



Ministry of
JUSTICE

Responding to human rights judgments

Government Response to the
Joint Committee on Human Rights'
Fifteenth Report of Session 2009-10

July 2010



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

July 2010

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Responding to human rights judgments

Introduction

On 26 March this year, the Joint Committee on Human Rights (JCHR) published its Report, *Enhancing Parliament's role in relation to human rights judgments*¹ ('the Joint Committee report'). This is the third in a series of broadly annual reports monitoring the Government's progress in implementing adverse human rights judgments from both the European Court of Human Rights (the Court) and the domestic courts. This paper sets out the Government's position on the implementation of such judgments and in doing so responds to the Joint Committee's Report and the recommendations made in it.

Since the publication of the Joint Committee's Report, there has been a change of government. Therefore, although the initial report referred to the policies of the previous administration, the contents of this paper represent the views of the current Government. The Joint Committee responsible for the Report to which this paper responds has also been dissolved, and the Government looks forward to working with its successor.

This paper is divided into three main sections. Following some initial general comments, the first main part addresses the Government's record on the implementation of adverse judgments. The second main part considers specific cases on which the Joint Committee has commented, and the third main part describes the wider system for responding to judgments of the European Court of Human Rights and declarations of incompatibility. Quotations from the Joint Committee report are framed in boxes for ease of identification. Paragraph numbers cited refer to the Joint Committee's Report, unless stated otherwise, and all references to Article numbers are to the European Convention on Human Rights (the Convention).

¹ Fifteenth Report of Session 2009-10; HL Paper 85, HC 455; available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/8502.htm>

General Comments

This paper considers two particular types of human rights judgments:

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

The common feature of these judgments is that their implementation usually requires changes to legislation,² 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 Convention). 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. This responsibility also results from Article 46.

The Committee of Ministers is a political body, on which every Member State of the Council of Europe is represented. It is advised by a specialist Secretariat³ in its work overseeing the implementation 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.

² Whether primary legislation (i.e. Acts of Parliament) or subordinate legislation (e.g. statutory instruments).

³ The Department for the Execution of 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 rights⁴. If a higher court⁵ finds itself unable to do so in respect of primary legislation,⁶ 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, 26 declarations of incompatibility have been made, of which 18 have become final (in whole or in part) and none of which are subject to further appeal. Information about each of the 26 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 made⁷; 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.

The Government's approach to human rights

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 properly reflects our traditions. To this end, a Commission will be created 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. More information will be provided to the Joint Committee on the Commission, its remit and operation as these details are finalised.

⁴ The rights drawn from the ECHR listed in Schedule 1 of the Human Rights Act 1998.

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

⁶ Or secondary legislation in respect of which primary legislation prevents the removal of any incompatibility with the Convention rights other than by revocation.

⁷ Section 4(6) of the Human Rights Act.

As the Joint Committee has highlighted in its report,⁸ the Interlaken Conference on Reform of the European Court of Human Rights, held in Switzerland on 18 and 19 February 2010, led to the adoption of a political declaration and an action plan to bring about much-needed reform of the European Court of Human Rights. A significant volume of work is now beginning in the Council of Europe to give effect to this action plan, and the UK is an active participant in many of the work programmes being developed.

⁸ At para 5-7 of the Joint Committee's Report.

The UK's record on the implementation of judgments

The Government's record on the implementation of judgments is a strong one and steps are being taken to improve performance further by improving co-ordination and communication across Government. These steps are set out in detail over the course of this section of the paper.

The UK is responsible for a relatively low number of cases (27) before the Committee of Ministers, representing 0.34% of the overall total. Although there is a large proportion of leading cases among that number 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, 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.

However, the Government notes with concern its relatively weak performance regarding the percentage of just satisfaction payments made on time. The reasons for this will be investigated by the Ministry of Justice and monitoring work will be undertaken as part of the Department's co-ordination role to ensure the problem does not reoccur.

The UK also has a high proportion of leading cases outstanding for more than five years. However, six of these cases are a group relating to one issue, the investigation of deaths in Northern Ireland,⁹ and work is progressing to bring those cases to a close; only one general measure remains outstanding. While it is important that these cases 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.

However, subject to the exceptions noted above, performance has generally been maintained at a high level across both 2008 and 2009. The overall number of UK cases before the Committee of Ministers has fallen from 34 in 2008 to 27 in 2009, and the amount of just satisfaction awarded against the UK has also fallen. Finally, it should be noted that, although the number of final resolutions pending for UK cases is extremely high, this does not reflect badly on the UK. The Committee of Ministers has agreed to close all the cases listed in this category, and all that remains is the adoption of final resolutions formally striking the case from the Committee's list. Indeed, the fall in the number of UK final resolutions outstanding since last year, despite the overall

⁹ *McKerr v UK, Finucane v UK, McShane v UK, Shanaghan v UK, Jordan v UK, Kelly & others v UK.*

increase in the number outstanding across all States, should instead be viewed as an achievement.

The statistics produced by the Court itself in relation to the number of violations found against each State have also now been considered. In 2009, 18 judgments were made in UK cases, in 14 of which violations were found. Of these violations, seven (50%) were found in relation to Article 14 (the prohibition on discrimination in the exercise of Convention rights). This is a reflection of the large number of cases relating to access to widows' benefits by widowers, the last of which were decided in 2009. The incompatibility that led to these cases has been remedied and it unlikely that this situation will be repeated next year.

More broadly, the number of judgments against the UK compares favourably with that of many other States; the tally of 14 cases represents just 1% of the violations found by the Court in 2009.

The JCHR said:

In short, we find it unfortunate that the UK's generally good record on implementation is undermined to a considerable extent by the very lengthy delays in implementation in those cases where the political will to make the necessary changes is lacking. In our view, whatever the challenges thrown up by a judgment of the European Court of Human Rights, a delay of five years or more in implementing such a judgment can never be acceptable. However good the record in the majority of cases, inexcusable delay in some cases undermines the claim that the Government respects the Court's authority and takes seriously its obligation to respond fully and in good time to its judgments. It is also damaging to the UK's ability to take a lead in improving the current backlog at the Court by encouraging other States with far worse records to take their obligations under the Convention more seriously. The UK, with its strong institutional arrangements for supervising the implementation of judgments, is in a good position to lead the way out of the current crisis facing the Court, but leaders must lead by example. (*Paragraph 33*)

As stated above, the Government is committed to the European Convention on Human Rights and its obligations under the Convention. The approach to the implementation of judgments in the majority of cases has historically been timely and effective; the Joint Committee has previously acknowledged good practice in this area.¹⁰ There are some particularly sensitive and difficult areas in which progress towards implementation has not been as rapid as in other cases. However, this is a necessary consequence of the complexity of the issues raised in such cases.

¹⁰ *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>

While 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. Whenever the implementation process does take more than five years to complete, the reasons for this will of course be explained to the Joint Committee.

Although the Joint Committee's report focuses on a number of specific cases, the UK has had a number of cases discharged from scrutiny in recent years and, as set out in more detail above, the number of UK cases before the Committee of Ministers has fallen since last year. This demonstrates that the UK is taking effective action to address the issues identified by the European Court of Human Rights.

The JCHR said:

It would be helpful if the Government could review the annual statistics provided by both the Court and the Committee of Ministers relating to the United Kingdom and provide an overview of any developments it considers relevant or significant. We consider that such an annual review of the statistical information by the Government would help inform parliamentarians of the work of the United Kingdom to meet its obligations under the Convention and would also enhance our understanding of the Government's position. (*Paragraph 31*)

In 2009, the then-Minister of State, Michael Wills, wrote to the Joint Committee following the publication of the Committee of Ministers' Annual Report for 2008, enclosing a copy of the report and highlighting the key points relating to the UK. However, as the Committee of Ministers published its Annual Report for 2009 on 14 April, it was not possible to provide the report and analysis to the Joint Committee before the General Election.

There has now been sufficient opportunity to analyse the UK's performance, both for 2009 alone and in comparison with performance in 2008. Annexed to this paper is a more detailed statistical breakdown of performance, the key points of which have been set out above.

Consideration of specific cases

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

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 the House of Lords. However, the European Court of Human Rights ruled¹¹ that 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).

