system for protecting the rights and freedoms of over 800 million citizens across Europe. However, the Court's ability to carry out its proper role has been undermined by the highly challenging situation it faces, not least its very high backlog of cases. The Government has been strongly committed to the programme of reform of the Court started at the Interlaken Conference in 2010 and built upon by the Izmir Conference in 2011.

¹⁰ http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

¹¹ <http://www.justice.gov.uk/about/cbr>

In December 2011, the Government published a report on the steps the United Kingdom has taken to implement the action plan agreed at Interlaken¹². All member States were required to submit these reports, which will inform the Council of Europe's work to strengthen the implementation of the European Convention on Human Rights at a national level. The report gives a short narrative on the UK's activity in areas including promoting awareness of human rights, the implementation of judgments of the Court and how it has taken account of recommendations of the Court.

The UK held the Chairmanship of the Committee of Ministers of the Council of Europe for six months between November 2011 and May 2012. This presented a rare opportunity for the UK to play a leading role in the vital work of the Council of Europe in promoting rights, democracy and rule of law across the continent. Also, it came at a crucial stage in the timetable set down at Interlaken, which called for specific proposals for measures requiring amendment to the Convention to be put forward by June 2012.

The overarching theme of the UK Chairmanship was the promotion and protection of human rights and our top priority was to drive further meaningful progress on reform of the Court. The culmination of this work was the Brighton Declaration, agreed at a ministerial conference chaired by the Justice Secretary in Brighton on 19–20 April 2012. This substantial package of reforms came after several months of negotiation with the other 46 Council of Europe member States as well as engagement with civil society. In addition, it took into account contributions from the Council of Europe expert committees and the Court itself.

The Declaration is an important step towards realising the UK Government's broad ambition for reform, which was set out by the Prime Minister in a speech to the Parliamentary Assembly of the Council of Europe on 25 January 2012. The key goals he outlined were to strengthen subsidiarity (the principle that, where possible, final decisions should be made nationally), to improve the efficiency of the court and to raise the quality of the nomination process for judges. The Brighton Declaration delivers in these three areas.

The work to implement some of these reforms can begin immediately and will be taken forward, as appropriate, by member States, the Council of Europe and the Court. The technical work on those reforms requiring amendment to the Convention will be taken forward largely by the Steering Committee for Human Rights (CDDH) and its sub-committees according to the timetable agreed by the Committee of Ministers.

¹² <http://www.justice.gov.uk/downloads/publications/policy/moj/interlaken-action-plan-uk-report.pdf>

Universal Periodic Review

The United Kingdom remains deeply committed to the Universal Periodic Review (UPR) as an important mechanism for sharing best practice on human rights around the world and promoting continual improvement of human rights on the ground. It is a peer review mechanism, which creates the opportunity for countries to take a self-critical look at their own human rights records.

The UK's second Universal Periodic Review took place in Geneva on 24 May 2012 and was led by Lord McNally, Minister with responsibility for Human Rights in the Ministry of Justice.

In preparation, the UK Government and the Devolved Administrations consulted widely with NGOs and National Human Rights Institutions, holding engagement events in all four nations of the UK.

Following the review, the UK received a number of recommendations for its consideration. The UK Government is now in the process of consulting with the Devolved Administrations and civil society on these recommendations before responding formally to the Human Rights Council in September 2012.

The UK's aim for the second cycle of the UPR is that it serves to further strengthen this unique mechanism, preserving its universality and constructive spirit.

Reporting to United Nations Treaty Monitoring Bodies

The United Kingdom sees the monitoring process carried out by expert UN treaty monitoring bodies as an essential element in the promotion and protection of human rights throughout the world, and a catalyst for achieving positive change. The UK Government values the advice given by expert committees on the implementation of the Conventions to which the UK is party and gives serious consideration to that advice in the development of human rights policy in the UK.

The UK welcomes opportunities to discuss fulfilment of its treaty obligations with the Monitoring Bodies. The Government is committed to constructive engagement with the UK's National Human Rights Institutions and NGOs on these matters.

On 6 September 2011, the Government submitted the UK's 5th periodic report under the Convention against Torture and is due to be examined by the Committee against Torture at its session in May 2013. In addition, in July 2013, the UK is due to be examined by the Committee on the Elimination of Discrimination Against Women on how it is fulfilling its obligations under the Convention on the Elimination of all forms of Discrimination Against Women.

On 24 November 2011 the UK submitted its first periodic report under the Convention on the Rights of Disabled People.

Preparation of the UK's 7th report under the International Covenant on Civil and Political Rights is continuing and the intention is to submit this in autumn 2012. Work has begun on the next periodic report under the International Covenant on Economic, Social and Cultural Rights which is due in June 2014.

The UK's approach to the implementation of human rights judgments

Coordinating the implementation of human rights judgments

As outlined in previous Government reports, the Ministry of Justice is the light-touch coordinator for the implementation of adverse judgments. It coordinates information from the Government departments leading on particular cases and is responsible for its onward transmission to the UK Delegation to the Council of Europe (UKDel). This system has been in place for some time now and has helped to ensure implementation takes place in a timely and effective manner.

Lead responsibility for the implementation of a particular judgment rests with the relevant Government department, whilst UKDel represents the UK at the Committee of Ministers' meetings on the execution of judgments.

On receiving notice of an adverse judgment against the UK, the lead Government department completes an **implementation form**. This ensures the information needed for the effective oversight of the implementation process is provided to the Ministry of Justice. The information on the form is also used as the basis for drafting the Action Plan for implementation required by the Committee of Ministers.

The Ministry of Justice monitors cases involving other Council of Europe member States to identify those that have a read-across to existing UK cases and issues. In addition to communicating developments directly to relevant departments, the department produces a cross-Whitehall Human Rights Information Bulletin to highlight significant developments and cases.

However, as noted in previous Government reports, it is not feasible for any one department to identify all the judgments that may be relevant. As a consequence all Government departments are expected to identify judgments relevant to their area of work, for onward dissemination as appropriate to bodies for which they are responsible. The Ministry of Justice's role is supplementary to and supports this work.

Access to information on the implementation of judgments

A large volume of information regarding the implementation of judgments is available in the public domain from a number of sources.

Domestically, the Government sets out information on **declarations of incompatibility** in the list annexed to this paper. The department with responsibility for a new declaration of incompatibility is responsible for drawing the Joint Committee's attention to the new declaration. The Ministry of Justice encourages lead departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility.

The Department for the Execution of Judgments has a dedicated website for the **implementation of judgments**.¹³ This website provides access to a searchable list of all judgments currently outstanding against all Member States, together with links to the Committee's Annotated Agenda Notes on cases concerning systemic issues,¹⁴ which set out all the action taken by Member States to date, along with proposed future action where needed. This is also the place where **Action Plans** submitted by states in relation to all judgments for which they are responsible can be accessed, as well as submissions made by NGOs.

All forthcoming **judgments of the European Court of Human Rights** are highlighted a few days in advance on the Court's¹⁵ website. The Court's decisions and judgments are available via a comprehensive searchable database¹⁶ called HUDOC.

The following table was compiled from information held on HUDOC and illustrates the range and number of cases involving the UK where the Court has issued judgments in the last twelve months.

¹³ http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

¹⁴ Cases that appear to disclose a new problem with the law or administrative practices of a State, and which therefore have the potential to affect large numbers of people (whether this has occurred in practice or not).

¹⁵ http://www.EuropeanConventiononHumanRights.coe.int/EuropeanConventiononHumanRights/homepage_en

¹⁶ <http://www.EuropeanConventiononHumanRights.coe.int/EuropeanConventiononHumanRights/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>

Judgments in cases against the UK between 1 August 2011 and 31 July 2012

	Case name	Judgment date	Final judgment date	Outcome
1.	Mosley	10/5/11	15/9/11	No violation Art 8
2.	RH	31/5/11	15/9/11	No violation Art 8
3.	EG	31/5/11	28/11/11	No violation Art 3
4.	Sufi & Elmi	28/6/11	28/11/11	Violation Art 3
5.	Goggins & Others	19/7/11	8/3/12	Struck out following unilateral declaration
6.	AA	20/9/11	20/12/11	Violation Art 8
7.	BAH	27/9/11	27/12/11	No violation of Art 14 taken in conjunction with Art 8
8.	Alder	22/11/11	22/2/12	Struck out following unilateral declaration
9.	Ashendon & Jones	15/12/11 (rectified 21/2/12)	No date given	No violation Art 6.2
10.	Al Khawaja & Tahery	15/12/11	GC judgment	Al Khawaja – no violation of Art 6.1 read in conjunction with Art 6.3 Tahery – violation of Art 6.1 read in conjunction with Art 6.3
11.	Hanif & Khan	20/12/11	20/3/12	Violation Art 6.1
12.	Minshall	20/12/11	20/3/12	Violation Art 6.1
13.	AH Khan	20/12/11	20/3/12	No violation Art 8
14.	JH	20/12/11	20/3/12	No violation Art 3
15.	Othman (Abu Qatada)	17/1/12	9/5/12	Violation Art 6
16.	Vinter & Others	17/1/12	Referred to the GC 9/7/12	No violation of Art 3

