Ministry of JUSTICE

Responding to human rights judgments

Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2010-11

September 2011

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

September 2011

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Introduction

This is the latest 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 (ECtHR) and the domestic courts.

Following some initial general comments, this paper is divided into three main sections:

- comments on the Government's **record on the implementation of adverse judgments** based on statistics produced by the Committee of Ministers in their most recent annual report;
- an **overview of significant judgments** which have been received and which have become final in the previous twelve months, and measures either proposed or taken to implement them; and
- comments on the **wider system for responding to judgments** of the ECtHR and declarations of incompatibility.

Since the publication of the Government's previous report in July 2010,[1] the current Joint Committee has been appointed (following the dissolution of its predecessor prior to the General Election in May 2010). The Government has been pleased to see the new Joint Committee active on many issues concerning human rights.

Following the recommendation of the previous Joint Committee on Human Rights (the Joint Committee),[2] it is also the first such paper to be published proactively in advance of the Joint Committee's anticipated evidence session with the Human Rights Minister. Although the information set out in this report is a key means of keeping the Joint Committee up-to-date with developments in this important area, the Government attaches particular importance to the Joint Committee's oral evidence session. The Government would welcome any subsequent correspondence from the Joint Committee should they require further information on any points, whether made in this report or at the evidence session.

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1 http://www.justice.gov.uk/downloads/publications/policy/moj/2010/responding-human-rights-judgements-2009-2010.pdf

2 In its report '*Enhancing Parliament's role in relation to human rights judgments*'.

General Comments

This paper considers two particular types of human rights judgments:

- **judgments of the European Court of Human Rights (ECtHR)** in Strasbourg against the United Kingdom under the European Convention on Human Rights (ECHR); 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 ECtHR under Article 46 of the ECHR. The implementation – or "execution", as it is described in the Convention – of judgments of the ECtHR 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 political 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 Secretariat[5] in its work overseeing the implementation of judgments.

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[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 ECtHR 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.

This paper considers only the general measures element of the implementation of Strasbourg judgments.

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 court[7] 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. Information about each of the 27 declarations of incompatibility is set out as an annex to this paper.

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, nor 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.

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6 The rights drawn from the ECHR 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

The following information will be of interest and will provide the general context when considering the Government's overall approach to implementing human rights judgments.

Bill of Rights Commission

The Government remains committed to the European Convention on Human Rights, and to giving effect to the Convention in domestic law. However, 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 has been established to investigate the creation of a Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. The Government will also seek to promote a better understanding of the true scope of these obligations and liberties. Information on the Commission's remit and operation has been provided to the Joint Committee. 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 2012.

Reform of the ECtHR and the UK Chairmanship of the Committee of Ministers of the Council of Europe

The Government is aware of the highly challenging situation facing the European Court of Human Rights[10] and is actively engaged in the implementation of the Interlaken Conference's Action Plan for reforming the Court. The Government believes it is essential to minimise the burden on the Court by effectively implementing the principle of subsidiarity. The effective national implementation of the Convention and the Court's jurisprudence is an important element of this principle.

As part of the Interlaken Action Plan, all Council of Europe Member States must review their implementation of a number of Committee of Ministers' recommendations regarding the national implementation of the Convention. The Government will publish this report by the end of the year.

The Izmir Conference on the Future of the European Court of Human Rights, held in Turkey on 26 and 27 April 2011, led to the adoption of a political declaration (the Izmir Declaration). This built on the Interlaken process already underway to drive further reform of the ECtHR. The UK sees progress on this

[10] The ECtHR has a backlog of more than 150,000 cases at time of publication.

agenda as a priority for its forthcoming chairmanship of the Committee of Ministers of the Council of Europe (November 2011–May 2012).

Universal Periodic Review

The United Kingdom is deeply committed to the success of the Universal Periodic Review process at the United Nations. In April 2008, the UK was among the first countries to have its record on human rights reviewed. We see this as a process based on collaboration and co-operation and, above all, a commitment to improving human rights on the ground. We see it as an opportunity to create the space and support for countries to take a self-critical look at their own human rights records.

We have now commenced our preparations for our next review in 2012, and as part of that process, we intend to consult widely and non selectively with civil society.

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 the 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.

On 23 and 24 August 2011, in Geneva the UK discussed fulfilment of its obligations under the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) with the Committee that oversees the Convention.

On 10 June 2011 we submitted the UK's 7th periodic report under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)[11] and we intend to submit the UK's 5th periodic report under the Convention Against Torture early in September 2011. Preparation of the UK's first periodic report under the Convention on the Rights of Person with Disabilities is continuing, and we intend to submit this later this year.

Work has begun to prepare the UK's next periodic reports under the Convention on the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are both due by 31 July 2012.