The previous Government, following public consultation on initial proposals set out in the then-Policing and Crime Bill,¹² introduced a new framework for the retention of the biometric data of those not convicted of a crime. This framework, which is part of the Crime and Security Act 2010, involves:

- *Adults*: six-year retention period for the fingerprints and DNA profiles of those arrested but not ultimately convicted of an offence, irrespective of the seriousness of the crime for which they were arrested;
- *16 and 17 year-olds*: six-year retention period for the fingerprints and DNA profiles of minors aged 16 and 17 years arrested but not ultimately convicted of a serious offence. For other recordable offences (lesser offences) the retention period is three years;
- *Under 16 year-olds*: three-year retention period for the fingerprints and profiles of minors aged under 16 years arrested but not ultimately convicted of an offence, irrespective of the seriousness of the crime for which they were arrested. Steps have already been taken to remove the records of children under 10 from the National DNA Database, and such material will not be retained in the future;
- *Volunteers*: Material which has been given voluntarily is to be destroyed as soon as it has fulfilled the purpose for which it was taken, unless, among other reasons, the individual consents to its retention. Consent to retention of material may be withdrawn at any time.

In relation to terrorism and national security, if the responsible Chief Officer determines that fingerprints or DNA profiles are to be retained for national security purposes, they need not be destroyed in accordance with the above retention periods for as long as the determination has effect. Such a determination has effect for a maximum of two years beginning with the date

¹¹ Application No. 30562/04, Grand Chamber judgment of 4 December 2008.

¹² Now the Policing and Crime Act 2009.

on which the material would otherwise be required to be destroyed, but may be renewed.

Section 22 of the Act requires the Secretary of State to make provision for the destruction of material taken prior to the commencement of the relevant provisions of the Bill, which would have been destroyed had those provisions been in force when the material was obtained.

The JCHR said:

The Government's response to this case has been inadequate both in terms of the approach it has adopted to implementation and in relation to the substance of the proposals in the Crime and Security Bill. While we welcome the Government's decision to act with haste, we are concerned that in this case, the Government's priority has not been to remove the incompatibility identified by the European Court of Human Rights, but to ensure the continued operation of the National DNA Database with as few changes as possible to its original policy... There are a number of positive aspects to the Government's proposals in the Crime and Security Bill, including the proposal to destroy all DNA samples within 6 months or as soon as a profile has been obtained. However, in our view, the proposal to continue to retain the DNA profiles of innocent people and children for up to 6 years irrespective of the seriousness of the offence concerned and without any provision for independent oversight, is disproportionate and arbitrary and likely to lead to further breaches of the ECHR... (Paragraph 52)

In our view, the Government's decision to purposely "push the envelope" in this case creates the risk of further violations of the Convention and fails to satisfy its obligations under Article 46... we consider that there is a significant risk that the proposals in the Crime and Security Bill would lead to further litigation both at home and at the European Court of Human Rights and a significant risk of further violations of the right to respect for private life by the United Kingdom... (Paragraph 53)

The present Government agrees that the six-year retention period proposed in the Crime & Security Act 2010 is excessive and such an extended period of DNA retention for those who have never been convicted is unacceptable. Legislation will be brought forward as soon as possible to adopt the essential protections of the Scottish model, which was noted with approval by the Court in reaching its judgment in the *S & Marper* case.

The JCHR said:

We also remain concerned that the Government has not yet published any clear timetable for dealing with legacy samples. After the decision in *S & Marper*, it is clear that some individuals' DNA is currently retained in breach of the ECHR, as part of the National DNA Database. Without review, this continued retention is likely to lead to further litigation with associated costs to individuals and to the taxpayer. (Paragraph 55)

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The Government also intends to bring the retention of historic samples and profiles into line with the judgment of the Court as soon as possible. A number of potential options to do this as soon as possible are being explored, including commencing some or all of the DNA provisions of the Crime & Security Act 2010 where that would assist us in achieving early implementation of our policy objectives and the judgment in *S & Marper*.

Detention of foreign terrorism suspects (*A & others v UK*)

In December 2001, the United Kingdom derogated¹³ from Article 5, the right to liberty, in respect of Part IV of the Anti-Terrorism Crime and Security Act 2001 (ATCSA). The applicants were detained under Part IV as “suspected international terrorists.” They challenged their detention in the Special Immigration Appeals Commission (SIAC) and on appeal to the House of Lords.

The European Court of Human Rights held¹⁴ that the derogation was valid but found that, as the detention measures only applied to foreign nationals, they were discriminatory. It also found that, in the proceedings before the SIAC, some allegations were general assertions or contained entirely in closed evidence unavailable to the applicants or their counsel, so could not be effectively challenged. Lastly, the Court stated that there was no way for the applicants to claim compensation before the national courts in respect of these violations. The Court therefore found violations of Article 5(1), (4) and (5).

Part IV of the ATCSA has now been repealed and replaced with a system of control orders, under the Prevention of Terrorism Act 2005, and the United Kingdom withdrew its derogation. The House of Lords also applied the Court’s decision in *Secretary of State for the Home Department v AF*,¹⁵ holding that at least the gist of closed evidence should be provided to those involved in cases before the SIAC. Subsequently, the domestic courts have held that, where these safeguards have not been applied, control orders must be revoked.¹⁶

The JCHR said:

We do not accept the Government’s argument that no further general measures are required. Part IV ATCSA 2001 was replaced by the control order regime in ss. 1–9 of the Prevention of Terrorism Act 2005 and that regime also involves secret evidence and special advocates, modelled closely on the regime which was the source of the violation in *A v UK*. Therefore, although *A v UK* concerned the 2001 Act not the 2005 Act, it is clear to us that the generality of its reasoning about the potential unfairness caused by secret evidence requires measures also to be taken in relation to control orders in order to prevent future violations. (*Paragraph 38*)

We repeat our recommendation, made in previous reports, that in order to give full effect to the decision of the Court in *A v UK*, the control orders legislation be amended to require the disclosure to the controlled person of the essence of the case against him. (*Paragraph 39*)

¹³ In accordance with Article 15 of the Convention.

¹⁴ Application No. 3455/05, Grand Chamber judgment of 19 February 2009.

¹⁵ [2009] UKHL 28; the case concerned the ability of those subject to control orders to have access to the evidence against them when challenging the application of their control orders.

¹⁶ See *Secretary of State for the Home Department v AN* [2009] EWHC 1966 (Admin) and *BM v Secretary of State for the Home Department* [2009] EWHC 1572 (Admin).

Protecting our civil liberties and protecting the public are not mutually exclusive aims. The first duty of any government is the protection of its citizens and the Government will devote its energies and efforts to doing just that.

The Programme for Government,¹⁷ published on 20 May, included a commitment to review control orders urgently, as part of a wider review of counter-terrorism legislation, measures and programmes. This is now happening. The review of the control order system will consider all the relevant aspects.

The JCHR said:

We urge the Government not to take a narrow approach to the implementation of the judgment in *A v UK* and repeat our recommendation in our report on counterterrorism, that the Government urgently conduct a comprehensive review of the use of secret evidence and special advocates in all contexts, in light of the judgments in *A v UK* and *AF*, to ascertain whether their use is compatible with the minimum requirements of the right to a fair hearing, and report to Parliament on the outcome of that review. (*Paragraph 40*)

The urgent review of counter-terrorism legislation outlined above will include consideration of the key concerns that have been expressed about the operation of the special advocate system, including by the Joint Committee. We will ensure that the special advocate system remains compatible with the UK's human rights obligations.

It will generally be for the courts to consider the applicability of the disclosure requirements set out in *AF* to closed proceedings in contexts other than proceedings relating to control orders imposing stringent restrictions on liberty. As the Joint Committee is aware, there is ongoing litigation about the applicability of those disclosure requirements in other such contexts.

¹⁷ *The Coalition: Our programme for government*, at page 24; available at: <http://programmeforgovernment.hmg.gov.uk/>

Length of criminal confiscation proceedings (*Bullen & Soneji v UK*)

The Crown Prosecution Service brought confiscation proceedings against the applicants, who had been convicted of money-laundering. The applicants complained that the length of time these proceedings took to be concluded amounted to excessive length of proceedings under Article 6(1). The European Court of Human Rights accepted this and found a violation of Article 6(1).¹⁸ The Court cited a number of factors that each contributed to what was, cumulatively, an unacceptable delay.