	Case name	Judgment date	Final judgment date	Outcome
17.	Harkins & Edwards	17/1/12	9/7/12	No violation of Art 3
18.	B	14/2/12	14/5/12	No violation Art 14 read together with Art 1 of Protocol 1
19.	Hardy & Maile	14/2/12	9/7/12	No violation Art 8
20.	YC	13/3/12	No date given	No violation Art 8
21.	Malik	13/3/12	Request for referral to GC outstanding	No violation Art 1 of Protocol 1
22.	Reynolds	13/3/12	13/6/12	Violation Art 13 in conjunction with Art 2
23.	Austin & Others	15/3/12	GC judgment	No violation Art 5
24.	Balogun	10/4/12	No date given	No violation Art 8
25.	Babar Ahmad & Others	10/4/12	Request for referral to GC outstanding	No violation of Art 3 for 5 applicants – consideration of further applicant’s case currently adjourned
26.	Woolley	10/4/12	10/7/12	No violation Art 5.1
27.	MS	3/5/12 (rectified 11/5/12)	3/8/12	Violation Art 3
28.	Munjaz	17/7/12	No date given	No violation of Art 5 or Art 8

The UK's record on the implementation of European Court of Human Rights judgments

As underlined in the latest annual report published by the Committee of Ministers of the Council of Europe covering 2011,¹⁷ the UK's overall record on the implementation of judgments continues to be a strong one.

At 31 December 2011, according to the statistics in the annual report, the UK was responsible for a relatively low number of pending cases before the Committee of Ministers (40 cases), representing 0.37% of the overall total. Further statistics taken from the annual report can be found at Annex B.

A number of cases have been closed since the publication of the Committee of Ministers' annual report. At 31 July 2012, twenty four judgments remained under the supervision of the Committee of Ministers, excluding friendly settlement decisions.

The Committee of Ministers' annual report notes that of the 40 UK cases outstanding at 31 December 2011, 25 were leading cases. "Leading cases (or pilot cases)" were defined in the 1st Annual Report of the Committee of Ministers on the "Supervision of the execution of judgments and decisions of the European Court of Human Rights" covering 2007 as "cases evidencing a more systemic problem requiring general measures".

As has been made clear in previous Government reports, the UK has a relatively large proportion of leading cases but that indicates the UK is not responsible for many repetitive cases.¹⁸ This suggests that problems identified are generally being addressed in a timely and appropriate manner, both in the domestic courts and through implementation measures taken.

In terms of just satisfaction payments, almost all UK payments are made within the three month deadline. The Ministry of Justice will continue to monitor performance across Government and if necessary intervene to ensure prompt payment.

As noted in previous Government reports, the UK has a high proportion of leading cases outstanding for more than two years. However, six of these cases are a group relating to one issue, the investigation of deaths in Northern

¹⁷ The Committee of Ministers 5th annual report *Supervision of the execution of judgments of the European Court of Human Rights*, published in April 2012 and covering the year 2011:
http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp

¹⁸ This is with the exception of cases on the issue of prisoner voting rights, which has generated a number of repetitive applications, leading to a pilot judgment being given in *Greens and MT*.

Ireland,¹⁹ on which work is continuing. While it is important that these cases are brought to a close as soon as possible, and work will continue to accomplish this, the large number of cases in the group has a disproportionate effect on the overall statistics.

The Government would wish to note that, although five years is a timeframe in which implementation could confidently expect to be completed in most cases, there will always be exceptional circumstances that render this impossible and the process may therefore legitimately take longer in a small number of cases. The Government will explain any such delays on individual cases to the Joint Committee as required.

In conclusion, the Government remains committed to the European Convention on Human Rights and to honouring its obligations under the Convention. The UK's approach to the implementation of judgments in the majority of cases has historically been timely and effective and the action taken to address issues highlighted by the European Court of Human Rights has generally been shown to be effective. The Joint Committee has previously acknowledged good practice in this area.²⁰ At the same time, the Government recognises that there will always be some particularly sensitive and difficult areas in which progress towards implementation will not be as rapid as in other cases. This is a consequence of the complexity of the issues raised in such cases.

¹⁹ *McKerr v UK, Finucane v UK, McShane v UK, Shanaghan v UK, Jordan v UK, Kelly & others v UK*.

²⁰ *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, Thirty-first Report of Session 2007–08; HL Paper 173, HC 1078 at para 26; available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrightts/173/17302.htm>

Consideration of significant judgments that became final in the past twelve months (1 August 2011 – 31 July 2012)

Right to a fair trial – Tahery

Tahery v UK.²¹

Court: European Court of Human Rights (Grand Chamber)

Case summary: The applicant alleged his trial for wounding with intent to commit grievous bodily harm had been unfair because the statement of one witness, who feared attending trial, was read to the jury.

The Court held that there had been a violation of Article 6(1) read in conjunction with Article 6(3)(d) of the Convention in respect of Mr Tahery and awarded just satisfaction payment of €18,000 in total to be paid him.

Government response: The Government paid the just satisfaction award of €18,000 to Mr Tahery. The Government considers no general measures to be necessary as the judgment is confined to its specific facts. The Grand Chamber stated in their decision that "... the safeguards contained in the 1988 and 2003 Acts, supported by those contained in section 78 of the Police and Criminal Evidence Act and the common law, are, in principle, strong safeguards designed to ensure fairness".

²¹ Application 22228/06; judgment final on 15 December 2011.

Prisoner voting – Scoppola v Italy, Hirst and Greens & MT v UK

*Scoppola v Italy No 3*²²

Court: European Court of Human Rights (Grand Chamber)

Case summary: The UK intervened in the Italian prisoner voting case of *Scoppola v Italy*. The Attorney General represented the UK at the hearing last November, where he argued that prisoner voting was a matter for national parliaments to decide. The UK was granted an extension until six months from the date of the judgment in *Scoppola* to implement the judgment in *Greens and MT* – i.e. to introduce proposals to remove the blanket ban on prisoner voting. In *Scoppola*, the Grand Chamber found no violation against Italy. It reaffirmed the view that a blanket ban on prisoners voting was incompatible, but found that each state should have a wide discretion on implementation.

The European Court of Human Rights judgment in the case of *Scoppola* means that the Council of Europe Committee of Ministers will resume its supervision of implementation of the *Hirst* and *Greens and MT* judgments (summaries of which appear below).

Hirst No.2 v UK:²³

Court: European Court of Human Rights (Grand Chamber)

Case summary: In March 2004, the UK's blanket ban on prisoners voting was declared unlawful as a result of a successful challenge by a prisoner, John Hirst. The European Court of Human Rights, in the case of *Hirst (No 2) v United Kingdom*, ruled that the UK was in breach of Article 3 of Protocol 1 to the European Convention on Human Rights (the right to free and fair elections). In October 2005 the European Court of Human Rights Grand Chamber upheld this ruling. In its judgment, it allowed the UK a 'margin of appreciation' in implementing *Hirst (No 2)* (i.e. a degree of discretion as to how far the right to vote should be restricted in the case of serving prisoners). It also indicated that in order to take advantage of this margin of appreciation there needed to be a substantive debate in Parliament on the proportionality of any restrictions in light of modern day penal policy and human rights standards.

²² Application 126/05; judgment final on 22 May 2012.

²³ Application 74025/01; judgment final on 6 October 2005.

Greens v UK & MT v UK.²⁴

Court: European Court of Human Rights (Chamber)

Case summary: This pilot case concerned the blanket ban on voting imposed automatically on the applicants due to their status as convicted offenders detained in prison. The applicants, both prisoners in Scotland, were refused the right to enrol on the electoral register for domestic elections and elections to the European Parliament.

The European Court of Human Rights found the blanket ban under sections 3 and 4 of the Representation of the People Act in violation of Article 3 of Protocol 1 (the right to free and fair elections) and, pursuant to the judgment in *Hirst No. 2 v UK*, set a deadline of six months from 11 April 2011 for the UK to bring forward legislative proposals to end the current blanket ban on prisoner voting. The Court declined to award compensation to the applicants and stayed all clone cases.

The Government deferred this time limit in order to intervene in the case of *Scoppola v Italy*. However, as the European Court of Human Rights delivered its judgment in the of *Scoppola* on 22 May 2012 the time period set on *Greens & MT v UK* begins to run again. The Council of Europe will resume its supervision of implementation of both *Hirst* and *Greens and MT* judgments.