[11] http://www.homeoffice.gov.uk/publications/equalities/international-equality/7th-cedaw-report

The UK's record on the implementation of ECtHR judgments

As underlined in the latest statistics published by the Council of Europe covering 2010,[12] the UK's overall record on the implementation of judgments continues to be a strong one.

As of 31 December 2010, the UK was responsible for a relatively low number of cases before the Committee of Ministers (30 cases), representing 0.34% of the overall total. Although the UK had a relatively large proportion of leading cases when compared to other States, this has both positive and negative connotations. While the problems identified by the Court tend to be systemic problems, rather than one-off violations, the UK is not responsible for many repetitive cases[13], indicating that problems are generally being addressed where identified or are affecting relatively low numbers of people. Similarly, the limited number of 'one-off' violations also seems to indicate that public authorities are taking their responsibilities under the Human Rights Act seriously when making decisions in individual cases and that the UK courts are effectively identifying and resolving cases where mistakes are made.

In terms of just satisfaction payments, almost all cases are paid within the three months deadline. Only one payment was recorded as being after the deadline. In relation to the relatively high number of cases where the UK had 'control of payment for more than six months'[14] (three out of eight cases in 2010), the Ministry of Justice notes room for improvement in terms of ensuring just satisfaction payments are communicated fully and promptly. We will continue to monitor progress in this area although we anticipate that the performance will improve in line with the arrangements and guidance put in place over the past year as a result of the Ministry of Justice's new coordination role (detailed below).

As noted last year, the UK also has a high proportion of leading cases outstanding for more than two years (eight cases). However, six of these cases are a group relating to one issue, the investigation of deaths in Northern Ireland,[15] and work is progressing to bring those cases to a close; individual measures remain open in four of them. While it is important that these cases

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[12] The Committee of Ministers 4th annual report *Supervision of the execution of judgments of the European Court of Human Rights,* published in April 2011 and covering the year 2010. Viewable at: http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2010_en.pdf

[13] 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*.

[14] Meaning that payment was still pending from the UK, but had missed the deadline.

[15] *McKerr v UK, Finucane v UK, McShane v UK, Shanaghan v UK, Jordan v UK, Kelly & others v UK*.

are brought to a close swiftly and effectively, and work will continue to accomplish this, the relatively large number of cases in the group has a disproportionate effect.

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 of course explain any such delays to the Joint Committee.

However, subject to the observations made above, performance has generally been maintained at a high level across the past three years. In particular, the number of leading UK cases before the Committee of Ministers has fallen from 34 in 2008 (12 leading, 22 clone) to under 30 (21 leading, 9 clone) at the time of the publication of the Committee of Ministers' report. However, the number of leading cases has since fallen further and, at the time of the publication of this report, we anticipate that up to a further ten open leading cases will be ready to be closed by the end of 2011.

Finally, the Committee of Ministers' report shows that, in 2010, 17 judgments finding violations were made and became final in UK cases – 12 in leading cases, 5 in clone cases. The number of judgments against the UK thus compares favourably with that of many other States; the tally of 14 cases represents just 1% of the violations found by the Court in 2010.

In conclusion, as stated above, the Government is 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 ECtHR has generally been shown to be effective. The Joint Committee has previously acknowledged good practice in this area[16]. 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.

[16] *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/jtrights/173/17302.htm

Consideration of significant judgments that became final in the past twelve months (August 2010 – August 2011)

ECtHR judgments[17]

Treatment of detainees and detention of suspects in Iraq; jurisdiction of the ECHR

Al-Jedda v UK *& Al-Skeini v UK*:[18] Court: ECtHR (Grand Chamber)

Case summaries

Al-Jedda: This case concerned the internment of an Iraqi civilian for more than three years (2004-2007) in a detention centre in Basrah, Iraq, run by British forces.

The ECtHR found a violation of Article 5(1) (right to liberty and security).

Al-Skeini: The case concerned the deaths of the applicants' six close relatives in Basrah in 2003 while the UK was an occupying power. Three of the victims were shot dead or shot and fatally wounded by British soldiers. One was shot and fatally wounded during an exchange of fire between a British patrol and unknown gunmen. One was beaten by British soldiers and forced into a river, where he drowned and one died at a British military base.

The ECtHR found that, in the exceptional circumstances deriving from the UK's assumption of authority for the maintenance of security in South East Iraq from 1 May 2003 to 28 June 2004, the UK had jurisdiction under Article 1 (obligation to respect human rights) of the European Convention on Human Rights in respect of civilians killed during security operations carried out by UK soldiers in Basrah and that there had been a violation of Article 2 (right to life) in that that there had been a failure to conduct an independent and effective investigation into the deaths of the relatives of five of the six applicants.

Government response: The Government is considering these complex judgments in detail and will outline its proposed action to implement the judgments in due course.