The JCHR said:

“The breach of the Convention found in the case of *Bullen and Soneji* appears to have resulted from a failure of practice rather than law. It is therefore right that the Government should seek to ensure that all those responsible for prosecuting or adjudicating upon criminal trials and confiscation proceedings are aware of their duties under Article 6 ECHR to ensure a fair trial within a reasonable time. We are satisfied that the UK is on the right track in respect of its implementation of this judgment, provided that it acts on the commitments for further action that it has made to the Committee of Ministers. We also recommend that the Ministry of Justice, Her Majesty’s Courts Service and the relevant prosecuting authorities closely monitor practice in this area to ensure that similar delays do not occur in the future.” (*Paragraph 97*)

As the Joint Committee noted in its report,¹⁹ the Government has already issued guidance on the need to bring cases in a timely manner to the Crown Prosecution Service and the Revenue and Customs Prosecution Office. The National Policing Improvement Agency has issued similar guidance to Accredited Financial Investigators within police forces.

The only remaining issue raised in this judgment is the efficient listing and management of cases by the courts. As the listing of cases before the courts is a judicial function, the assistance of the judiciary has been required. The senior judiciary have consulted with Crown Court judges on how best to address the challenges posed in listing cases of this type before the Crown Court. As a result, the Listing Section in the Crown Court Manual is being revised and updated to reflect the judgment in this case, along with other necessary updates. The Lord Chief Justice intends to give a Practice Direction to bring these changes into effect by the end of July.

Procedures in the Court of Appeal (Criminal Division) have been introduced whereby the Registrar of Criminal Appeals personally monitors cases which may experience delay, in order to give such directions as are necessary to hasten the progress of those cases. In addition, Court of Appeal (Criminal Division) staff with responsibility for managing cases on behalf of the Registrar have been instructed to pay particular regard to the entirety of the length of criminal proceedings, from their initiation to the final determination of any

¹⁸ Application No. 3383/06, Chamber judgment of 8 January 2009.

¹⁹ Para 95.

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appeal. Therefore, cases which are delayed during the initial trial may have any appeal (or application for leave to appeal) expedited, to make sure the total time taken to resolve the case does not violate Article 6.

Finally, the Supreme Court has put in place performance indicators for its Registry regarding the efficient management of cases, and has also introduced mechanisms to prevent undue delay where these deadlines cannot be met. The Government considers that, in light of these new systems for ensuring both efficient case management and effective oversight thereof, the implementation of this judgment has been completed.

Summary possession of people's homes (*McCann v UK*)

This case²⁰ concerns procedural safeguards in cases where local authorities seek possession of a house. Following the breakdown of the applicant's marriage, his wife was encouraged by the local authority to sign a 'notice to quit' their property. As this notice brought the tenancy to an end, the local authority tried to evict the applicant. In the eviction proceedings, he argued he should be allowed to raise a defence to possession under Article 8 of the Convention (the right to respect for private and family life).

The Court found that, given the nature of the summary possession²¹ proceedings brought against the applicant, he had been deprived of his home without the possibility of any court being able to assess the proportionality of this. It therefore found a violation of Article 8.

The House of Lords reconsidered²² the then-leading decision in this field²³, in light of the Court's decision in *McCann*. The result was that, in summary possession cases, a public law defence is now available in a broader range of circumstances.

However, the case of *Kay v Lambeth Borough Council* is now the subject of an application to the European Court of Human Rights (*Kay v UK*) and a judgment in that case is awaited.

The JCHR said:

...[W]ithout action by the Government, domestic courts remain bound by the decisions of the House of Lords in *McCann* and *Doherty*, that express consideration of the proportionality of any interference with the right to respect for home in Article 8 ECHR is not required. We think it is predictable that this position will not find favour with the European Court of Human Rights. We consider that the Minister should be required to explain why the costs of resisting further litigation in the case of *Kay v United Kingdom* on this repeat issue are justified... (paragraph 70)

We are concerned that the issue of respect for people's homes in summary possession cases remains unresolved, despite numerous decisions of the House of Lords and the European Court of Human Rights. We welcome the Government's acknowledgment that should the European Court of Human Rights decide again, in the pending case of *Kay v United Kingdom*, that domestic law is incompatible with Article 8 ECHR, it will have to revisit the

²⁰ Application No. 19009/04, Chamber judgment of 13 May 2008.

²¹ Legal process by which a landlord can evict a tenant who is in breach of the lease agreement or is occupying the premises after termination of the lease. The consent of those occupying the land is not required and the only defence is that the necessary conditions for using the power have not been met (e.g. if there is a dispute as to whether the terms of a lease have been broken).

²² *Doherty v Birmingham City Council*.

²³ *Kay v Lambeth Borough Council*.

question of whether a remedial order or legislation is necessary to remove the breach identified by the Court. Unless the European Court of Human Rights departs entirely from its reasoning in the case of *McCann*, we consider that the Government will inevitably need to revisit the breach identified in that case. We question whether it would not have been more cost effective to reform the summary possession process rather than to pursue further domestic and European litigation. It would be prudent for the Government in the meantime to consider how the process might be reformed to give effect to the decision in *McCann* in the event that the decision in *Kay* goes against it, in order to avoid any further delay following the forthcoming decision in *Kay v UK*. (Paragraph 71)

The question of the appropriate level of scrutiny to be applied in summary possession cases is by no means straightforward. The House of Lords has found it necessary to consider this issue on three separate occasions and a fourth case, *Pinnock v Manchester City Council*, was heard by a panel of nine judges in the Supreme Court at the beginning of July. The position in this area will therefore be reviewed when the decisions of both the Supreme Court in *Pinnock* and the European Court of Human Rights in *Kay v United Kingdom* are received.

In the meantime, some aspects of this issue remain unclear, as the Joint Committee has noted.²⁴ These include the extent to which *McCann* turned on its facts and the precise nature and scope of the proportionality review required by Article 8(2)'s "necessity" criterion. Therefore the costs incurred in fighting the case of *Kay v United Kingdom* were not wasted. We consider that allowing the Court to rule in the case of *Kay* will provide further clarity on whether, and, if so, how, the domestic law in this area requires further refinement.

Furthermore, as previously set out, the cases of *Kay* and *McCann* are very different cases on their facts; accordingly, the Court's judgment in *McCann* does not answer the question of whether the repossession in *Kay* was compliant with Article 8. It should be noted that applicants in *Kay v United Kingdom* do not rely on any personal circumstances that made the decision to seek an order for possession disproportionate. It was on this basis that Lord Bingham (who was in the minority in *Kay v Lambeth Council*) would not have allowed the appeal²⁵ notwithstanding his view that in some extreme cases an individual occupier's personal circumstances might render a decision to seek possession an infringement of Article 8.

²⁴ See para 71 of the Joint Committee's Report, set out above.

²⁵ See *Kay v Lambeth* para 47 "the appellants have not pleaded or alleged facts which give them a special claim to remain. I am satisfied that if these cases were remitted, possession orders would necessarily be made."

Interception of communications (*Liberty & others v UK*)

This case²⁶ concerns a violation of the right to respect for the applicants' correspondence under the Interception of Communications Act 1985. The two applicant organisations alleged that communications between them were intercepted by the State and that the regulatory system meant that they were unable to establish whether an interception had taken place and if so, whether it was lawful.

Arrangements to ensure that intercepted communications were disclosed, and reproduced, only to the limited extent necessary took the form of internal regulations, manuals and instructions never made accessible to the public. The Court therefore concluded that the domestic law was unclear as to the scope or manner of exercise of the state's very wide discretion to intercept communications. The interference was therefore not in accordance with the law and violated Article 8.

The JCHR said:

We note the similarities between certain features of the statutory regime which was in force at the time of the judgment in *Liberty v UK* (IoCA) and the statutory regime which is now in force (RIPA). We therefore consider this to be a case in which full implementation of the judgment of the Court requires the Government to consider general measures which go beyond the repeal of the statutory regime that was in force at the time. We note that compatibility of the RIPA regime will be the subject of a further judgment of the European Court of Human Rights in the forthcoming case of *Kennedy*. In the meantime we urge the Government to give serious consideration to ways in which it could amend the system for supervising the interception of communications to provide greater safeguards for individual rights. It should consider, for example, the powers and reporting of the Interception of Communications Commissioner and the information which the Minister routinely provides to Parliament on surveillance and monitoring; the notification of targets of monitoring and surveillance operations in the future, once those operations have ceased and their products will not be harmed by disclosure; and defining the phrase "national security" in RIPA, so as to provide greater specificity for those seeking and granting warrants as to what threats would and would not be considered sufficient to permit surveillance. (*Paragraph 79*)

The Government notes the Joint Committee's recommendations. Since publication of the Joint Committee's report, the European Court of Human Rights has issued its judgment in the *Kennedy* case, which effectively endorses the compatibility of the UK's interception regime and its oversight with the Convention.

