



Ministry
of Justice

Responding to human rights judgments

Report to the Joint Committee on
Human Rights on the Government response
to human rights judgments 2013–14

December 2014



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Government response to human rights judgments 2013–14

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

December 2014

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Introduction

This is the latest in a series of reports to the Joint Committee on Human Rights (the Joint Committee) setting out the Government's position on the implementation of adverse human rights judgments from the European Court of Human Rights (ECtHR) and the domestic courts. The previous report¹ was followed by an evidence session² on 18 December 2013 at which the Lord Chancellor and Secretary of State for Justice, Chris Grayling, was questioned by the Joint Committee on the Government's human rights policy.

Following the approach in previous reports, it is divided into three main sections:

- general introductory comments, including **wider developments in human rights and the process for implementation of adverse judgments**;
- **the UK's record on the implementation of judgments of the ECtHR** and an **overview of significant ECtHR judgments** that either became final since the last report or became final earlier but are still under the supervision of the Committee of Ministers; and
- information about **declarations of incompatibility in domestic cases**.

The aim of the report is to keep the Joint Committee up-to-date with the Government's response to human rights judgments and any significant developments in the field of human rights. The report covers the period 1 August 2013 to 31 July 2014.

On 17 July 2013, the Joint Committee issued a call for evidence on human rights judgments³ with submissions in response requested by 27 September 2013. The call for evidence noted:

The Committee intends to correspond with relevant Ministers where necessary and to ask the Human Rights Minister questions about the Government's response to judgments when he gives oral evidence to the Committee later this year. It intends to report to Parliament on the subject during the current Session.

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

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf

² http://www.parliament.uk/documents/joint-committees/human-rights/HC915_13-12-18_TRANSCRIPT_Grayling_Davies.pdf

³ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/human-rights-judgments-call-for-evidence1/>

General Comments

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

- **judgments of the ECtHR** in Strasbourg against the UK under the European Convention on Human Rights (ECHR); and
- **declarations of incompatibility** by UK courts under section 4 of the Human Rights Act 1998 (HRA).

A feature of these judgments is that their implementation may require changes to legislation,⁴ policy or practice, or a combination thereof.

European Court of Human Rights Judgments

Under Article 46(1) of the ECHR, the UK is obliged to implement judgments of the ECtHR in any case to which it is a party. The implementation or execution of judgments from the ECtHR is overseen by the Committee of Ministers of the Council of Europe (the Committee of Ministers) under Article 46(2).

The Committee of Ministers is a body on which every Member State of the Council of Europe is represented. The Committee of Ministers is advised by a specialist Secretariat⁵ 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 in had the breach not occurred; and
- *general measures*, required to prevent the breach happening again, or to put an end to breaches that still continue.

Declarations of Incompatibility

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

⁴ Whether primary legislation (i.e. Acts of Parliament) or subordinate legislation (e.g. statutory instruments).

⁵ The Department for the Execution of Judgments.

⁶ The rights drawn from the ECHR listed in Schedule 1 of the HRA.

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

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

Since the HRA came into force on 2 October 2000, 29 declarations of incompatibility have been made, of which 20 have become final (in whole or in part). There has been one new declaration of incompatibility in the period covered by this report, which is still subject to further appeal.

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

Remedial measures in respect of both declarations of incompatibility and ECtHR 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 HRA.

⁹ Section 4(6) of the HRA.

Wider developments in Human Rights

Current Government policy on human rights

When agreeing to establish the Commission on a Bill of Rights, the Government also agreed in the context of the Coalition Agreement that the obligations under the ECHR would continue to be enshrined in UK law.

The Commission reported in December 2012 and did not reach agreement. Its final report set out the views of both the minority and majority.

While the Coalition parties have expressed views on policy directions they may wish to consider in the future, the Coalition Agreement makes it clear there will be no major changes to the human rights framework before the general election.

Reform of the European Court of Human Rights

The Brighton Declaration on the future of the ECtHR was agreed on 20 April 2012 at a ministerial conference organised under the UK's chairmanship of the Committee of Ministers of the Council of Europe and represents a substantial package of reform.

The Brighton Declaration included agreement in principle to amend the ECHR in five ways:

- to add a reference to the principle of subsidiarity¹⁰ and the doctrine of the margin of appreciation¹¹ to the Preamble to the ECtHR, giving visibility to these key concepts that define the boundaries of the ECtHR's role;
- to change the rules on the age of judges of the ECtHR, to ensure that all judges are able to serve a full nine-year term;
- to remove the right of parties to a case before the ECtHR to veto a Chamber's relinquishing jurisdiction to the Grand Chamber, a measure intended to improve the consistency of the Court's case law;
- to reduce the time limit for applications to the Court from six months to four months; and
- to tighten the admissibility criteria in the ECHR to make it easier for the Court to throw out trivial applications.

¹⁰ The principle that national governments, parliaments and courts have the primary responsibility for securing to everyone within their jurisdiction the rights and freedoms defined in the Convention, and for providing an effective remedy before a national authority for everyone whose rights and freedoms are violated. By extension, the role of the Court is to interpret authoritatively the Convention, and to act as a safeguard for individuals whose rights and freedoms are not secured at the national level.