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[17] All ECtHR judgments can be found on the HUDOC database at: http://www.echr.coe.int/ECHR/EN/hudoc

[18] Applications 27021/08 & 55721/07; judgments final on 07 July 2011 for both Al-Jedda and Al-Skeini.

Detention of suspects in Iraq; jurisdiction of ECHR

Al Saadoon and Mufdhi v UK:[19] Court: ECtHR (Chamber)

Case summary: This case concerned the transfer of the two applicants (both Iraqi nationals) to the Iraqi authorities by British forces in Basrah on 31 December 2008. The applicants had been detained by the UK authorities at the request of Iraqi authorities pursuant to an Iraqi court order and were suspected of committing crimes in Iraq against Iraqi law.

In particular, the applicants complained their transfer to the Iraqi authorities exposed them to a real risk of the death penalty (in breach of Article 1 of Protocol 13), extra-judicial killing or the imposition of the death penalty following an unfair trial contrary to Article 2, treatment contrary to Article 3 and of a flagrant denial of justice in breach of Article 6.

The ECtHR found that the transfer of the applicants to the Iraqi authorities, in circumstances in which there was a real risk of the death penalty, was a violation of Article 3 as the applicants were exposed to psychological suffering that constituted inhuman treatment.

Under Article 46 of the ECHR, the ECtHR also found that "compliance with Article 3 of the Convention requires the United Kingdom authorities to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty" (§171).

The Government response: The Government has regularly updated the Committee of Ministers of the steps taken to seek assurances from the Iraqi authorities that the applicants would not suffer the death penalty if convicted of charges which attract the death penalty. It also indicated to the Iraqi High Tribunal (IHT) that before examining any request for mutual legal assistance, it would need credible assurances that the death penalty would not be applied.

Subsequent to the ECtHR's judgment, the applicants were acquitted by the IHT on 27 April 2011. The Prosecutor appealed the acquittal but did not request application of the death penalty on 17 May 2011. This appeal was rejected on 4 June 2011 and the applicants' acquittal was upheld. The Government notes that there does not appear to be any prospect of a further appeal but that, until 27 April 2012, the court could reopen the investigation against the applicants, should new evidence come to light. However, the Government considers that the applicants are no longer at risk of the death penalty and understands that that both applicants have now been released.

[19] Application 61498/08; judgment final on 4 October 2010.

The Government considers no general measures to be necessary in this case. This unusual case arose because on 31 December 2008 UK Armed Forces ceased to have the power to detain individuals in Iraq as a matter of international law and hence transferred the applicants to the Iraqi authorities. When negotiating arrangements relating to UK detainee transfers on military operations for the purpose of prosecution, assurances regarding the non-application of the death penalty will always be sought from those nations that retain the death penalty. Similarly, in this case, the UK declined to consider further requests for legal assistance from the Iraqi High Tribunal in the absence of credible assurances relating to the death penalty.

The Government would wish to note that it has always made great efforts to comply with interim measures indicated by the Court under Rule 39, including in situations where such indications have been communicated at very short notice. The Rule 39 indication in this case presented the UK with an unprecedented situation and it acknowledges the points made by the Court at paragraph 163 of its judgment concerning the response to the Rule 39 indication.

Early release scheme discriminating against prisoners serving long, fixed-terms sentences

Clift v UK:[20] Court: ECtHR (Chamber)

Case summary: The case concerned the unjustified discrimination in the conditions for allowing early release between prisoners serving fixed-term sentences of more than 15 years and those serving shorter sentences. Under the legislation applicable at the time, prisoners serving fixed-term sentences of imprisonment of 15 years or more were required to secure, in addition to a positive recommendation from the Parole Board, the approval of the Secretary of State for early release. However, prisoners serving fixed-term sentences of less than 15 years and those serving life sentences were entitled to early release upon the positive recommendation of the Parole Board only. No Secretary of State approval was required.

On 30 April 1994, the applicant was sentenced to eighteen years' imprisonment. He became eligible for release on parole on 13 March 2002. On 25 October 2002, the Secretary of State rejected the recommendation of the Parole Board to release the applicant. He was finally released on licence in March 2004.

The ECtHR held that there had been a violation of Article 5 (right to liberty and security) in conjunction with 14 (prohibition of discrimination).

The Government response: To avoid the repetition of such a breach, the Government has changed the applicable legislation to remove the power of the Secretary of State to override a recommendation of the Parole Board for release of any prisoner. The relevant amendment to the legislation was made by section 145 of the Coroners and Justice Act 2009. This provision transferred the responsibility for release decisions, in the case of those prisoners serving 15 years or more who are subject to the release provisions of the Criminal Justice Act 1991, to the Parole Board.[21,22]

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[20] Application 7205/07; judgment final on 22 November 2010.