Government response: The deadline set by the court is 22 November 2012. The Government is considering its response to these judgments.

²⁴ Applications 60041/08 and 60054/08; pilot judgment final on 11 April 2011.

Risk of torture and ill treatment (removal to Somalia) – Sufi & Elmi

Sufi & Elmi v UK.²⁵

Court: European Court of Human Rights (Chamber)

Case summary: The case involved Mr Sufi who submitted that he was at an enhanced risk of torture and ill-treatment over and above that which arose solely from being returned to Somalia on account of the fact that he was from a minority clan, the Reer Hamar.

Mr Elmi was the second applicant. He submitted that he would be at increased risk in areas controlled by al-Shabaab because he would be seen as westernised and therefore anti-Islamic.

The Court concluded that the removal of Mr Sufi and Mr Elmi to Mogadishu would violate their rights under Article 3 of the Convention.

Government response: The Government is in the process of granting Mr Sufi and Mr Elmi a period of Discretionary Leave to remain in the United Kingdom. Removal action will not be taken against them while the country situation in Somalia remains largely unchanged.

General measures:

More generally, the cases of Sufi and Elmi have been followed in subsequent cases of proposed removal to Somalia.

The subsequent domestic country guidance case of AMM (http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKUT/IAC/2011/00445_ukut_iac_2011_amm_ors_somalia_cg.html&query=amm+and+somalia&method=boolean), decided by the Upper Tribunal on 28 November 2011 took account of the judgment.

Both cases have been set out in the Operational Guidance Note (OGN) on Somalia published on 15 December 2011. These Notes provide asylum caseworkers and other decision makers with guidance on handling the main categories of claim from the country concerned. This means these cases will be followed in determining future cases of proposed removal to Somalia, as long as the factual situation there remains largely unchanged.

²⁵ Application 8319/07 and 11449/07; judgment final on 28 November 2011.

Deportation an interference with right to private life – AA

*AA v UK*²⁶

Court: European Court of Human Rights (Chamber)

Case Summary: AA was a 25 year old Nigerian national, who was convicted on 27 September 2002 of raping a 13 year old girl when he was aged 15. He was sentenced to four years in a Young Offenders Institution and did not appeal against his sentence or conviction. On 7 July 2003, whilst in detention, AA was granted Indefinite Leave to Remain (ILR) following an application made by his mother on behalf of her dependents. A notice of intention of to deport was issued to AA on 8 September 2003, a decision he appealed until his domestic appeal rights against the decision to deport were exhausted on 25 January 2008.

AA made an application to the European Court of Human Rights on 15 February 2008 and argued his deportation would constitute a violation of his right to private life under Article 8 of the European Convention on Human Rights. He was born in Nigeria in 1986 and arrived in the UK with valid entry clearance to join his mother when he was 13 years old.

The Court held there had been a violation of Article 8 on private life grounds because AA has made commendable efforts to rehabilitate himself over a seven year period and that, in these circumstances, the UK Government would be required to provide further support for the contention that he would cause future disorder or engage in criminal activities such as to render his deportation necessary. It was determined that no evidence was put forward by the UK Government to support such a contention.

Government response: Deportation action has been discontinued. As AA had been granted ILR in the UK previously he has retained that status. The Government did not consider any general measures were necessary because the Court held the interference with Article 8 was in accordance with the law and pursued the legitimate aim of the prevention of disorder or crime. The specific facts of the case led the Court to conclude that deportation to Nigeria would be disproportionate to the legitimate aim of the prevention of disorder and crime.

²⁶ Application no. 8000/08; judgment final on 20 December 2011.

Right to a fair trial – Hanif & Khan

Hanif & Khan v UK^{27[1]}

Court: European Court of Human Rights (Chamber)

Case Summary: The applicants were tried for conspiracy to supply heroin. The evidence of police officers was in dispute. Mr Hanif had alleged that there was a third man in his car whilst it was under observation by the police and that it had been this man who had left the drugs in his car. Just after the evidence began a juror informed the judge that he was a serving police officer, that he knew one of the police witnesses and that he had had some professional dealings with him, although not in relation to this case and not for two years. The trial judge had refused a defence application to discharge the police officer from the jury. The Court of Appeal dismissed the appeal in March 2008 – R.v. Khan (Bakish); R.v. Hanif [2008] 2 Cr. App. R 161 and the court declined to certify a point of law for the House of Lords.

In its decision, the European Court emphasised the need to ensure that juries are free from bias and the appearance of bias. The Court found that there was no evidence of any lack of impartiality on the part of the juror. As to the appearance of bias, the Court noted the Criminal Justice Act 2003 had only recently changed the law in the United Kingdom to allow police officers to serve on juries and also noted that many other jurisdictions that had jury trial did not allow this. However, the applicants did not seek to argue that this of itself would violate Article 6(1).

Although the Court recognised that there were a number of safeguards present in the case, the Court observed that Mr Hanif's defence depended to a significant extent on his challenge to the evidence of the police officers, and that it had been described by the trial judge as "a conflict of some importance within the case". The Court went on to state that where there was an important conflict regarding police evidence, and a police officer who was personally acquainted with another police officer who was giving evidence was a member of the jury, safeguards such as jury directions and judicial warnings were insufficient to safeguard against a risk of bias. Accordingly there had been a violation of Article 6(1).

A violation of Article 6(1) was also found in the case of Mr Khan on account of the fact that he was convicted by the same jury, and it would have been artificial to reach a different conclusion.

^{27[1]} Application 52999/08 & 61779/08; judgment final 20 March 2012

Government response: The Government considers no further individual measures are required. It is open to the applicants to make applications to the Criminal Cases Review Commission for review of their cases.

The Government also considers no general measures to be necessary. The UK courts already have the power to discharge a juror. Should a similar case arise again, the UK courts would be obliged by section 2 of the Human Rights Act 1998 to take into account the judgment of the European Court of Human Rights in this case when considering whether to exercise that power. The European Court of Human Rights expressly noted at paragraph 145 that it was not assessing the extent to which the legislation permitting police officers to participate in jury service in England and Wales complies with the requirements of Article 6(1) of the Convention, but only whether, in the circumstances of the applicants' case, there had been a breach of Article 6(1).

Right to a fair trial (removal to Jordan) – Othman (AKA Abu Qatada)

Othman v UK:²⁸

Court: European Court of Human Rights (Chamber)

Case summary: This case concerns the proposed removal of the applicant from the UK to Jordan under the Deportation with Assurances (DWA) policy. Othman complained against his proposed deportation under Articles 3, 5 and 6 of the Convention. He also complained under Article 3 taken in conjunction with Article 13, that the use of closed evidence in Special Immigration Appeals Commission (SIAC) proceedings, in relation to his safety on return, was not a fair procedure.

The Court unanimously found that deportation to Jordan would not be in violation of Article 3 of the Convention. There was no violation of Article 3 taken in conjunction with Article 13 of the Convention (regarding SIAC's procedures). Deportation to Jordan would not be in violation of Article 5 of the Convention. However, deportation to Jordan would be in violation of Article 6 of the Convention on account of the real risk of the admission of evidence obtained by torture of third persons at the applicant's retrial.

In relation to the Article 3 complaints, the Court noted the concerns about the use of torture in Jordan as reported by human rights organisations and UN bodies. They decided that diplomatic assurances from the Jordanian government, approved at the highest levels (including by the King), were sufficient. In addition, Othman's high profile would make the Jordanian authorities careful to ensure he was properly treated. The assurances would also be monitored by an independent human rights organisation in Jordan, which would have full access to Othman in prison.

The Court considered that SIAC's procedures satisfied the requirements of Article 13, noting in particular the involvement of special advocates. On Article 5, Othman alleged he might be held incommunicado for up to 50 days, but the Court said this period fell far short of the length of detention required for a flagrant breach of Article 5. On the Article 6 complaint, the Court agreed with the Court of Appeal that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. The Court also found that, in relation to each of the two terrorist conspiracies charged against Othman, there was a real risk the evidence of his involvement had been obtained by torturing one of his co-defendants. The Court agreed with SIAC that there was a high probability that the incriminating evidence would be admitted at Othman's retrial and that it would be of considerable, perhaps decisive, importance. In the absence of any assurance by Jordan that the torture evidence would not be used against Othman, the Court therefore

²⁸ Application 8139/09; judgment final on 9 May 2012.

concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.

Government response: The Government assured the Committee of Ministers of their commitment to comply with the judgment and referred in this context to the statements given by the Home Secretary to Parliament on 17 April and 10 May 2012.²⁹ In her statement to Parliament of 17 April 2012 the Home Secretary referred to diplomatic assurances received from the Jordanian authorities that the applicant would receive a fair trial, and that the Government would undertake his deportation in full compliance with the law and with the ruling of the European Court.