²⁶ Application No. 58243/00, Chamber judgment of 1 July 2008.

Prisoners' correspondence with medical practitioners (*Szuluk v UK*)

The applicant in this case was a prisoner suffering from a life-threatening medical condition that required continuous specialist medical supervision. He complained that, although the practice was in line with prison correspondence rules, correspondence between him and his doctor was being read by prison staff and this amounted to a violation of Article 8 (the right to respect for private and family life).

The Court found²⁷ that there had not been any grounds to suggest that the applicant had ever abused the confidentiality given to his medical correspondence in the past or that he had any intention of doing so in the future. The Court did not share the Court of Appeal's view that the applicant's medical specialist, whose probity had never been challenged, could be "intimidated or tricked" into transmitting illicit messages or that that risk had been sufficient to justify the interference with the applicant's rights.

The JCHR said:

We welcome the Government's swift approach to respond to this judgment. We suggest that our successor Committee might consider the wider issue of prisoners' correspondence with medical practitioners. (*Paragraph 86*)

As the Joint Committee has acknowledged, the Government has taken steps to implement the decision in *Szuluk v UK* so that prisoners may correspond confidentially with a registered medical practitioner who has treated them for a life threatening condition, save for exceptional circumstances in which governors are concerned that the letter does not relate to treatment of that condition. However, the Government suggests there would be limited benefit in the Joint Committee considering the wider point of all correspondence between prisoners and registered medical practitioners because the existing policy on continuity of healthcare for prisons sets out that healthcare staff in prisons may have a legitimate need to see these records, particularly where they are copied in as primary healthcare providers, in order to implement appropriate care at the establishment.

²⁷ Application No. 36936/05, Chamber judgment of 2 June 2009.

Care proceedings (*RK & AK v UK*)

The applicants' child was made the subject of a care order by Social Services due to the apparently unexplained injuries the child had suffered. It was eventually discovered that the child had brittle bone disease and the child was returned to the applicants. The applicants claimed they had not been able to challenge the decision of the social workers effectively.

The Court held that there had been a violation of Article 13,²⁸ as there was an arguable claim that the family's Article 8 rights had been violated. They were therefore entitled to a means of claiming that the local authority's handling of the procedure was responsible for any damage which they suffered and of obtaining compensation for that damage.

However, the facts of the case took place before the Human Rights Act 1998 came into force; a remedy would now be available to the applicants as the Council employing the social workers is a public authority for the purposes of section 6 of the Human Rights Act and its decisions can therefore be challenged under that Act.

The JCHR said:

As the Minister rightly states, the enactment of the Human Rights Act makes cases like *RK and AK* less likely to need to go to the Strasbourg Court in the future, as applicants should be able to seek a remedy for their grievance in the UK. However, it appears that there are still some historic cases in the system which involve events which occurred before the coming into force of the Human Rights Act. Whilst we accept that the enactment of the Human Rights Act provides redress for cases where the events occurred after the Act came into force (2 October 2000), which is likely to be compatible with Article 13, no such mechanism exists for pre October 2000 cases. In such cases, the UK will, almost inevitably, be found to be in breach of the requirement to ensure an effective remedy under Article 13, irrespective of whether or not the Court finds a violation of a substantive Article of the Convention. In our view, where a finding of a violation is inevitable, the UK should actively pursue settlement negotiations, in order to relieve the Strasbourg Court of the burden of dealing with repetitive cases and to save both the applicant and the Government, the cost and inconvenience of pursuing the litigation in Strasbourg. (*Paragraph 92*)

Every case of course has to be considered on its own merits. It is not possible to commit to pursuing settlement negotiations in all cases where the facts occurred before the entry into force of the Human Rights Act, but settlements are pursued in appropriate cases to save cost and inconvenience to both the applicant and the Government. It would be an inappropriate use of public funds to pursue settlement in clearly unmeritorious claims, such as those that have been made out of time.

²⁸ Application No. 38000/05, Chamber judgment of 30 September 2008.

Prisoners' voting rights (*Hirst v UK; Smith v Electoral Registration Officer*)

The European Court of Human Rights found²⁹ that the United Kingdom's prohibition on all convicted serving prisoners from voting breached Article 3 of the First Protocol (right to free elections).

The previous Government conducted a two stage consultation on how to approach the matter, and in the second consultation document proposed possible options for implementation based on sentence length. That consultation closed in September 2009 but the results were not published.

The JCHR said:

We are concerned that, despite the time taken to publish the second consultation, the Government's proposals appear to take a very limited approach to the judgment in *Hirst*. As we noted earlier in this report, this type of approach can lead to further unnecessary litigation with the associated burden on the European Court of Human Rights and the taxpayer. We accept that the Grand Chamber left a broad discretion to the United Kingdom to determine how to remove the blanket ban. However, the Court stressed that withdrawal of the franchise is a very serious step and gave guidance on the types of offences which might rationally be connected with such a step. We are not persuaded that automatic disenfranchisement based upon a set period of custodial sentence can provide the "discernible link between the conduct and circumstances of the individual" and necessity for the removal of the right to vote required by the Grand Chamber. In our view, this approach will lead to a significant risk of further litigation. (*Paragraph 107*)

Despite our concerns about the narrow nature of the Government's approach, our overriding disappointment is at the lack of progress in this case. We regret that the Government has not yet published the outcome of its second consultation, which closed almost 6 months ago, in September 2009. This appears to show a lack of commitment on the part of the Government to proposing a solution for Parliament to consider. (*Paragraph 108*)

It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK*. The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable. (*Paragraph 116*)

So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation. (*Paragraph 117*)

²⁹ *Hirst v United Kingdom (No. 2)*, Application 74025/01, judgment of 6 October 2005; see also *Smith v Scott* [2007] CSIH 9.

The Government's analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government's international obligation to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations. (*Paragraph 119*)

The Government is considering afresh the issue of prisoner voting rights. The issues raised are important and Ministers will be giving them full consideration. A fuller update will be provided to the Committee of Ministers at their meeting in September. Information provided at that meeting will be passed on to the Joint Committee, in line with usual practice relating to such updates. The approach to sharing information provided to the Committee of Ministers is discussed in more detail later in this paper.

Equal treatment of occupants of caravan sites (*Connors v UK*)

The European Court of Human Rights found³⁰ that the eviction of the applicant and his family from a local authority Gypsy and Traveller caravan site was not attended by the requisite procedural safeguards, in that there was no requirement for the local authority to establish proper justification for the serious interference with the applicant's rights. The eviction therefore could not be regarded as justified by a "pressing social need", or proportionate to the legitimate aim being pursued, and therefore breached Article 8 (right to private and family life).

The JCHR said:

In view of this apparent yet further delay in remedying the incompatibility in this case, we have written to the Minister to ask whether the Government intends to introduce the statutory instrument necessary to bring section 318 into force before the end of this Parliament; if not why not; and to ask for a full explanation of why a statutory instrument which would bring into force a piece of legislation which prevents future breaches of the Convention is not regarded as a priority claim on parliamentary time by the Government.
(Paragraph 123)

In late 2008, the previous Government conducted a consultation in response to concerns raised by local authorities and Gypsies and Travellers about some of the terms in the Mobile Homes Act 1983 (the 1983 Act). Following this consultation, statutory instruments were drafted that would commence section 318 of the Housing and Regeneration Act 2008 and amend the 1983 Act for local authority Gypsy and Traveller sites. There was not enough Parliamentary time to debate these statutory instruments before the general election.

A decision on section 318 will be made shortly, in the context of a wider strategy being developed in relation to Gypsies and Travellers, and an announcement will be made in due course.

³⁰ Application 66746/01, judgment of 27 August 2004.

Interim measures: Rule 39 cases (*Al Saadoon & Mufdhi v UK*)

The applicants are Iraqi nationals suspected of involvement in the murders of two British soldiers and, at the request of the Iraqi authorities, were detained in Iraq by British forces pending trial. The Iraqi authorities then requested that the applicants be transferred into their custody.