[21] This provision and the following associated amendments were commenced with effect from 2 August 2010.
- Section 145 – Transfer to Parole Board of functions under the Criminal Justice Act 1991
- Section 177 – Consequential etc amendments and transitional saving provisions
- Section 178 – Repeals
- Para 43 of Schedule 22 – Transfer of functions to Parole Board
- Part 5 of Schedule 23 – Miscellaneous Criminal Justice Provisions relevant to Section 145.

[22] The following provide links to the Coroners and Justice Act 2009 and Explanatory Notes: http://www.legislation.gov.uk/ukpga/2009/25/contents http://www.legislation.gov.uk/ukpga/2009/25/notes/contents

The consequent effect is that, as of 2 August 2010, the Secretary of State no longer has the power to make parole release decisions in respect of 1991 Act prisoners serving 15 years or more. The Secretary of State retains such power in no other cases and, therefore, the discrimination found in this case cannot happen again.

Stop and search powers

Gillan and Quinton v UK:[23,24] Court: ECtHR (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 ECtHR 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 the following immediate steps after the judgment became final to ensure the judgment was implemented:

On 8th July 2010, the Government publicly announced that the powers under sections 44 to 46 would no longer be used in a way which had been found to be incompatible with article 8 of the ECHR in the ECtHR's judgment. In summary this announcement laid down that:

- Terrorism-related stops and searches of individuals would be conducted under section 43 of the 2000 Act (which allows for stops and searches to be conducted on the basis of reasonable suspicion that the individual is a terrorist). Section 44 would no longer be used for the searching of individuals.
- In view of the fact that section 43 did not cover the stop and search of vehicles on the basis of reasonable suspicion, the section 44 regime continued to be available for the purpose of searching vehicles, but only on the basis that authorisations could be made (and would only be confirmed by the Secretary of State) only on the basis that they were 'necessary' for the prevention of acts of terrorism (rather than 'expedient' as expressed in section 44(3)) and that stops and searches carried out under an authorisation were carried out under an authorisation were carried out on the basis of reasonable suspicion.

[23] Although this case became final just before the period covered by this report, it is included as it is anticipated that it will be of particular interest to the Joint Committee.

[24] Application 4158/05; judgment final on 28 June 2010.

- These guidelines were in place temporarily pending the outcome of a Government review of sections 44 to 47 (which formed part of a wider 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 ECHR. The outcome of that review was announced to Parliament on 26 January 2011.[25]

The review recommended significant changes to bring powers into compliance with ECHR rights and ensure previous misuse associated with section 44 is not repeated:

i. The test for authorisation should be where a senior police officer reasonably believes that an act of terrorism will take place. An authorisation should only be made where the powers are considered "necessary", (rather than the previous requirement of merely "expedient") to prevent the act of terrorism.

ii. The period of authorisation should be reduced from the current maximum of 28 days to 14 days.

iii. It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The length of authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent the suspected act of terrorism.

iv. The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.

v. The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present).

vi. Robust statutory guidance on the use of the powers should be developed to ensure that the scope for misinterpretation or misuse of the powers is minimised.

As a result, provisions to repeal and replace sections 44-47 of the Terrorism Act 2000 are included in clauses 60 and 61 of the Protection of Freedoms Bill.[26] The Bill is likely to become law in early 2012.

The review also recommended that 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, that they were ECHR compliant.

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[25] This can be viewed at: www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

[26] This can be viewed at: www.publications.parliament.uk/pa/bills/cbill/2010-2012/0189/2012189.pdf

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 order containing the new provisions, which came into force on 18 March 2011.[27]

It is the Government's view that the powers in the remedial order and the Protection of Freedoms Bill are compliant with the ECHR. 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.

[27] Full details of the remedial order, the new powers and the associated statutory Code of Practice can be found at www.homeoffice.gov.uk/publications/counter-terrorism/terrorism-act-remedial-order

Prisoner voting rights

Greens v UK *& M.T. v UK:*[28] Court: ECtHR (Chamber)

Case summary: This pilot case concerned the blanket ban on voting imposed automatically on the applicant due to the applicants' status as a convicted offender 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 ECtHR 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 Court noted that a wide range of policy alternatives were available to the Government and emphasised the broad margin of appreciation that applies in this area. It was for the Government to decide in the first instance how to achieve compliance with Article 3 of Protocol 1 when introducing legislative proposals (§114 of the judgment).

The Government response: The Government has actively been considering the appropriate course of action in order to respond to the judgment in *Greens and MT*.

In July, the Grand Chamber accepted a referral in the case of *Scoppola v Italy* (no. 126/05, judgment of the Second Section of 18 January 2011). A hearing before the Grand Chamber has been scheduled for 2 November 2011. The legal issues which arise in *Scoppola* under Article 3 of Protocol 1 are analogous to those which arose in *Hirst* and in *Greens and MT*, and the Second Section referred in its judgment to *Hirst*, as did the Italian Government in its referral request.