²⁹ <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/debtext/120417-0001.htm>; (Citation: HC Deb, 17 April 2012, c173).

Right to an effective remedy – Reynolds

Reynolds v UK.³⁰

Court: European Court of Human Rights (Chamber)

Case summary: The applicant, Mrs Patricia Reynolds, was a British national, who died subsequent to lodging her complaint. The case was pursued by her daughter on her behalf and concerned the death in 2005 of Mrs Reynolds' son, a mental health patient diagnosed with schizophrenia, following his fall from a mental health unit on the sixth floor of a building, after being placed there by an NHS Trust.

Relying on Article 2 (right to life) alone and in conjunction with Article 13 (right to an effective remedy), Mrs Reynolds complained that no effective mechanism had been available to her whereby civil liability could be determined for the alleged negligent care of her son and by which she could have obtained compensation for her loss. The court held that there had been a violation of Article 13 in conjunction with Article 2. Just satisfaction of €7,000 was awarded for non-pecuniary damage and €8,000 was awarded for costs and expenses.

Government response: The judgment became final on 13 June 2012 and the Government is currently considering its response.

³⁰ Application 2694/08; judgment final on 13 June 2012.

Consideration of other significant judgments that became final before 1 August 2011 and which are still under the supervision of the Committee of Ministers

Retention of DNA profiles and cellular samples (S & Marper)

*S & Marper v UK*³¹

Court: European Court of Human Rights (Grand Chamber)

Case summary: The applicants, both of whom had been arrested for but not convicted of criminal offences, sought to have their DNA samples and profiles, and their fingerprints, removed from police records. The refusal of the police to delete this information was upheld by all domestic courts up to the House of Lords. However, the European Court of Human Rights ruled the blanket policy of retaining this information from all those arrested or charged but not convicted of an offence was disproportionate and therefore unjustifiable under Article 8 (the right to respect for private and family life).

Government response: The Government brought forward legislative proposals to address the violation in England and Wales, which received Royal Assent in the Protection of Freedoms Act 2012 on 1 May 2012. The legislation adopted the protections of the Scottish model for the retention of DNA and fingerprints.

Public consultation on legislative proposals for the retention and destruction of DNA and fingerprints in Northern Ireland ended on 7 June 2011. In the main, the proposals replicate those for England and Wales contained within the Protection of Freedoms Act 2012. The Criminal Justice Bill (Northern Ireland) was introduced into the Northern Ireland Assembly on 25 June 2012 and is expected to complete its legislative passage in February/March 2013.

The Government has confirmed to the Committee of Ministers that, once the Protection of Freedoms Act had come into force in England and Wales, the police would begin removing the profiles of un-convicted people from the National DNA Database. It is anticipated that the same approach would be adopted in Northern Ireland following the necessary legislative changes.

³¹ Application No. 30562/04 and 30566/04, judgment final on 04 December 2008.

Overseas detention – Al Jedda

*Al Jedda v UK*³²

Court: European Court of Human Rights (Grand Chamber)

Case summary: Hilal Abdul-Razza Ali Al Jedda was captured by US forces in Baghdad on 10 October 2004 and detained by the UK in the Divisional Theatre Detention Facility until 30 December 2007 for ‘imperative reasons of security’ pursuant to UNSCR 1546.

The Court found that the applicant’s detention was attributable to the UK rather than the United Nations. Therefore, during his detention the applicant fell within the jurisdiction of the UK for the purposes of Article 1 of the Convention. The Court also found that UNSCR 1546 did not require the UK to detain the applicant, so there was no conflict between the UK’s obligations under the Charter of the United Nations and its obligations under Article 5(1) of the Convention.

Consequently the Court found that the applicant’s internment breached Article 5(1) (right to liberty and security) of the European Convention on Human Rights.

Government Response: In terms of general measures concerning similar violations, the Government notes there are a significant number of legal claims pending domestically from former detainees who were interned in Iraq on security grounds during the period of occupation. The Government has entered into settlement negotiations with the claimants’ British legal representatives and a significant number of cases have already been settled.

The Government takes the view that the judgment relates to the factual circumstances of the UK’s past operations in Iraq and it has no implications for its current operations elsewhere including detention operations in Afghanistan where the legal basis for UK operations is materially different from that which pertained in Iraq.

³² Application 27021/08; judgment final on 7 July 2011.

Extra-territorial effect of the Convention – Al Skeini

*Al Skeini and others v UK*³³

Court: European Court of Human Rights (Grand Chamber)

Case summary: After the invasion of Iraq, from 1 May 2003 British forces became an occupying power in the country as part of a United Nations authorised Multi National Force (MNF). This case concerns the deaths of the applicants' five close relatives between May–November 2003 in Basrah, Iraq during that period of occupation. The deaths were either caused by, or involved British soldiers and the key legal issue was whether the applicants were within the jurisdiction of the UK pursuant to Article 1 of the Convention.

In the first four cases, the applicants' relatives were shot by British soldiers who were on patrol or carrying out checks. The fifth applicant's son was a minor and the European Court of Human Rights considered that there was "at least *prima facie*" evidence that he was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned.

The Grand Chamber concluded that all the applicants were within the UK's jurisdiction. Investigations were carried out in all five cases, but the Grand Chamber found that they did not satisfy the procedural requirements of Article 2 because they were not sufficiently independent and/or effective.

In respect of the first, second and third applicants, the Court concluded that the investigation process fell short of the requirements of Article 2 as it remained entirely within the military chain of command and was limited to taking statements from the soldiers involved.

In respect of the fourth and fifth applicants, investigations were also carried out by the Special Investigations Branch (SIB) of the Royal Military Police. However, the Grand Chamber noted that the SIB was not operationally independent from the military chain of command during the relevant period, and was therefore not sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2. The Court also highlighted the delays in investigating the fourth and fifth applicant's cases.

In respect of the fifth applicant, the Court also criticised the narrow focus of the criminal proceedings that were ultimately brought against the accused soldiers. It found that in the circumstances, the investigation was not sufficiently accessible to the victim's family and to the public and should have investigated the broad issues of State responsibility for the death including instructions, training and supervision given to soldiers undertaking law enforcement tasks in the aftermath of an invasion.

³³ Application 55721/07; judgment final on 7 July 2011.

Government Response: In March 2010 the Ministry of Defence announced the establishment of the Iraq Historic Allegations Team (IHAT). The IHAT was originally established to investigate many alleged violations of Article 3, arising from mistreatment of individuals by British forces in Iraq during the period March 2003 – July 2009. However, on 26 March 2012, the Minister for the Armed Forces stated that the judgment in this case obliged the authorities to undertake additional investigations concerning Article 2 and a new team was to be created within IHAT for this. The action plan indicates that the new team will investigate the five Al Skeini cases as well as other claims of alleged Article 2 and 3 violations in approximately 170 cases in total.

The IHAT is led by a civilian, who reports to the Provost Marshal (Navy), the head of the Royal Navy Police (RNP), following recent structural changes. It contains a number of investigations and case review teams staffed by a mix of RNP and civilian staff (§14 of the judgment *R(Ali Zaki Mousa) v Secretary of State for Defence & Anr* [2011] EWCA Civ 1334). In the event of the work of the IHAT leading to prosecution or disciplinary proceedings, decisions on whether to prosecute will be taken by the Director of Services Prosecutions under the Armed Forces Act 2006.

The Government takes the view that the Al Skeini judgment relates to the particular circumstances of the past operations in Iraq and it has no implications for its current operations elsewhere, including in Afghanistan, where the legal basis for UK operations is materially different from that which pertained in Iraq.

Interference with a prisoner's medical correspondence

*Szuluk v UK*³⁴

Court: European Court of Human Rights (Chamber)

Case summary: The applicant complained that the monitoring of a prisoner's medical correspondence with his doctor was a breach of the Article 8 right to respect for correspondence. The Court found there had been a violation of Article 8.

The Court held:

In light of the severity of the applicant's medical condition, uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP.

It concluded that *"the monitoring of the applicant's medical correspondence... did not strike a fair balance with his right to respect for his correspondence in the circumstances"*.

Government response: A Prison Service Instruction on prisoner communications includes amended policy to comply with this judgment.³⁵ Paragraph 14.15 is of particular relevance and sets out that: *'Correspondence between a prisoner and a registered medical practitioner must be handled in confidence but only to the extent that the registered medical practitioner is acting in a professional capacity and the correspondence directly relates to the treatment of the prisoner'*.