The applicants lodged a claim with the European Court of Human Rights³¹ regarding that their transfer and trial in Iraq. They then obtained a Rule 39 indication restraining the UK from transferring them, pending the European Court of Human Rights' consideration of the substantive case. The then-Government took the view that, wholly exceptionally, it could not comply with this indication following the expiry of the UN Security Council Resolution mandate for Multi National Forces in Iraq, which gave the UK the power to detain. The applicants were subsequently transferred and tried by the Iraqi Higher Tribunal. The charges were dismissed due to insufficient evidence but a re-trial is now pending.

The European Court of Human Rights rejected the argument that the UK was obliged by international law to transfer the applicants. The Court held any impediment to compliance with the Rule 39 indication was of the Government's own making, through failure to obtain satisfactory assurances regarding the application of the death penalty earlier.

Furthermore, in the absence of binding assurances, there were substantial grounds for believing that the applicants were at real risk of being condemned to the death penalty if convicted and that the UK had therefore acted in breach of their rights under Article 3. Due to of the risk of the death penalty being imposed if convicted, the inhuman treatment was continuing, therefore all possible steps should be taken to seek further assurances.

The JCHR said:

Although there was not a final judgment in this case, because of the seriousness of what was at stake for the individuals concerned we exceptionally decided to write to the Government to raise our concern over its decision not to comply with the Rule 39 request of the court, that the Iraqi applicants be retained by the UK, in order to allow their case to be considered by the European Court of Human Rights. We welcome the Government's acceptance that the decision of the European Court of Human Rights on the scope and jurisdiction of the ECHR is final, and question why the analysis of the Court of Appeal on this question was allowed to form the basis for the decision to ignore the Rule 39 request from Strasbourg. We remain concerned about the Government's conduct in this case. (*Paragraph 129*)

³¹ Application No. 61498/08, Chamber judgment of 2 March 2010.

We are concerned that despite the extremely grave issues at stake in this case, we had to write to the Secretary of State for Defence in order to secure a more detailed chronology and account of and the decisions taken by the Government. A full response took over two weeks. We recommend that in any case where the Government considers refusing a Rule 39 request, information about that request and the Government's decision should be provided to us routinely and without delay. (*Paragraph 130*)

The judgment in this case is not yet final. We have not had the opportunity to consider the Government's views on its findings and we have no information on whether the Government intends to request that the case is considered by the Grand Chamber. We reiterate our view that the issues raised in this case are serious ones. We note that a number of additional applications against the UK about the scope of the jurisdiction of the ECHR and its application to the activities of UK forces in Iraq are due to be heard by the ECtHR during 2010. We particularly draw the Government's attention to the ECtHR guidance in this case that a violation of the rights of the applicants to be free from inhuman and degrading treatment is ongoing, and that the Government remains under an obligation to seek diplomatic reassurances from the Iraqi Government that the death penalty will not be applied in this case. We recommend that the Government provide a full response to the conclusions of the ECtHR in this case, including whether a request for a hearing by the Grand Chamber is planned. We recommend that our successor Committee consider any Government response and keep this case under close scrutiny in the next Parliament. (*Paragraph 135*)

Having considered the Chamber judgment of the European Court of Human Rights, the Government has requested that this case be referred to the Grand Chamber. There are issues regarding a number of aspects of the Chamber's analysis of the position that require confirmation and clarification. The case also raises serious issues about the circumstances in which the Convention applies outside the territory of Council of Europe states.

The Government notes the Court's finding that the risk of the imposition of the death penalty if the applicants are convicted breaches their rights, although the judgment is not yet final pending the outcome of the referral request. Work continues, as before, to secure assurances from the Iraqi authorities that the applicants will not be subject to the death penalty if they are convicted. The applicants remain in Iraqi custody and the Government is satisfied that the Iraqi authorities are abiding by their assurances regarding humane treatment and conditions.

The UK complies with Rule 39 indications as matter of course but the facts of this case were entirely exceptional. Given the request by the Iraqi authorities to hand over the suspects for criminal trial, and the expiry of the UK's power in international law to continue to detain the applicants, there was an objective impediment to compliance. In those circumstances, there was no legal option other than to transfer the applicants to Iraqi custody.

**Suitability of care home workers to work with vulnerable adults
(*Wright v Secretary of State for Health*)**

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 by the High Court,³² a decision that was confirmed by the House of Lords.³³ However, by the date of the House of Lords' judgment, the transition to a new scheme under the Safeguarding Vulnerable Groups Act (SVGA) 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.

The JCHR said:

We noted the House of Lords' decision that there needed to be a swift method for hearing both sides of the story and before irreparable harm was done. We concluded that it was unclear how quickly a hearing involving the barred person, at which he or she could make representations, would take place under the new [SVGA] scheme. We recommended that the Government consider whether the procedure needs to be amended to give effect to the judgment by ensuring that an individual who is placed on the barred list without the possibility of making representations is able to make representations at a full hearing as a matter of urgency and, as the House of Lords held, "before irreparable damage [is] done." We reiterate these concerns and encourage the Government to clarify the issue. (*Paragraph 141*)

This case primarily concerned the issue of provisional listing, which could last for some time under the previous barring regimes. The arrangements for barring decisions under the Vetting and Barring Scheme (the scheme introduced by the Safeguarding Vulnerable Groups Act) are not the same, and at the time the relevant legislation was passed were considered compatible with human rights law. The Joint Committee will however be aware that the Government has announced the remodelling of the Vetting and Barring Scheme, and relevant human rights issues will be considered as part of this process.

³² [2006] EWHC 2886 (Admin).

³³ [2009] UKHL 3.

The JCHR said:

We have not had an opportunity to enter into correspondence with the Government on the scope of concerns raised by the Chairman of the Administrative Justice and Tribunals Council (AJTC) about the right to a fair hearing in relation to barring decisions made under the Safeguarding Vulnerable Groups Act 2006. We publish the recent letter of the Chairman of the AJTC with this report. We consider that the concerns which he has raised about the scope of the right to appeal in respect of barring decisions are serious ones. We recommend that the Government should respond directly to the Chairman of the AJTC, including its analysis of the compatibility of Section 4 of the Safeguarding Vulnerable Groups Act 2006 with Articles 6 and 8 ECHR. We call on the Government to publish that response as soon as possible. (*Paragraph 143*)

The Government will respond to the letter from the Chairman of the AJTC as soon as possible, and make its response publicly available.

**Religious discrimination in the sham marriages regime
(*Baiai v Secretary of State for the Home Department*)**

The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 sets out the Certificate of Approval scheme that was introduced to tackle sham marriages. Under the scheme, all those subject to immigration control who wish to marry in the UK and Isle of Man must seek permission from the Secretary of State to marry. Once a Certificate of Approval is granted they can give notice to marry. However, marriages taking place in the Anglican Church were exempted from this scheme. Section 19(1), which granted this exemption, was declared³⁴ incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Article 12 (right to marry), insofar as it discriminated between civil marriages and Anglican marriages.

The JCHR said:

We welcome the Government's decision to bring forward a Remedial Order in this case. Unfortunately, as we have no information about the substance of the Order or its likely timetable, we are unable to consider the substance of the Government's approach. We are concerned that it is now almost a year since we asked for further information on this case. The relevant declaration of incompatibility is over three years old and yet we still have no clear proposals to scrutinise or any timetable for action. (*Paragraph 151*)

The previous Government did not succeed in remedying the incompatibility in the Certificate of Approval scheme and it has been noted that the first judgment in this case dates back to 2006. The Government takes its obligations in relation to the European Convention on Human Rights seriously and is committed to removing the incompatibility found in relation to the Certificate of Approval scheme. In this regard, however, it should be noted that, while the Joint Committee's Report refers to Article 9 (right to freedom of thought, conscience and belief), the original declaration of incompatibility in the case of *Baiai* relates to Article 14 read with Article 12 as highlighted above; Article 9 of the Convention was not mentioned in the declaration of incompatibility by the High Court or subsequently by the House of Lords.

To remove the incompatibility, a non-urgent Remedial Order (under Section 10 of the Human Rights Act) will be laid in Parliament before the Summer Recess. The Remedial Order is intended to come into force by the end of 2010 or in early 2011, subject to Parliamentary approval.

³⁴ [2008] UKHL 53.