For these reasons the Government has sought leave to intervene in the *Scoppola* hearing and to defer the time limit specified in *Greens and MT*, which is due to expire on 11 October 2011. The Government was notified on 31 August that the Court has granted an extension of six months from the date of the *Scoppola* judgment. The Government welcomes the decision of the Court and believes it is right to consider *Scoppola* and the wider legal context before setting out next steps on prisoner voting. The Government awaits the Court's decision in relation to the intervention request.

[28] Applications 60041/08 & 60054/08; pilot judgment final on 11 April 2010.

Discrimination against same-sex couples in relation to child maintenance payments; recognition of same-sex relationships as 'family life'

JM v UK:[29]

Court: ECtHR (Chamber)

Case summary: This case concerned an applicant who complained that, under Article 8 of the Convention and Article 1 of Protocol No. 1 taken in conjunction with Article 14, she suffered discrimination on the basis of her sexual orientation. She complained that, had she entered into a heterosexual relationship, her maintenance contributions to her children under the Child Support Act 1991 would have been approximately £30 less per week.

The European Court of Human Rights held that there had been violations of Article 14 in conjunction with Article 1 of Protocol No. 1.

The Government response: The Government considers that no further general measures are necessary to avoid the repetition of such a breach because the discrimination complained about in this case would have been eliminated by the Civil Partnership Act 2004.

[29] Application 37060/06; judgment final on 28 September 2010.

Summary possession of people's homes

Kay v UK:[30] Court: ECtHR (Chamber)

Case summary: The applicants were occupiers of housing units owned by Lambeth Borough Council, which had originally sublet the accommodation to a charitable housing trust. Once Lambeth terminated the lease in November 1999, the occupiers became trespassers against the council. Lambeth then brought possession proceedings to evict them. The applicants were not permitted to raise their human rights as a defence to possession proceedings, and they complained that this breached their right to respect for private and home life under Article 8 (the right to a family life).

The ECtHR found a violation of Article 8, insofar as the applicants had been prevented from raising Article 8 as a defence in domestic proceedings.

The Government response: The Government considers no further general measures are necessary to avoid the repetition of such a breach because the Supreme Court decision in *Manchester City Council v Pinnock*[31] clarified the law in relation to possession proceedings. The Supreme Court in *Pinnock* invited written submissions on the effect of *Kay v UK* as the judgment was handed down after the oral hearing in *Pinnock* in July 2010. The decision in *Pinnock* has now modified the law as set out in the House of Lords decision in *Kay v Lambeth*.

Consistent with the judgment in *Kay v UK*, *Pinnock* holds 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 county court. This consideration can include factors such as the occupier's personal circumstances. This is a significant clarification of the law as it stood when *Kay* was before the House of Lords. As the Supreme Court's decision sets a binding precedent for lower courts, the Government does not consider that any further steps are necessary to implement the judgment or avoid further such breaches.

[30] Application 37341/06; judgment final on 21 December 2010.

[31] http://www.supremecourt.gov.uk/docs/UKSC_2009_0180_Judgment.pdf

Inability to challenge a court order prohibiting reporting of a criminal trial

Mackay and BBC Scotland v UK:[32] Court: ECtHR (Chamber)

Case summary: This concerned the complaint by the applicants about not being able to challenge a court order prohibiting reporting on a criminal trial. The first applicant (a journalist employed by BBC Scotland) and the second applicant (BBC Scotland) complained that they had suffered a violation of Article 6 (right to a fair trial) by the refusal to hold an oral hearing to enable them to challenge an Order made under section 4(2) of the Contempt of Court Act 1981.

The order prevented them from reporting on criminal proceedings in Scotland, which the applicants also argue was an unjustified limitation to their right to impart information under Article 10 (freedom of expression) and that there was no effective remedy, in breach of Article 13 (availability of a national remedy).

The criminal proceedings at issue before the High Court of Justiciary in Glasgow were abandoned when the Trial Judge decided to desert the trial *diet simpliciter* on the basis that no fair trial could continue. This was owing to the fact that two police officers who were due to give evidence for the prosecution had been found watching the proceedings by remote video link. An Order was made under Section 4(2) of the Contempt of Court Act 1981 to prevent reporting of the trial. The Crown appealed against a decision to desert the trial and the BBC asked for an opportunity to address the Court should any application be made to prevent publication of the appeal. In February 2005 the BBC were told that they would not be given an opportunity to make representations and the High Court of Justiciary proceeded to make a section 4(2) Order prohibiting report of the appeal. The appeal was then determined on 24 March 2005. The Trial Judge's Order was substituted by an Order for desertion, which allowed for the re-indictment of one of the original accused.

The ECtHR found that there had been a breach of Article 13 (lack of an effective remedy) in conjunction with Article 10 (freedom of expression and information).