In respect of England and Wales, a Statutory Instrument³⁶ was laid before Parliament on 25 November 2009 and came into force on 1 January 2010. The SI amends, amongst other things, Rule 20 of the Prison Rules 1999 and Rule 27 of the Young Offender Institution Rules 2000 to provide that a prisoner may correspond confidentially with a registered medical practitioner who has treated the prisoner for a life threatening condition, and such correspondence may not be opened, read or stopped unless the Prison Governor has "reasonable cause" to believe that the contents do not relate to the treatment of that condition.

³⁴ Application no 36936/05; judgment final on 2 September 2009.

³⁵ www.justice.gov.uk/downloads/offenders/psipso/psi-49-2011-prisoner-comms-services.doc

³⁶ www.legislation.gov.uk/uksi/2009/3082

The Scottish Prison Service has made provision³⁷ in Rule 58 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 which came into force on 1 November 2011 for the circumstances in which correspondence with medical practitioners may be opened or read, which is designed to be consistent with the decision in this case.

The Northern Ireland Prison Service has not yet introduced amendments to the Prison & Young Offenders Centre (NI) Rules 1995 but has given effect to the judgment by issuing an Instruction to Governors. The NI Prison Rules will be amended as soon as it is practicable to do so.

³⁷ <http://www.sps.gov.uk/Publications/Publication-3598.aspx>

Terrorism stop and search powers – Gillan & Quinton

*Gillan & Quinton v UK*³⁸

Court: European Court of Human Rights (Chamber)

Case summary: This case concerned the stop and search of the two applicants at a demonstration in the vicinity of the Defence Systems and Equipment International Exhibition in London Docklands in September 2003 (“the arms fair”). One applicant was an individual who was on his way to take part in the demonstration and the other was a journalist who was intending to film the demonstration. They were both stopped and searched by the police under an authorisation made under section 44 of the Terrorism Act 2000, which allowed individuals to be stopped and searched to search for articles that could be used in connection with terrorism, even where a constable did not suspect the presence of such articles. Nothing incriminating was found in either case, and the applicants were allowed to go on their way (although the second applicant did not feel able to return to the demonstration).

The European Court of Human Rights found that the lack of adequate safeguards on police powers to “stop and search” individuals without reasonable suspicion under section 44 of the Terrorism Act 2000 was a violation of Article 8 (right to respect for family and private life).

Government response: To avoid the repetition of such a breach, the Government took immediate steps after the judgment became final to ensure the judgment was implemented, announcing that the powers under sections 44 to 46 would no longer be used in a way which had been found to be incompatible.

These arrangements were in place temporarily pending the outcome of a wider Government review into various counter-terrorism measures and powers, which sought to identify changes that should be made to the legislation to ensure it is compatible with the European Convention on Human Rights. The outcome of that review was announced to Parliament on 26 January 2011.

As a result, provisions to repeal and replace sections 44–47 of the Terrorism Act 2000 were included in the Protection of Freedoms Bill, which later became the Protection of Freedoms Act.

In addition, the review recommended consideration should be given to whether the replacement provisions could be implemented more quickly than would be possible through the Protection of Freedoms Bill to fill the operational gap in ‘no suspicion’ police stop and search terrorism powers and to ensure that if such powers were necessary before the passage of the Bill,

³⁸ Application no. 4158/05; judgment final on 28 June 2010.

that they were European Convention on Human Rights compliant. The Government concluded that the most appropriate way of meeting the legal and operational requirements was to make an urgent remedial order under section 10 of and Schedule 2 to the Human Rights Act 1998, to immediately repeal and replace section 44 with new, circumscribed powers. The Home Secretary made an urgent remedial order³⁹ containing the new provisions, which came into force on 18 March 2011.

The Protections of Freedoms Act 2012⁴⁰ received Royal Assent on 1 May 2012 and places the powers provided by the Terrorism Act 2000 (Remedial) Order 2011 on a permanent footing.

Section 59 of the Protection of Freedoms Act 2012 repeals the stop and search powers in sections 44 to 47 of the 2000 Act. Section 60 and Schedule 5 to that Act introduce new and tightly circumscribed powers. The new powers enable the police to stop and search people and vehicles with no suspicion only in exceptional circumstances, where a senior police officer reasonably suspects that an act of terrorism will take place and where the powers are considered necessary to prevent such an act. In addition to this significantly higher threshold for the police to authorise the use of the powers, there are a number of strengthening safeguards provided by the Act.

Section 62 of the Protection of Freedoms Act 2012 inserts a new section 47AA to 47AE into the Terrorism Act, making provision for a Code of Practice for terrorism stop and search powers. New section 47AA places a duty on the Secretary of State to prepare a Code of Practice about the powers in section 43 and 43A of the 2000 Act (stop and search with reasonable suspicion), and those created by new section 47A of the 2000 Act.

Following a public consultation, the Codes of Practice governing the use of terrorism stop and search powers (in Great Britain and Northern Ireland) were laid before Parliament on 10 May 2012 and came into force on 10 July 2012.

Commencement of the substantive stop and search provisions is provided for in the Protection of Freedoms Act 2012 (Commencement No. 1) Order 2012, which was laid before Parliament on 2 May 2012. The majority of the provisions within this Order came into force on 1 July (two months after the date of Royal Assent) with stop and search powers in force from 10 July. This ensured that the relevant Code(s) of Practice were in force before the substantive powers were available for use.

³⁹ www.homeoffice.gov.uk/publications/counter-terrorism/terrorism-act-remedial-order

⁴⁰ <http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted>

Responding to human rights judgments

It is the Government's view that the powers in the Protection of Freedoms Act 2012 are compliant with the European Convention on Human Rights. The threshold for authorisation of the powers is significantly higher. This, along with other safeguards such as a statutory Code of Practice, powers for the Secretary of State to amend, reject or cancel authorisations, specific requirements for temporal and geographical extent of authorisations to be justified, and a reduction in the maximum period of an authorisation from 28 to 14 days, means that there is no longer a risk of the powers being used arbitrarily.

The Government does not believe that any further measures are necessary in response to the judgment.

Interference with Article 8 rights in eviction decisions – Kay & McCann

Kay v UK

*McCann v UK*⁴¹

Court: European Court of Human Rights (Chamber)

Case Summary: Both cases involved local authority decisions to evict but without the possibility for the applicants to challenge the proportionality of the decision. The European Court of Human Rights found that this violated Article 8.

Government response: On 3 November 2010, the Supreme Court in *Manchester City Council v Pinnock* [2010] UKSC 45 considered the European Court of Human Rights jurisprudence on the application of Article 8 to possession proceedings. Consistently with the judgment in *Kay v UK*, the Supreme Court held that, in principle, any public sector occupier at risk of losing their home must have the opportunity to have the proportionality of that step considered by the court.

Since the *Pinnock* judgment, a further Supreme Court case, *London Borough of Hounslow v Powell* [2011] UKSC 8, confirmed the principle established in *Pinnock* that where a public authority sought possession of a person's home, the court asked to order possession would have the power to consider the proportionality of the decision.

Consequently, the Government does not believe any further measures are required with respect to these judgments.

⁴¹ Kay – Application no. 37341/06; judgment final on 21 December 2010.
McCann – Application no. 19009/04; judgment final on 13 August 2008.

Fees in defamation cases and freedom of expression – MGN Ltd

MGN Ltd v UK.⁴²

Court: European Court of Human Rights (Chamber)

Case summary: The applicant is a British company, MGN Limited, the publisher of the newspaper, *The Daily Mirror*. In its judgment of 18 January 2011, the European Court of Human Rights found that there had been a violation of Article 10 (freedom of expression) as regards the requirement that the publisher pay disproportionately high success fees agreed between Naomi Campbell and her lawyers following the British courts' finding that *The Daily Mirror* had breached Ms Campbell's privacy by publishing articles and pictures about her drug-addiction treatment. The Court asked the parties to try and reach agreement on the amount payable to MGN. However, this was not possible and the issue of just satisfaction was referred back to the Court.

Therefore the European Court of Human Rights judgment on 12 June 2012 relates solely to the issue of MGN Ltd's claim for just satisfaction.

Government response: The Government is in the process of paying the just satisfaction award of £232,000 to the applicant. In addition to making the just satisfaction payment the Government is also implementing a fundamental reform of no win no fee conditional fee agreements (CFAs). The Legal Aid, Sentencing and Punishment of Offenders Act will bring this into effect in April 2013.

Under the changes the recovery of CFA success fees and after the event (ATE) insurance premiums from the losing side will be abolished in all categories of civil litigation. This will rebalance the CFA regime to make it fairer for defendants and to reduce the substantial additional costs that they have to pay under the current no win no fee regime.

⁴² Application 39401/04; this judgment becomes final on 12 September 2012.