The JCHR said:

If the Government intends to remove the entire Certificate of Approval Scheme, this would be a relatively simple legislative change, which could have been achieved during this parliamentary session with relative ease. However, we regret that the Government has moved so slowly towards the production of a draft Order that it cannot be considered before the end of this Parliament. In the meantime, this scheme continues to operate in a discriminatory way, in breach of the right to marry without discrimination. In the light of the earlier prolonged delay in this case, further procrastination is unacceptable. We call on the Government to publish its draft Order and its timetable for reform as soon as possible. While delay may be inevitable, because of the forthcoming election, any work done by the Government so far to meet this incompatibility should be published in order to inform the next Parliament, and to encourage prompt action to remove the ongoing incompatibility in section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. (*Paragraph 152*)

In our last report, we set out a number of factors to be considered by Government in their response to accepted declarations of incompatibility in cases which were still subject to appeal. One of those factors was administrative cost. Our comments were limited to a very narrow set of circumstances, and even in those small number of cases, our view remains that any declaration of incompatibility should be removed without unnecessary delay. We repeat that the Government's response to cases finding incompatibilities with Convention rights should be proactive, in order to ensure that future breaches are avoided and that public funds are not wasted pursuing repetitive cases. (*Paragraph 154*)

The proposed Remedial Order will abolish 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. This will ensure that the incompatibility with the Convention will be removed. Though the current exemption for the Anglican Church only relates to marriages, not to civil partnerships, and thus there was no discrimination in the application of the scheme to civil partnerships, the Remedial Order will also repeal the Certificate of Approval scheme in relation to civil partnerships. This will ensure consistency between the treatment of civil partnerships and marriages.

The JCHR said:

We would be grateful if the Government would keep us informed of progress in the case of *O'Donoghue v United Kingdom* and provide us with the judgment in the case and any Government response in due course. (*Paragraph 155*)

The Joint Committee will be kept informed of progress in the case of *O'Donoghue v United Kingdom* and a copy of the judgment and any Government response will be provided in due course.

Morris v Westminster City Council

The case concerned the duty on local authorities to offer assistance to families that become unintentionally homeless. The Court of Appeal declared³⁵ section 185(4) of the Housing Act 1996 incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Article 8 (right to private and family life) because it unjustifiably discriminated against British citizens who have a dependant child or pregnant spouse who is ineligible for 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 came into force on 2 March 2009.

The JCHR said:

We have previously reported our view that although this measure may remove the direct cause of the incompatibility identified in these cases, the solution in Schedule 15 of the 2008 Act gives rise to a similar risk of incompatibility. Schedule 15 continues to make a distinction between those entitled to the full range of housing assistance in relation to priority need, and a lesser set of obligations which will be open to those whose priority need is based upon their relationship with a dependant who is subject to certain immigration controls. We note that a similar kind of distinction, albeit based on facts which arose prior to the enactment of Schedule 15, is currently being challenged at the European Court of Human Rights. (*Paragraph 157*)

The Government's view remains that Schedule 15 to the Housing Act 2008 has addressed the incompatibility identified by the Court of Appeal in *Morris*, for the reasons stated in the response to the Joint Committee's previous Report on the implementation of this judgment.³⁶

³⁵ [2005] EWCA Civ 1184; see also *R (Gabaj) v First Secretary of State*, 28 March 2006, unreported.

³⁶ *Responding to Human Rights Judgments: Government response to the Joint Committee on Human Rights Thirst-first Report of Session 2007-08*, at page 25; available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/jtrights.htm>

Systemic issues

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.

Although this section considers both types of human rights judgment, certain issues relate only to one type of judgment; this is indicated at the relevant point.

Co-ordinating the implementation of human rights judgments

Historically, responsibility for implementing adverse judgments has always rested with the Government department responsible for the policy area to which that judgment relates, with the Ministry of Justice undertaking a light-touch co-ordination role. In relation to European Court of Human Rights judgments, this co-ordination role has been undertaken jointly with the Foreign and Commonwealth Office.

The JCHR said:

We welcome the de facto assumption by the Human Rights Division of the Ministry of Justice of the role of co-ordinator, both of the national implementation of judgments of the European Court of Human Rights and of the Government's response to declarations of incompatibility. We look forward to working closely with the Ministry of Justice to develop that co-ordination role in future. (*Paragraph 163*)

Following discussions between the Ministry of Justice and the Foreign and Commonwealth Office on how the implementation of adverse European Court of Human Rights judgments might be undertaken more efficiently, the Ministry of Justice has taken over a number of additional administrative responsibilities.

Lead responsibility for the implementation of a particular judgment continues to rest with the relevant Government department, and the Foreign and Commonwealth Office continue to represent the UK at the Committee of Ministers' meetings on the execution of judgments. However, the Ministry of Justice is now responsible for the domestic co-ordination of information from Government departments leading on cases and its onward transmission to the Foreign and Commonwealth Office.

As part of this process of rationalisation, the Ministry of Justice and the Foreign and Commonwealth Office have taken the opportunity to review a

number of procedures surrounding the implementation of judgments, the outcome of which relates to some of the Joint Committee's recommendations.

The JCHR said:

We believe it to be useful, at the end of this Parliament, to distil our current practice into some guidance for departments, to assist those advising Government departments and also our successor Committee. For the reasons we have explained in chapter 1 above, we believe that the future effectiveness of the ECHR system depends on more effective national implementation of the Convention, in order to stem the flood of applications to Strasbourg, and we therefore publish in the Annex to this Report this guidance which we believe will help to underpin Parliament's important role in monitoring the Government's response to human rights judgments. (*Paragraph 166*)

The most significant change that has been made is the introduction of a specifically-designed form for Government departments to complete regarding the implementation of an adverse judgment from the European Court of Human Rights. This form provides departments with advice on the completion of an Action Plan for implementation, a document which is now required by the Committee of Ministers, and ensures that all the information needed for effective oversight of the implementation process is provided to both the Ministry of Justice and the Foreign and Commonwealth Office. A copy of the form and its accompanying explanatory notes will be provided to the Joint Committee separately.

In addition to the introduction of the form (which is now in operation), the Ministry of Justice is also considering the need for further guidance for Government departments regarding the implementation of adverse judgments. Should a decision to develop such guidance be taken, the guidance offered by the Joint Committee as part of their report will be taken into account during the drafting process.

The JCHR said:

We think it is reasonable to expect the Government's remedial action following Court judgments to follow a target timetable, and to expect the Government to provide reasoned justifications for any departures from that timetable. Good explanations for not keeping to the target timetable will not lightly be dismissed. We believe that the discipline of a target timetable is necessary in order to facilitate effective parliamentary scrutiny of the Government's response. Our guidance for departments therefore spells out a target timetable, requiring notification of judgments within 14 days, detailed plans as to what the Government's response will be within four months, and a final decision as to how the incompatibility will be remedied within six months. (*Paragraph 184*)

The issue of notifying the Joint Committee of adverse judgments is discussed in more detail later in this paper. However, the implementation information form discussed above sets out deadlines for the return of information to the Ministry of Justice. Initial information, such as contact details and a summary of the case, must be provided within four weeks of the judgment and more detailed information on proposals for implementation, including an action plan for submission to the Committee of Ministers, within one month of a judgment becoming final.³⁷

Most judgments of the Chamber of the European Court of Human Rights become final three months after they are handed down; Grand Chamber judgments become final immediately. Hence, the deadlines set on the implementation form mean that in the vast majority of cases, information can be supplied to the Joint Committee within the recommendation's four-month deadline. The exception will be cases that are the subject of a request for referral to the Grand Chamber of the Court following a Chamber decision. This is because the Grand Chamber often takes more than four months to decide a referral request, during which time the judgment will not become final.

Therefore, whilst the Government will strive to provide information on implementation proposals to the Joint Committee within four months, there may be some instances in which this is not possible. In such circumstances, information will be provided at the earliest opportunity beyond the four month timescale. It should also be noted that, as the Joint Committee rightly acknowledge, there may be some cases where the complexity or sensitivity of the issues raised mean that decisions on implementation cannot necessarily be made within a four month period. This is relevant in the context of both adverse European Court of Human Rights judgments and declarations of incompatibility.