The Government response: To avoid the repetition of such a breach, the Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Miscellaneous) 2011[33] came into force on 28 March 2011, section 6 of which amended Chapter 56 of the Criminal Court Rules to implement the terms of the decision.

The instrument puts the previous administrative arrangements into a legally binding form. This means the court is required to take certain steps to communicate the existence of section 4(2) orders (which ban reporting) and that

[32] Application 10734/05; judgment final on 7 December 2010.

[33] This can be viewed at: http://www.legislation.gov.uk/ssi/2011/194/contents/made

there is a procedure for the making by aggrieved parties of applications for the revocation or variation of such orders.

Such applications are determined following a hearing which will, ordinarily, take place within 48 hours of the making of the application and which will be before the judge who made the order.

Fees in defamation cases and freedom of expression

MGN LTD v UK:[34]

Court: ECtHR (Chamber)

Case summary: This case concerned two decisions of the House of Lords: in *MGN Ltd v Naomi Campbell* [2004] UKHL 22 and *Naomi Campbell v MGN Ltd* [2005] UKHL 61.

The application to the ECtHR consisted of two elements. The first ("the first appeal") concerned the decision that MGN's publication of information and photographs about the details of the treatment Ms Campbell was seeking for her drug addiction constituted an intrusion into her private life, in violation of Article 8. The applicant complained that this decision was contrary to Article 10 (freedom of expression).

The second ("the second appeal") concerned the decision that the success fees deriving from the Conditional Fee Agreement (CFA) into which Ms Campbell had entered for the proceedings before the House of Lords were consistent with Article 10 (freedom of expression) and were recoverable in full.

The ECtHR dismissed the first appeal but, in relation to the second appeal, found that success fees were disproportionate and contrary to Article 10.

The Government response: Currently, the issue of just satisfaction is still before the ECtHR and yet to be resolved.

However, the Government is making fundamental changes to 'no win, no fee' conditional fee agreements (CFAs). The changes include abolishing the recoverability of CFA success fees from the losing side in all cases including defamation related proceedings. This would prevent any future infringements of Article 10 rights.

The changes are being taken forward in the Legal Aid, Sentencing and Punishment of Offenders Bill currently before Parliament. Subject to the Bill's timetable for Royal Assent, it is intended that the changes would come into force in autumn 2012. The changes will prevent future infringements of Article 10 rights like those that arose in MGN v the UK in defamation related proceedings.

[34] Application 39401/04; judgment final on 18 April 2011.

Permission to marry for those subject to immigration control (Certificate of Approval scheme)

O'Donoghue and Others V UK:[35] Court: ECtHR (Chamber)

Case summary: This case concerned the powers to operate the Certificate of Approval (COA) scheme, set out in the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, before the abolition of the scheme on 9 May 2011. The scheme required those subject to immigration control to have permission to marry from the Secretary of State before giving notice to marry to a registrar. Those marrying in the Anglican Church were exempt from the requirement.

The Applicants in *O'Donoghue* complained that the COA scheme violated their rights under Articles 8, 9, 12 and 13 of the Convention. They further complained of an infringement of their rights under Article 14 (prohibition of discrimination), when read in conjunction with Articles 8 (right to family life), 9 (freedom of though, conscience and religion) and 12 (right to marry), on the grounds of (i) religion (the COA scheme would not have applied to them had they been willing or able to marry in the Church of England according to Anglican rites); (ii) the 2nd Applicant's nationality; and (iii) their inability to pay the requisite fee.

The Court held that there had been a violation of the Applicants' rights under Article 12; Article 14 read together with Article 12 and Article 12 read together with Article 9.

The Government response: The Government considers no further general measures are necessary to avoid the repetition of such a breach because it abolished the Certificate of Approval scheme on 9 May 2011 by amending primary legislation using a remedial order under section 10 of the Human Rights Act 1998 [36].This remedied any incompatibility of the ECHR identified in this case and first identified by the UK domestic courts in *R (Baiai) v Secretary of State for the Home Departments* [2009] 1 A.C. 287 (HL).

[35] Application 34848/07; judgment final on 14 March 2011.

[36] The final remedial order as approved by Parliament can be viewed here: http://www.legislation.gov.uk/uksi/2011/1158/made

Risk of torture or inhuman or degrading treatment (removal to Bhutan)

SH v UK:[37] Court: ECtHR (Chamber)

Case summary: This case concerned the risk that the applicant, a Bhutanese national of ethnic Nepalese origin, might be subjected to torture or degrading on inhuman treatment in his country of origin, Bhutan, if the removal directions against him were to be enforced. The applicant claimed his removal would be in violation of Article 3 (prohibition of torture or inhuman or degrading treatment). He complained his removal to Bhutan would expose him to a risk of ill-treatment on account of his ethnicity, his status as a failed asylum seeker and as the close relative of a human rights activist who had been granted asylum in the UK.