Other significant decisions

First UK case to be rejected using the new “no significant disadvantage” criterion – Heather Moor & Edgecomb Ltd

In early July 2012, the European Court of Human Rights declared the application of **Heather Moor & Edgecomb Ltd v the United Kingdom (No. 2)** (application no. 30802/11) inadmissible. The Court found there had been no significant disadvantage.

The significance of the decision was that it was the first time the Court had rejected an application against the UK under Article 35(3)(b) of the European Convention on Human Rights. The new admissibility criterion in Article 35(3)(b) was introduced by Protocol No. 14 in June 2010 in response to the Court's increasing workload. The intention is to enable the Court to focus on cases that justify an examination on the merits.

The application concerned the UK system for dealing with complaints against companies providing financial advice and, in particular, the applicant company's complaint about the Financial Ombudsman's failure to publish its decision upholding a complaint made by a former client about inappropriate pension advice.

Unilateral Declaration – Brady v the United Kingdom

In May 2012 the European Court of Human Rights struck out the case of Brady v the United Kingdom on the basis of a unilateral declaration submitted by the UK Government. The case concerned the decision by the Sentence Review Commissioners to revoke the licence of John Hugh Brady as a result of concerns about his involvement in terrorist activity, following the Secretary of State for Northern Ireland's decision to suspend his licence. The applicant's complaint was made under Article 5(4) of the European Convention on Human Rights and concerned the procedures before the Sentence Review Commissioner-which led to the revocation of his licence. In particular, he complained that the Commissioners' decision was based on "damaging information" certified by the Secretary of State which was not disclosed to him and that the provision to him of the "gist" of the "damaging information" and the Special Advocate procedures were not sufficient to protect his interests.

In response to the application the UK Government made a unilateral declaration acknowledging that in the particular circumstances of this case, there was a procedural violation of Article 5(4) of the European Convention of Human Rights. The Government acknowledged that the Special Advocate was not involved in the Commissioners' review of the Secretary of State's decision to certify evidence as "damaging information", and that the gist of the damaging information was insufficiently detailed. The declaration also outlined the steps taken to rectify the violation in future cases.

Since this case was struck out by the Court, the UK Government have paid the stipulated compensation of Euro 3,000 in this case to the applicant's family.

Domestic cases – new declarations of incompatibility in the previous twelve months

There have been no new declarations of incompatibility between August 2011 and July 2012.

Annex A: Declarations of incompatibility

Since the Human Rights Act 1998 came into force on 2 October 2000, 27 declarations of incompatibility have been made. Of these:

- 19 have become final (in whole or in part) and are not subject to further appeal;
- 8 have been overturned on appeal; and

Of the 19 declarations of incompatibility that have become final:

- 11 have been remedied by later primary legislation
- 3 have been remedied by a remedial order under section 10 of the Human Rights Act;
- 4 related to provisions that had already been remedied by primary legislation at the time of the declaration;
- 1 is under consideration as to how to remedy the incompatibility.

Information about each of the 27 declarations of incompatibility is set out below in chronological order. All references to Articles are to the Convention rights, as defined in the Human Rights Act 1998, unless stated otherwise.

This information was last updated on 31 July 2012, and will not reflect any changes after that date.

Contents

1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions
(Administrative Court; [2001] HRLR 2; 13 December 2000)
2. R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health
(Court of Appeal; [2001] EWCA Civ 415; 28 March 2001)
3. Wilson v First County Trust Ltd (No.2)
(Court of Appeal; [2001] EWCA Civ 633; 2 May 2001)
4. McR's Application for Judicial Review
(Queen's Bench Division (NI); [2002] NIQB 58; 15 January 2002)
5. International Transport Roth GmbH v Secretary of State for the Home Department
(Court of Appeal; [2002] EWCA Civ 158; 22 February 2002)
6. Matthews v Ministry of Defence
(Queen's Bench Division; [2002] EWHC 13 (QB); 22 January 2002)
7. R (on the application of Anderson) v Secretary of State for the Home Department
(House of Lords; [2002] UKHL 46; 25 November 2002)
8. R (on the application of D) v Secretary of State for the Home Department
(Administrative Court; [2002] EWHC 2805 (Admin); 19 December 2002)
9. Blood and Tarbuck v Secretary of State for Health
(unreported; 28 February 2003)
10. R (on the application of Uttley) v Secretary of State for the Home Department
(Administrative Court; [2003] EWHC 950 (Admin); 8 April 2003)
11. Bellinger v Bellinger
(House of Lords; [2003] UKHL 21; 10 April 2003)
12. R (on the application of M) v Secretary of State for Health
(Administrative Court; [2003] EWHC 1094 (Admin); 16 April 2003)
13. R (on the application of Wilkinson) v Inland Revenue Commissioners
(Court of Appeal; [2003] EWCA Civ 814; 18 June 2003)
14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions
(Court of Appeal; [2003] EWCA Civ 875; 18 June 2003)

Responding to human rights judgments

15. R (on the application of MH) v Secretary of State for Health
(*Court of Appeal*; [2004] EWCA Civ 1609; 3 December 2004)
16. A and others v Secretary of State for the Home Department
(*House of Lords*; [2004] UKHL 56; 16 December 2004)
17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)
(*Court of Appeal*; [2005] EWCA Civ 1184; 14 October 2005)
18. R (Gabaj) v First Secretary of State
(*Administrative Court*; unreported; 28 March 2006)
19. R (on the application of Baijai and others) v Secretary of State for the Home Department and another
(*Administrative Court*; [2006] EWHC 823 (Admin); 10 April 2006)
20. Re MB
(*Administrative Court*; [2006] EWHC 1000 (Admin); 12 April 2006)
21. R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills
(*Administrative Court*; [2006] EWHC 2886 (Admin); 16 November 2006)
22. R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another
(*House of Lords*; [2006] UKHL 54; 13 December 2006)
23. Smith v Scott
(*Registration Appeal Court (Scotland)*; [2007] CSIH 9; 24 January 2007)
24. Nasserri v Secretary of State for the Home Department
(*Administrative Court*; [2007] EWHC 1548 (Admin); 2 July 2007)
25. R (Wayne Thomas Black) v Secretary of State for Justice
(*Court of Appeal*; [2008] EWCA Civ 359; 15 April 2008)
26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department
(*Administrative Court*; [2008] EWHC 3170 (Admin); 19 December 2008)
27. R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department
(*Administrative Court*; [2010] EWHC 2761; 10 November 2010)

1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions

Administrative Court; [2001] HRLR 2; 13 December 2000

The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.

The Divisional Court declared that the powers were in breach of Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker. A number of provisions were found to be in breach of this principle, including the Town and Country Planning Act 1990, sections 77, 78 and 79.

The House of Lords overturned the declaration on 9 May 2001: [2001] UKHL 23

* * * * *

2. R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & the Secretary of State for Health

Court of Appeal; [2001] EWCA Civ 415; 28 March 2001

The case concerned a man who was admitted under section 3 of the Mental Health Act 1983 and sought discharge from hospital.

Sections 72 and 73 of the Mental Health Act 1983 were declared incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.

The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712), which came into force on 26 November 2001.

3. Wilson v First County Trust Ltd (No.2)

Court of Appeal; [2001] EWCA Civ 633; 2 May 2001

The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement with the result that it could not be enforced.

Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 of the First Protocol by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditor's enjoyment of contractual rights.

The House of Lords overturned the declaration on 10 July 2003: [2003] UKHL 40

* * * * *

4. McR's Application for Judicial Review

Queen's Bench Division (NI); [2002] NIQB 58; 15 January 2002

The case concerned a man who was charged with the attempted buggery of a woman. He argued that the existence of the offence of attempted buggery was in breach of Article 8.

It was declared that Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.

Section 62 was repealed in Northern Ireland by the Sexual Offences Act 2003, section 139, section 140, Schedule 6 paragraph 4, and Schedule 7. These provisions came into force on 1 May 2004.

5. International Transport Roth GmbH v Secretary of State for the Home Department

Court of Appeal; [2002] EWCA Civ 158; 22 February 2002

The case involved a challenge to a penalty regime applied to carriers who unknowingly transported clandestine entrants to the United Kingdom.

The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was declared incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of the First Protocol as it imposed an excessive burden on the carriers.

The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8, which came into force on 8 December 2002.

* * * * *

6. Matthews v Ministry of Defence

Queen's Bench Division; [2002] EWHC 13 (QB); 22 January 2002

The case concerned a Navy engineer who came into contact with asbestos lagging on boilers and pipes. As a result he developed pleural plaques and fibrosis. The Secretary of State issued a certificate that stated that the claimant's injury had been attributable to service and made an award of no fault compensation. The effect of the certificate, made under section 10 of the Crown Proceedings Act 1947, was to preclude the engineer from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The engineer claimed this was a breach of Article 6.