Although the implementation form is tailored to the implementation of European Court of Human Rights judgments and therefore is not used in the context of declarations of incompatibility, the Government will endeavour to provide the Joint Committee with information on the proposals to address such declarations within a similar timeframe. The provision of information in relation to declarations of incompatibility is discussed in further detail below.

The Government is, as set out at the beginning of this paper, aware of the highly challenging situation facing the European Court of Human Rights and is actively engaged in the implementation of the Interlaken Conference's Action Plan for reforming the Court and associated systems. It will be 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.

³⁷ The point at which a judgment becomes binding on a State, as defined by the criteria in Article 43 ECHR.

The JCHR said:

We recommend that the Human Rights Division of the Ministry of Justice, working with the Foreign Office, make the necessary arrangements to ensure that systematic consideration is given to whether judgments of the European Court of Human Rights finding a violation by another State have any implications for UK law, policy or practice and that this consideration take place as soon as reasonably practicable after the judgment. (*Paragraph 191*)

We also recommend that the Minister for Human Rights provide a detailed description of the arrangements which are made for this purpose in his memorandum to be provided to the Committee before he next gives oral evidence in relation to human rights judgments. The Minister's memorandum should also include a summary report of the outcome of this consideration of the implications for the UK of Court judgments finding violations by other States. (*Paragraph 192*)

As a consequence of the obligation under the Human Rights Act 1998, public authorities³⁸ must act consistently with Convention obligations; one element of this is ensuring that they take account of any developments in the Court's jurisprudence that affect the way Convention obligations apply to their work. Although judgments against other States are in no way directly binding on the UK, they remain part of the corpus of the Court's jurisprudence and regard should be had to elements of such cases that may be applicable in the UK context. That said, it should also be remembered that the wide variety of legal and constitutional structures and systems in use among States means that not all judgments will be relevant to the UK.

At present, the system for considering the impact of European Court of Human Rights judgments against other States is largely decentralised. The Ministry of Justice monitors judgments of the European Court of Human Rights to identify cases that have a clear read-across to existing UK cases and issues and, in addition to communicating developments directly to relevant departments, produces a cross-Whitehall Human Rights Information Bulletin to highlight significant developments and cases. However, it is not possible for any one Department to identify all judgments that may be relevant to others in Government, as no department has the detailed understanding of all areas of UK law necessary to do so. 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 work is supplementary to these processes.

³⁸ 'Public authority' is defined in section 6 of the Human Rights Act. The duties imposed by the Human Rights Act apply to all bodies and organisations falling within this definition.

It follows that the development of a document drawing together the work of all departments in this field would be difficult and time-consuming to produce, requiring a significant outlay of resources. It is by no means clear that the benefits that would be derived from producing such a summary document are sufficient to justify the resources required to produce it.

Provision of information to the Joint Committee

As part of its expanded role in co-ordinating the implementation of judgments, the Ministry of Justice has given careful thought to if and, where appropriate, how the information requests made by the Joint Committee in their Report can be accommodated. Whilst a number of these recommendations and requests represent what is frequently existing practice, the rationalisation of responsibilities in this area has offered a new opportunity to consider these requests afresh.

The JCHR said:

We repeat our recommendation, first made in 2005, that the Ministry of Justice should provide an accessible database of information, perhaps on its website, listing recent judgements, implementation measures taken or proposed, and cases where implementation measures had yet to be decided on.

(Paragraph 182)

A large volume of information on the implementation of judgments is already available in the public domain from a number of sources. In relation to judgments of the European Court of Human Rights, the information requested by the Joint Committee is almost all available from the dedicated execution of judgments website of the Committee of Ministers.³⁹ 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,⁴⁰ which set out all the action taken by Member States to date, along with proposed future action where needed. As regards domestic cases, the information is provided by the Government itself in relation to declarations of incompatibility, in the list of such declarations annexed to this paper. This list is discussed in more detail below. In light particularly of the need for efficient public administration, the development of a further database providing both sets of information would be an unnecessary duplication.

³⁹ http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

⁴⁰ 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).

The JCHR said:

Through officials at the Ministry of Justice, we have been provided with an updated version of this database [on declarations of incompatibility], which adopts a different narrative format, which in our view is difficult to follow and less accessible. We are disappointed that the database is no longer available on the Ministry of Justice website. We recommend that the Ministry of Justice takes steps to resolve this problem to enable widespread public access to its database on declarations of incompatibility in order to enhance transparency in the implementation process. We also repeat our recommendation that the database should be reviewed and updated on at least a quarterly basis. (Paragraph 138)

While the list of declarations of incompatibility, a copy of which is annexed to this paper, is currently available to all on request, this situation could perhaps be improved to allow easier access to the information. In order to address this, the Ministry of Justice has for some time intended to publish the list on the Department's website but has been prevented by technical difficulties from doing so. Continuing efforts will be made to address these difficulties and the Joint Committee will be kept informed of progress.

The list of declarations of incompatibility is currently updated whenever developments occur in the case to which they relate or progress is made in relation to their implementation. As only three declarations of incompatibility remain active,⁴¹ this approach is the most effective in terms of ensuring information remains accurate and up to date. However, should this situation change, the approach to updating the list will be reviewed. It was the practice of the previous Government to provide the Joint Committee with a copy of the list following each update and this will continue.

Updates to the list will of course be made not only when changes occur regarding existing declarations of incompatibility but when any new declarations are made. The updated list constitutes one of the ways in which the Joint Committee is made aware of declarations of incompatibility and progress towards their implementation.

The JCHR said:

We recommend that the Ministry of Justice should notify the Committee of any judgment of the European Court of Human Rights in an application against the UK and of any declaration of incompatibility made by a UK court under s. 4 of the Human Rights Act 1998 as soon as reasonably practicable and in any event within 14 days of the date of the judgment. (Paragraph 172)

However, it has historically been the practice of the Government to draw the making of new declarations of incompatibility to the Joint Committee's attention, and to update them on later appeals. This practice will also continue,

⁴¹ In that the case in which they were made is still before the courts or implementation, where appropriate, has not been completed.

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 European Court of Human Rights are highlighted a few days in advance on the website of the Court and via press announcements. It would be inappropriate, and counter to the interests of efficient public administration, for an additional process to be introduced. Furthermore, the Joint Committee already receives a regular update from the Foreign and Commonwealth Office on new adverse decisions of the European Court of Human Rights against the United Kingdom.

The Committee of Ministers has now adopted a policy of requiring States to complete Action Plans in relation to all judgments for which they are responsible. The Government supports this policy as it encourages States to supply the Committee with full and comprehensible information, improving the effectiveness of the scrutiny process.

The JCHR said:

We welcome the Government's intention to make available to us the Action Plan which it is required to submit to the Committee of Ministers. We recommend that the Government always send us, as a matter of course, a copy of the Action Plan, at the same time as it sends it to the Committee of Ministers, and that we be copied in to all subsequent significant communications with the Committee of Ministers about the case.

(Paragraph 175)

The Joint Committee have already been provided with copies of the relevant Action Plans and updates for two of the previous three Committee of Ministers meetings; the dissolution of the Joint Committee in line with that of Parliament on 12 April prevented the information submitted to the June 2010 Committee of Ministers meeting from being supplied. This information will continue to be provided to the Joint Committee, and copies of the Action Plans and updates submitted for consideration at the Committee of Ministers' forthcoming meeting in September, and the missing information from the June meeting, will be supplied to the Joint Committee separately.

It has been assumed that the Joint Committee's reference to 'subsequent significant communications,' above, refers to significant updates to the Action Plan for each case. It would be neither possible nor appropriate for the Joint Committee to receive copies of correspondence between Government officials and the Committee of Ministers' Secretariat.

Previous practice has also been to provide the Joint Committee, via the Ministry of Justice, with an annual update, in the form of a letter, setting out progress made in relation to human rights issues and judgments. This has been provided in advance of the Joint Committee's yearly evidence session with the Minister responsible for human rights.

The JCHR said:

Following our previous practice, described in Chapter 1, we recommend that, prior to our annual evidence session with the Minister responsible for human rights, the Government provide the Committee with a written memorandum covering the following:

- all judgments against the UK, or declarations of incompatibility, since the last evidence session;
- all measures taken to implement such judgments;
- the progress made towards the implementation of all other outstanding judgments;
- the UK's record on implementation according to the latest available statistics from the Council of Europe;
- the progress made towards the implementation of Committee of Ministers' recommendations on national implementation;
- the implications of Strasbourg judgments against other States for the UK's legal system. (*Paragraph 178.vi*)

The practice of making the Minister responsible for human rights matters available to the Joint Committee to attend annual oral evidence sessions, to discuss their work in the previous twelve months, will continue and the Government looks forward to many fruitful discussions with the Joint Committee in future. The Ministry of Justice will also continue to supply the Joint Committee with written evidence in advance of these discussions.