The applicant entered the UK on 31 December 2002 and claimed asylum. The UK refused his application for asylum and issued removal directions against the applicant which were deferred on 23 March 2006 following his application to the Court of Appeal. On 9 August 2007, the ECtHR applied Rule 39 of the Rules of the Court indicating that the applicant should not be removed until further notice. The ECtHR subsequently found that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment contrary to Article 3 if returned to Bhutan.

The Government response: The applicant's expulsion was halted in accordance with Rule 39 of the ECtHR and the order setting directions for his removal to Bhutan cancelled. In October 2009 the applicant submitted an application for leave to remain in the United Kingdom on the grounds of marriage to an individual with leave to remain in the United Kingdom as a refugee. On 16 June 2010, before the judgment of the Court was conveyed to the United Kingdom, the United Kingdom granted the applicant leave to remain until 16 June 2013 on the basis of the application of October 2009.

The Government has noted the ECtHR's conclusions that the removal of the applicant to Bhutan would be contrary to Article 3 and will take the judgment in this case into account if and when the applicant seeks further leave to remain in the UK as a refugee in the future.

The Government has disseminated the judgment to UK Border Agency staff responsible for obtaining and publishing information about Bhutan and to staff responsible for noting the outcome of the case and deciding whether there is need for further guidance to caseworking staff in light of the judgment.

[37] Application 19956/06; judgment final on 15 September 2010.

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

Vetting and Barring Scheme

R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department[38]

Court: Administrative Court

Case summary: The Royal College of Nursing (RCN) sought judicial review of the operation of four separate elements of the Vetting and Barring Scheme.

The court ruled against one element of the scheme, making a declaration of incompatibility under the Human Rights Act in respect of paragraphs 2 and 8 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006.

This element was the current provisions that involve the placing of individuals on the barred lists by the Independent Safeguarding Authority (ISA), based on a range of criminal offences specified in regulations, prior to them having the right to make representations to the ISA (automatic barring with representations).

The court upheld the remaining elements of the scheme that were subject to challenge.

The Government response: The provisions in clause 66 of the Protection of Freedoms Bill alter the barring system under paragraphs 2 and 8 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 by introducing provision that the person is not placed on the barred list before their representations to the ISA are made and considered. Rather the ISA must request and consider any representation made before coming to their barring decision.

[38] Declaration of incompatibility issued on 10 November 2010.

Developments in systemic processes

This section of the paper addresses issues relating to the general manner in which the Government responds to European Court of Human Rights judgments and declarations of incompatibility. It also considers matters of general applicability to either Strasbourg judgments or declarations of incompatibility, including those that have arisen in the context of a particular case.

Coordinating the implementation of human rights judgments

As outlined in the Government's last report, the Ministry of Justice has now assumed the role of light-touch coordinator for the implementation of adverse judgments. In practice, this involves responsibility for the domestic coordination of information from the Government departments leading on particular cases and its onward transmission to the Foreign and Commonwealth Office (FCO) and the UK Delegation to the Council of Europe (UKDel). More time is needed to give any assessment of the effectiveness of this arrangement, although the Ministry of Justice will work with the FCO and other departments to monitor its effectiveness.

It should be noted that lead responsibility for the implementation of a particular judgment continues to rest with the relevant Government department, whilst the FCO/UKDel continues to represent the UK at the Committee of Ministers' meetings on the execution of judgments.

A key part of this coordination is the introduction of a specifically-designed '**implementation form'** issued to lead Government departments to aid with responding to adverse ECtHR judgments. This provides lead departments with advice on the completion of the Action Plan for implementation required by the Committee of Ministers.[39]

The deadlines set in the implementation form help to ensure that the required information can be submitted to the Committee of Ministers on time[40]. However, there may be some instances in which this is not possible as cases may raise complex or sensitive issues.

The form also ensures that all the information needed for the effective oversight of the implementation process is provided to the Ministry of Justice and FCO.

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[39] The Secretariat of the Committee of Ministers has a dedicated execution of judgments website: http://coe.int/t/dhjl/monitoring/execution/default_en.asp. This provides access to a searchable list of all judgments currently outstanding against all Member States and information on all the action taken by member States to date and proposed future action where needed.

[40] Evidence of payment of just satisfaction is required within three months of the judgment becoming final and an outline of steps for general measures is normally required after six months.

In relation to cases involving other Council of Europe Member States that impact on ECtHR and UK case law, the Ministry of Justice monitors ECtHR judgments to identify cases that have a clear 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, it should be noted that, as it would not be feasible for any one department to identify all judgments that may be relevant to others in Government, all Government departments are in consequence expected to identify judgments relevant to their area of work, for onward dissemination as appropriate to relevant 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

The Government notes that a large volume of information regarding the implementation of judgments is already available in the public domain from a number of sources:

The Department for the Execution of Judgments has a dedicated website for the **implementation of judgments**.[41] 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,[42] 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. The Government will also continue to liaise with the Joint Committee to keep them up-to-date with the latest Action Plans submitted to the Committee of Ministers.