Section 10 of the Crown Proceedings Act 1947 was declared incompatible with Article 6 in that it was disproportionate to any aim that it had been intended to meet.

The Court of Appeal overturned the declaration, a decision which was upheld by the House of Lords on 13 February 2003: [2003] UKHL 4

7. R (on the application of Anderson) v Secretary of State for the Home Department

House of Lords; [2002] UKHL 46; 25 November 2002

The case involved a challenge to the Secretary of State for the Home Department's power to set the minimum period that must be served by a mandatory life sentence prisoner.

Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence.

The law was repealed by the Criminal Justice Act 2003, sections 303(b)(i) and 332 and Schedule 37, Part 8, with effect from 18 December 2003. Transitional and new sentencing provisions were contained in Chapter 7 and Schedules 21 and 22 of that Act.

* * * * *

8. R (on the application of D) v Secretary of State for the Home Department

Administrative Court; [2002] EWHC 2805 (Admin); 19 December 2002

The case involved a challenge to the Secretary of State for the Home Department's discretion to allow a discretionary life prisoner to obtain access to a court to challenge their continued detention.

Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court.

The law was amended by section 295 of the Criminal Justice Act 2003 section 295, which came into force on 20 January 2004.

9. Blood and Tarbuck v Secretary of State for Health

unreported; 28 February 2003

The case concerned the rules preventing a deceased father's name from being entered on the birth certificate of his child.

Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was declared incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father's name to be given on the birth certificate of his child.

The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, which came into force on 1 December 2003.

* * * * *

10. R (on the application of Uttley) v Secretary of State for the Home Department

Administrative Court; [2003] EWHC 950 (Admin); 8 April 2003

The case concerned a prisoner who argued that his release on license was an additional penalty to which he would not have been subject at the time he was sentenced.

Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were declared incompatible with the claimant's rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison.

**The House of Lords overturned the declaration on 30 July 2004:
[2004] UKHL 38**

11. **Bellinger v Bellinger**

House of Lords; [2003] UKHL 21; 10 April 2003

A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.

Section 11(c) of the Matrimonial Causes Act 1973 was declared incompatible with Articles 8 and 12 in so far as it made no provision for the recognition of gender reassignment.

In *Goodwin v UK* (Application 28957/95; 11 July 2002) the European Court of Human Rights had already identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004, which came into force on 4 April 2005.

* * * * *

12. **R (on the application of M) v Secretary of State for Health**

Administrative Court; [2003] EWHC 1094 (Admin); 16 April 2003

The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of the Act designated her adoptive father as her “nearest relative” even though he had abused her as a child.

Sections 26 and 29 of the Mental Health Act 1983 were declared incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative.

The Government published in 2004 a Bill proposing reform of the mental health system, which would have replaced these provisions. Following substantial opposition in Parliament, the Government withdrew the Bill in March 2006, and introduced a new Bill to amend the Mental Health Act 1983 which received Royal Assent on 19 July 2007 as the Mental Health Act 2007. Sections 23 to 26 of this Act amend the relevant provisions to remove the parts declared incompatible. These provisions came into force on 3 November 2008.

13. R (on the application of Wilkinson) v Inland Revenue Commissioners

Court of Appeal; [2003] EWCA Civ 814; 18 June 2003

The case concerned the payment of Widow's Bereavement Allowance to widows but not widowers.

Section 262 of the Income and Corporation Taxes Act 1988 was declared incompatible with Article 14 when read with Article 1 of the First Protocol in that it discriminated against widowers in the provision of Widow's Bereavement Allowance.

The section declared incompatible was no longer in force at the date of the judgment, having already been repealed by the Finance Act 1999 sections 34(1), 139, and Schedule 20. This came into force in relation to deaths occurring on or after 6 April 2000.

* * * * *

14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions

Court of Appeal; [2003] EWCA Civ 875; 18 June 2003

The case concerned Widowed Mother's Allowance which was payable to women only and not to men.

Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were found to be in breach of Article 14 in combination with Article 8 and Article 1 of the First Protocol in that benefits were provided to widows but not widowers.

The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1), which came into force on 9 April 2001.

15. R (on the Application of MH) v Secretary of State for Health

Court of Appeal; [2004] EWCA Civ 1609; 3 December 2004

The case concerned a patient who was detained under section 2 of the Mental Health Act 1983 and was incompetent to apply for discharge from detention. Her detention was extended by operation of provisions in the Mental Health Act 1983.

Section 2 of the Mental Health Act 1983 was declared incompatible with Article 5(4) of the European Convention on Human Rights in so far as:

- (i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the Mental Health Review Tribunal but the incompetent patient is incapable of exercising that right; and
- (ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).

The House of Lords overturned the declaration on 20 October 2005: [2005] UKHL 60

* * * * *

16. A and others v Secretary of State for the Home Department

House of Lords; [2004] UKHL 56; 16 December 2004

The case concerned the detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without breaching Article 3. They were detained without charge or trial in accordance with a derogation from Article 5(1) provided by the Human Rights Act 1998 (Designated Derogation) Order 2001.

The Human Rights Act 1998 (Designated Derogation) Order 2001 was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was declared incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.

The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders; it came into force on 11 March 2005.

17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)

Court of Appeal; [2005] EWCA Civ 1184; 14 October 2005

&

18. R (Gabaj) v First Secretary of State

Administrative Court; unreported; 28 March 2006

These two cases concerned applications for local authority accommodation. In *Morris*, the application was by a single mother (a British citizen) whose child was subject to immigration control. Section 185(4) of the Housing Act 1996 was declared incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation.

In *Gabaj*, it was the claimant's pregnant wife, rather than the claimant's child, who was a person from abroad. As this case was a logical extension of the declaration granted in *Morris*, the Government agreed to the making of a further similar declaration that section 185(4) of the Housing Act 1996 is incompatible with Article 14 to the extent that it requires a pregnant member of the household of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation or is homeless, when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.

The law was amended by Schedule 15 to the Housing and Regeneration Act 2008. The Act received Royal Assent on 22 July 2008 and Schedule 15 was brought into force on 2 March 2009.

19. R (on the application of Baiai and others) v Secretary of State for the Home Department and another

Administrative Court; [2006] EWHC 823 (Admin); 10 April 2006

The case concerned the procedures put in place to deal with sham marriages, specifically which persons subject to immigration control are required to go through before they can marry in the UK.

Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was declared incompatible with Articles 12 and 14 in that the effect of this provision is unjustifiably to discriminate on the grounds of nationality and religion, and in that this provision is not proportionate. An equivalent declaration was made in relation to Regulations 7 and 8 of the Immigration (Procedure for Marriage) Regulations 2005 (which imposed a fee for applications). Home Office Immigration Guidance was also held to be unlawful on the grounds it was incompatible with Articles 12 and 14, but this did not involve section 4 of the Human Rights Act.

The House of Lords held that the declaration of incompatibility should be limited to a declaration that section 19(1) of the Act was incompatible with Article 14 taken together with Article 12, insofar as it discriminated between civil marriages and Church of England marriages. In other respects it was possible to read and give effect to section 19 in a way which was compatible with Article 12: [2008] UKHL 53.

The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011 was made on 25th April 2011 and came into force on 9th May 2011. This abolished the Certificate of Approval scheme so that those subject to immigration control who wish to marry in the UK and the Isle of Man will have the freedom to give notice of marriage without having first to seek permission of the Secretary of State.

* * * * *

20. Re MB

Administrative Court; [2006] EWHC 1000 (Admin); 12 April 2006

The case concerned the Secretary of State's decision to make a non-derogating control order under section 2 of the Prevention of Terrorism Act 2005 against MB, who he believed intended to travel to Iraq to fight against coalition forces.

The procedure provided by the 2005 Act for supervision by the court of non-derogating control orders was held incompatible with MB's right to a fair hearing under Article 6.

The Court of Appeal overturned the declaration, a decision which was upheld by the House of Lords on 31 October 2007: [2007] UKHL 46.

21. R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills

Administrative Court; [2006] EWHC 2886 (Admin); 16 November 2006

This case concerned the Care Standards Act 2000 Part VII procedures in relation to provisional listing of care workers as unsuitable to work with vulnerable adults.

Section 82(4)(b) of the Care Standards Act 2000 was declared incompatible with Articles 6 and 8. The Court of Appeal overturned the declaration of incompatibility on 24 October 2007.

The House of Lords reinstated the declaration of incompatibility on 21 January 2009: [2009] UKHL 3. By the date of the House of Lords' judgment, the transition to a new scheme under the Safeguarding Vulnerable Groups Act 2006 was already underway. The new SVGA scheme does not include the feature of provisional listing which was the focus of challenge in the Wright case. However, the new Act was subject to a subsequent challenge in the Royal College of Nursing case set out below.