However, improvements could be made to the system of providing written evidence. Under the current system, the Joint Committee receives via correspondence information about cases of particular interest or importance to it from the Government department responsible and written evidence on systemic issues and processes from the Ministry of Justice. This informs the Joint Committee's annual report, which the Government then responds to. A more efficient approach would be for the Government to publish proactively each July an annual report on the implementation of judgments.

An annual report by the Government would enable the Joint Committee to avoid the need for large volumes of detailed correspondence while still providing them with the necessary information; this information could then be discussed with Ministers at the autumn evidence session. Subsequent correspondence from the Joint Committee would, of course, continue to be welcome should they require further information on any points made in the report or at the evidence session. However, the Government considers that the publication of an annual report would remove the need for a formal response to a subsequent report on the same issues published by the Joint Committee.

The Government's proposed report would cover:

- Judgments⁴² received in the previous twelve months, and measures either proposed or taken to implement them;
- An update on progress in older cases, the implementation of which has not yet been completed;
- An update on changes or developments in the wider systems for co-ordinating the implementation process;
- Analysis of the statistics produced by the Committee of Ministers in their annual report; the current availability-based approach set out above reflects the fact that the publication date of the Joint Committee's reports has not always chimed well with that of the Committee of Ministers.

As part of the Interlaken Conference Action Plan, all Council of Europe Member States have been asked to review their implementation of a number of Committee of Ministers' recommendations regarding the national implementation of the Convention. This review will be conducted in order to meet the Action Plan's 2011 deadline, and the Joint Committee will be informed of the results. The Government's position on the provision of information on adverse judgments against other States is set out in detail above and is not repeated here. The Government looks forward to receiving the Joint Committee's views on these proposals.

The JCHR said:

We recommend that the Government inform us on a quarterly basis of the number of Rule 39 requests that have been made by the Court and provide a detailed breakdown of the sorts of cases in which those requests have been made. (*Paragraph 181*)

There are some areas in which the publication of statistical data is not undertaken by the Council of Europe institutions and where it would be difficult to fill the gap. Data regarding Rule 39 indications is an example of this; the UK receives a very high volume of Rule 39 indications, particularly in relation to cases concerning removal of the applicant to another country. Collating this information and providing a detailed statistical breakdown would require a significant amount of resources that, in the current climate, cannot be justified. By way of an indication of the scale of the numbers involved, the Foreign and Commonwealth Office have calculated that the UK received 197 Rule 39 indications in the previous twelve months.⁴³

The Joint Committee also requested information in relation to interventions made by the UK in cases against other States. Permission to intervene will generally be requested where a case raises an issue of particular importance

⁴² Both adverse judgments of the European Court of Human Rights and domestic declarations of incompatibility.

⁴³ Information is for 1 July 2009 to 30 June 2010.

or sensitivity and intervention is likely to add to the completeness of the information before the Court.

The JCHR said:

We recommend that the Government commit to informing us at the earliest opportunity whenever it intervenes on behalf of the UK in a case against another State, and to making available to Parliament the reasons for its intervention and the substance of its argument. (*Paragraph 180*)

The decision to intervene in a case against another State is not one which is taken lightly. There are often sensitive political and diplomatic issues to consider, and a careful balance to be drawn on the costs and benefits of such an intervention. It is not always therefore possible to make the fine detail of such considerations public. However, it would be possible to notify the Joint Committee when an intervention is made, in order to allow the Committee to track the progress of the case as it deems appropriate. Notifications will therefore be sent to the Joint Committee by the Foreign and Commonwealth Office as part of that Department's regular update to the Joint Committee on judgments in cases against the UK.

However, it would not be appropriate to provide the substance of the arguments made in such cases as this would represent a great deal more information than is currently provided on cases against the UK and therefore represents something of an imbalance.

The Government remains conscious of the important role of Parliament in the implementation of human rights judgments, in terms of both the scrutiny of the Joint Committee and the wider debates and discussions on proposed remedial measures. Parliamentary scrutiny is an important tool for ensuring that the Government's approach to implementation in a given case is robust and addresses all the relevant issues fully.

In 2008, the Joint Committee held a Westminster Hall debate on the implementation of adverse human rights judgments. This debate provided just such an opportunity for wider Parliamentary scrutiny of the Government's work in this area.

The JCHR said:

We recommend that there should be an annual debate in Parliament on the Joint Committee's report scrutinising the Government's memorandum. (*Paragraph 179*)

The holding of similar debates in future would continue this process of encouraging wider Parliamentary scrutiny and, therefore, a Minister from the Ministry of Justice, the lead department on this issue, will endeavour to attend future debates on this topic secured by the Joint Committee.

Annex A: Declarations of incompatibility

Since the Human Rights Act 1998 came into force on 2 October 2000, 26 declarations of incompatibility have been made. Of these:

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

Of the 18 declarations of incompatibility that have become final:

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

Information about each of the 26 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 13 July 2010, and will not reflect any changes after that date.

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1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions
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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
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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
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6. Matthews v Ministry of Defence
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7. R (on the application of Anderson) v Secretary of State for the Home Department
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8. R (on the application of D) v Secretary of State for the Home Department
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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
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14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions
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15. R (on the application of MH) v Secretary of State for Health
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16. A and others v Secretary of State for the Home Department
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17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)
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18. R (Gabaj) v First Secretary of State
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24. Nasser v Secretary of State for the Home Department
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25. R (Wayne Thomas Black) v Secretary of State for Justice
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26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department
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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 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 which received Royal Assent on 19 July 2007 as the Mental Health Act 2007, of which sections 23 to 26 replace the incompatible provisions. 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**

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 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.

To remove the incompatibility, a non-urgent Remedial Order will be laid before Parliament at the earliest opportunity before the Summer Recess. It is intended to come into force by the end of 2010 or in early 2011, subject to Parliamentary approval. The proposed Remedial Order will abolish 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. Though the current exemption for the Anglican Church only relates to marriages, not to civil partnerships, and thus there was no discrimination in the application of the scheme to civil partnerships, the remedial order will also repeal the Certificate of Approval scheme in relation to civil partnerships. This will ensure consistency between the treatment of civil partnerships and marriages.

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.

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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.

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 is currently considering afresh the issue of prisoners' voting rights and the outcome of this process will determine the Government's response to the declaration in *Smith*.

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.

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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 continued application of the notification requirements could be evaluated.

The Supreme Court upheld the declaration on 22 April 2010: [2010] UKSC 17. The Government is currently considering how to respond.

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	
	2008	2009	2008	2009
UK cases as proportion of cases becoming final	3% (39)	DNR ¹ (12)		
Leading cases among UK cases becoming final	6 of 39 (15%)	3 of 12 (25%)	14%	13%
UK cases as proportion of cases closed in principle	13%	8%		
UK cases as proportion of leading cases closed in principle	13%	DNR		
Payment of just satisfaction				
i) Within deadline	47% (8)	19% (3)	36%	37%
ii) Payment was late	0%	6% (1)	5%	11%
iii) Payment is outstanding and over deadline ²	53% (9)	76% (12)	59%	52%
Amount of just satisfaction (€)				
i) Total amount	353,245	143,234		
ii) Average per case	9,058	11,936	39,333	34,874
iii) Pecuniary damage	79,785	8,185		
iv) Non-pecuniary damage	51,500	1,000		
v) Costs	200,329	68,770		
vi) Global awards ³	21,631	65,279		
UK cases as proportion of leading case outstanding >2yrs	2%	DNR		
Cases outstanding <2yrs	46% (6)	50% (6)	54%	64%
Cases outstanding 2-5yrs	23% (3)	8% (1)	35%	22%
Cases outstanding >5yrs	31% (4)	42% (5)	11%	15%
Final resolutions pending ⁴	111	104	713 (total)	774 (total)
UK cases before the Committee of Ministers	34 (0.51%)	27 (0.34%)		
Proportion of UK cases that are leading cases	35% (13)	44% (12)	11%	10%

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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