The Government sets out information on **declarations of incompatibility** in domestic cases in the list annexed to this paper. Historically it has been Government practice to draw new declarations of incompatibility to the Joint Committee's attention, and to update them on later appeals. This practice will continue, and will still be undertaken by the department with responsibility for the subject matter of the declaration of incompatibility. The Ministry of Justice will also continue to encourage lead departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility.

All **judgments of the ECtHR** are highlighted a few days in advance on the website of the Court[43] and via press announcements and the judgments are themselves available on the website once handed down.

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[41] http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

[42] 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).

[43] http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/

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:

- 12 will have been remedied by later primary legislation[44]
- 2 will have been remedied by a remedial order under section 10 of the Human Rights Act;[45]
- 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 8 August 2011, and will not reflect any changes after that date.

[44] Subject to the passage of the Protection of Freedoms Bill.

[45] Subject to final Parliamentary approval of the Sexual Offences Act 2003 (Remedial) Order 2011 was laid before both Houses on 14 June 2011.

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18. R (Gabaj) v First Secretary of State
    (Administrative Court; unreported; 28 March 2006)

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)

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
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22. R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another
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23. Smith v Scott
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24. Nasseri 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

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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

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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.

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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.

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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.

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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.

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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.

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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 ECHR 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

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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.

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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).

The Government has been actively 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 is currently considering the case of *Scoppola v Italy* (no. 126/05, judgment of the Second Section of 18 January 2011). The legal issues which arise 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 *Scoppola* and the wider legal context before setting out next steps on prisoner voting.

24. Nasseri 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. There is no statutory mechanism for reviewing the notification requirements.

S82 of the Sexual Offences Act 2003 was declared incompatible with Article 8 by the Court of Appeal to the extent that indefinite notification periods were not subject to any review mechanism whereby the proportionality of the notification requirements could be evaluated.

The Supreme Court upheld the declaration on 22 April 2010: [2010] UKSC 17. The draft Sexual Offences Act 2003 (Remedial) Order 2011 was laid before both Houses of Parliament on 14 June 2011. That Order seeks to introduce a mechanism for reviewing the indefinite notification requirements under section 82(1) of the 2003 Act.

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)*.

The Government included provisions in the Protection of Freedoms Bill to amend Schedule 3 to the SVGA 2006 (on introduction these provisions were contained within clause 66(2) and 66(6) of the Bill).

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

Statistic	UK performance		Council of Europe average	
	2009	**2010**	**2009**	**2010**
UK cases as proportion of cases becoming final	DNR[1] (12)	DNR (17)	-	-
Leading cases among UK cases becoming final	3 of 12 (25%)	12 of 17 (70.59%)	13%	14%
UK cases as proportion of cases closed in principle	8%	5%	-	-
UK cases as proportion of leading cases closed in principle	DNR	DNR	-	-
Payment of just satisfaction				
i) Within deadline	19% (3)	50% (4)	37%	36%
ii) Payment was late	6% (1)	12.5% (1)	11%	5%
iii) Payment is outstanding and over deadline[2]	76% (12)	37.5(3)	52%	59%
Amount of just satisfaction (€)				
i) Total amount	143,234	371,160	-	-
ii) Average per case	11,936	28,551	34,874	42,940
iii) Pecuniary damage	8,185	-	-	-
iv) Non-pecuniary damage	1,000	58,000	-	-
v) Costs	68,770	313,160	-	-
vi) Global awards[3]	65,279	-	-	-
UK cases as proportion of leading case outstanding >2yrs	DNR	DNR		
Cases outstanding <2yrs	50% (6)	61.90% (13)	64%	41.76%
Cases outstanding 2-5yrs	8% (1)	23.81% (5)	22%	51.52%
Cases outstanding >5yrs	42% (5)	14.29% (3)	15%	6.72%
Final resolutions pending[4]	104	42	774 (total)	598 (total)

Statistic	UK performance		Council of Europe average	
	2009	2010	2009	2010
UK cases before the Committee of Ministers	27 (0.34%)	30 (0.32%)		
Proportion of UK cases that are leading cases	44% (12)	70% (21)	10%	11%

[1] DNR = 'Did not register' i.e. the number was so low it did not merit separate inclusion in the report's graph and formed part of a broader 'Other' category.

[2] Note that the quarterly cycle of Committee of Ministers meetings means that, in some of these cases, even though States may have made payment on time, the Committee may not yet have had chance to note the evidence of this and so the payment may not in fact have been late.

[3] Amount awarded not broken down into separate heads of damages and costs.

[4] Cases where the Committee of Ministers has agreed to close scrutiny of the case but the final resolution formally striking the case from their list has not been adopted.

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