* * * * *

22. R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another

House of Lords; [2006] UKHL 54; 13 December 2006

This was a conjoined appeal in which the appellants were all former or serving prisoners. The issue on appeal was whether the early release provisions, to which each of the appellants was subject, were discriminatory.

Sections 46(1) and 50(2) of the Criminal Justice Act 1991 were declared incompatible with Article 14 taken together with Article 5 on the grounds that they discriminated on grounds of national origin.

The provisions in question had already been repealed and replaced by the Criminal Justice Act 2003, save that they continued to apply on a transitional basis to offences committed before 4 April 2005. Section 27 of the Criminal Justice and Immigration Act 2008 therefore amended the Criminal Justice Act 1991 to remove the incompatibility in the transitional cases. The amendment came into force on 14 July 2008, but reflected administrative arrangements addressing the incompatibility that had been put in place shortly after the declaration was made.

23. **Smith v Scott**

Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007

This case concerned the incapacity of convicted prisoners to vote under section 3 of the Representation of the People Act 1983.

The Court ruled that it was part of the Court of Session for the purposes of section 4 of the Human Rights Act, and therefore had power to make a declaration of incompatibility under that section. It declared section 3(1) of the Representation of the People Act 1983 incompatible with Article 3 of the First Protocol on the grounds that it imposed a blanket ban on convicted prisoners voting in Parliamentary elections. This declaration was substantially similar to the judgment of the European Court of Human Rights in the earlier case of *Hirst v United Kingdom (No. 2)* (Application 24035/01; 6 August 2005) and its subsequent pilot judgment in the case of *Greens and MT v United Kingdom* (Applications: 60041/08 and 60054/08; 23 November 2010).

The Government has been considering the issue of prisoners' voting rights and the outcome of this process will determine the Government's response to the declaration in *Smith* and the European Court of Human Rights decision in *Hirst* and its pilot judgment in *Greens and MT v United Kingdom* (Applications: 60041/08 and 60054/08; 23 November 2010).

The Grand Chamber of the European Court of Human Rights recently considered the case of *Scoppola v Italy* (no. 126/05, judgment of the Second Section of 18 January 2011) and a judgment was issued on the 22 May 2012. The UK intervened in this case as the legal issues that arose in *Scoppola* under Article 3 of Protocol 1 are analogous to those which arose in *Hirst* and in *Greens and MT*. The Government believes it is right to consider carefully the judgment in *Scoppola* and its implications for the UK before setting out next steps on prisoner voting.

Further information about *Scoppola*, *Hirst (No. 2)* and *Greens and MT* can be found at page 17 of this report.

24. Nasser v Secretary of State for the Home Department

Administrative Court; [2007] EWHC 1548 (Admin); 2 July 2007

The case concerned a challenge, by a national of Afghanistan, to a decision to remove him to Greece under the terms of the Dublin Regulation. The issue was whether paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 – which requires the listed countries (including Greece) to be treated as countries from which a person will not be sent to another State in contravention of his Convention rights – is compatible with Article 3.

Paragraph 3 of Schedule 3 to the 2004 Act, applied by section 33 of the Act, was declared incompatible with Article 3 on the grounds that it precludes the Secretary of State and the courts from considering any question as to the law and practice on *refoulement* in any of the listed countries.

The Court of Appeal overturned the declaration of incompatibility on 14 May 2008: [2008] EWCA Civ 464.

The claimant appealed to the House of Lords and was unsuccessful. Lord Hoffman said that the presumption in paragraph 3 of Schedule 3 to the 2004 Act did not preclude an inquiry into whether the claimant's Article 3 rights would be infringed for the purpose of deciding whether paragraph 3, would be incompatible with his Convention rights. In addition, the House of Lords found there to be no evidence of a real risk of *refoulement* from Greece therefore no violation had occurred in this case.

On declarations of incompatibility more generally, Lord Hoffman said that they would *normally* concern a real Convention right in issue in the proceedings, not a hypothetical Convention right (i.e. a breach should generally be demonstrated on the facts for a declaration to be issued) and that the structure of the Human Rights Act suggests that a declaration of incompatibility should be the last resort."

25. R (Wayne Thomas Black) v Secretary of State for Justice

Court of Appeal; [2008] EWCA Civ 359; 15 April 2008

This case concerned the application of Article 5(4) to the early release of determinate sentence prisoners subject to the release arrangements in the Criminal Justice Act 1991. Under section 35(1) of the Act, the decision whether to release long-term prisoners serving 15 years or more who have reached the halfway point of their sentence, when they become eligible for parole, lies with the Secretary of State rather than the Parole Board. Section 35(1) was repealed and replaced by the Criminal Justice Act 2003. However, it continues to apply on a transitional basis to offences committed before 4 April 2005.

The Court of Appeal found that Article 5(4) requires the review of continuing detention to be undertaken by the Parole Board following the halfway point of such sentences. As a result the Court declared that section 35(1) was incompatible with Article 5(4).

The House of Lords overturned the declaration of incompatibility on 21 January 2009: [2009] UKHL 1.

* * * * *

26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department

Court of Appeal; [2009] EWCA Civ 792; 23 July 2009

This case concerned a juvenile and an adult who have been convicted of sexual offences. Under section 82 of the Sexual Offences Act 2003, the nature of the offences they committed and the length of their sentences mean that they are subject to the notification requirements set out in Part 2 of that Act for an indefinite period. At the time, there was no statutory mechanism for reviewing indefinite notification requirements.

Section 82 of the Sexual Offences Act 2003 was declared incompatible with Article 8 by the Court of Appeal on 23 July 2009 and this decision was upheld by the Supreme Court on 21 April 2010: [2010] UKSC17. In doing so, the court concluded that, in so far as the relevant provisions allow for indefinite notification without review, they present a disproportionate interference with the right to respect for private life and are incompatible with Article 8(1) European Convention on Human Rights.

To remedy the incompatibility, the draft Sexual Offences Act 2003 (Remedial) Order 2012 was laid before Parliament on 5 March 2012 in accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998. The remedial order was subsequently approved by Parliament and came into force on 30 July 2012, amending the Sexual Offences Act 2003 to introduce a mechanism which will enable registered sex offenders who are subject to indefinite notification requirements to apply for those requirements to be reviewed.

27. R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department

Administrative Court; [2010] EWHC 2761; 10 November 2010

The case concerned the procedures established by Part 1 of the Safeguarding Vulnerable Groups Act 2006 ("SVGA 2006"), specifically those in Schedule 3 to that Act, which provide for the inclusion of individuals who had committed a specified criminal offence on a list to bar them from working with children or vulnerable adults. It was found that procedures which denied the right of a person to make representations as to why they should not be included on a barred list breached Article 6 and had the potential to give rise to breaches of Article 8.

The legislation which preceded the SVGA 2006 was also declared incompatible, see: at 21 above, R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills (*House of Lords; [2009] UKHL 3; 21 January 2009*).

Section 67(2) and (6) of the Protection of Freedoms Act 2012 amends Schedule 3 to the SVGA 2006 and gives the person the opportunity to make representations as to why they should not be included in the children's or adults' barred list before a barring decision is made. These provisions commence on 10 September 2012.

Annex B: Statistical information on the UK's record on the implementation of adverse European Court of Human Rights judgments⁴³

Statistic	UK performance	
	2010	2011
New Cases		
i) Total number of new cases UK cases	17	19
ii) Leading UK cases	12 of 17	9 of 19
Final Resolutions	2010	2011
i) Total number of cases	76	48
ii) Leading cases among UK cases	25	33
Pending Cases	2010	2011
i) Total number of cases	67	40
ii) Leading cases among UK cases	45	25
Payment of just satisfaction	2010	2011
i) Within deadline	4	8
ii) Payment was late	1	0
iii) Payment is outstanding and over deadline	2	3
Amount of just satisfaction (€)	2010	2011
Total amount paid by the UK	371,160	454,457
Average execution time	2010	2011
Leading UK cases pending <2yrs	13	16
Leading UK cases outstanding 2–5yrs	5	4
Leading UK cases outstanding >5yrs	6	5

⁴³ Data taken from the 5th Annual Report of the Committee of Ministers on the "Supervision of the execution of judgments and decisions of the European Court of Human Rights" and shows the position at 31 December 2011.



Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, telephone fax and email

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/general enquiries 0870 600 5522

Order through the Parliamentary Hotline Lo-Call 0845 7 023474

Fax orders: 0870 600 5533

Email: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Houses of Parliament Shop

12 Bridge Street, Parliament Square,
London SW1A 2JX

Telephone orders/general enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: shop@parliament.uk

Internet: <http://www.shop.parliament.uk>

TSO@Blackwell and other accredited agents

ISBN 978-0-10-184322-5



9 780101 843225