¹¹ The doctrine that, depending on the circumstances and the rights engaged, national authorities may choose within a range of responses how they implement the Convention.

Protocol 15 to the ECHR will give legal effect to these changes. The UK signed Protocol 15 on 24 June 2013, the day it was opened for signature. On 28 October 2014, the Secretary of State for Foreign Affairs laid Protocol 15 before Parliament as part of the process towards the United Kingdom's ratification.

Following implementation of other short- and medium-term measures in the Brighton Declaration, the Council of Europe has now turned to consideration of the longer-term future of the ECtHR and ECHR also called for in the Declaration. In light of the extensive questions raised by this subject, the expert bodies of the Council of Europe have been mandated to undertake consideration of this issue by December 2015.

EU Accession to the ECHR

Article 6(2) of the Treaty on European Union requires the EU to accede to the ECHR. The EU's accession to the ECHR will mean that the EU and its institutions are directly bound by the ECHR, and will enable individuals to apply to the ECtHR if they believe that EU legislation or the actions of an EU institution have violated their ECHR rights.

The terms of accession are currently under negotiation between the EU and the 47 Council of Europe States, with agreement in principle reached at negotiator level in April 2013 on the text of the Accession Agreement and its Explanatory Report.¹² The Accession Agreement adapts the ECHR for the EU as a non-State party and is now subject to a number of political and procedural steps in the Council of Europe, the EU and individual States. The European Commission referred the Agreement to the ECJ for an opinion on its compatibility with the EU Treaties and the full court of the ECJ held a hearing in those proceedings on 5-6 May 2014. The opinion of the ECJ is expected to be published on 18 December 2014.

Changes to human rights responsibilities in the European Commission

The new college of EU Commissioners has been approved by the European Parliament. Frans Timmermans (The Netherlands) has been appointed First Vice President with responsibility for better regulation, inter-institutional reforms, the rule of law, and the Charter of Fundamental Rights. Mr Timmermans has been charged with ensuring that every Commission proposal or initiative complies with the Charter of Fundamental Rights and with concluding the process of accession of the EU to the ECHR. The new Commissioner for Justice, Consumers and Gender Equality (Věra Jourová, Czech Republic) will work closely with the First Vice President on these issues and is also charged with leading the EU's work on anti-discrimination, gender equality and data protection.

¹² [http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf)

Review of the Balance of Competences: Fundamental Rights¹³

The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the EU. The Ministry of Justice led a review into the balance of competences between the EU and the UK on fundamental rights. Its report was published in summer 2014.¹⁴

Reporting to United Nations (UN) Human Rights Monitoring Bodies

The UK continues to see the monitoring process carried out by expert UN treaty monitoring bodies¹⁵ as an essential element in the promotion and protection of human rights throughout the world, and a catalyst for achieving positive change. The Government values the advice given by expert committees on the implementation of the instruments to which the UK is party and gives serious consideration to that advice in the development of human rights policy in the UK.

The UK also remains fully committed to the Universal Periodic Review (UPR¹⁶) process, an essential mechanism for sharing best practice on human rights, and for promoting the continual improvement of human rights on the ground. In September 2014, Baroness Anelay (Minister of State for Human Rights at the FCO) visited the UN HQ in Geneva and co-hosted a panel discussion with Morocco on voluntary mid-term reports for the UPR.

As part of the monitoring process, the UK Government is committed to constructive engagement with the National Human Rights Institutions and interested NGOs.

Since August 2013, the UK has completed the following milestones:

- May 2014: periodic report under the Convention on the Rights of the Child (CRC) and also the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (DfE lead);
- May 2014: examination under the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (HO lead);
- May 2014: follow up information under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (MoJ lead);
- June 2014: periodic report under the International Covenant on Economic, Social and Cultural Rights (MoJ lead);
- June 2014: updated UN Core Document (MoJ lead) ;
- August 2014: mid-term report in the context of the UPR (MoJ lead).

¹³ Fundamental rights are general principles of EU law, which bind both the EU and, when acting within the scope of EU law, its Member States. Examples of fundamental rights include the right to freedom of expression and the right to protection of personal information.

¹⁴ <https://www.gov.uk/government/consultations/balance-of-competences-fundamental-rights-review>

¹⁵ <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

¹⁶ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

The upcoming milestones (until July 2015) in the UN monitoring process are:

- 2014: periodic report under the International Convention on the Elimination of All Forms of Racial Discrimination (DCLG lead);
- November 2014: follow up information under the Convention on the Elimination of All Forms of Discrimination against Women (GEO lead);
- June-July 2015: examination under the International Covenant on Civil and Political Rights (MoJ lead);
- Date to be confirmed (possibly in 2015): examination under the Convention on the Rights of Persons with Disabilities (DWP lead).

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

Coordinating the implementation of human rights judgments

There have been no significant changes to the Government's arrangements for co-ordinating the implementation of judgments in the last year. Please see page 10 of the 2011-12 report¹⁷, which provides further detail about the arrangements.

Access to information on the implementation of judgments

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

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

The Department for the Execution of Judgments has a dedicated website for the **implementation of judgments**,¹⁸ which provides access to a searchable list of all judgments currently outstanding against all Contracting Parties.

All forthcoming **judgments of the ECtHR** are highlighted a few days in advance on the Court's¹⁹ website. The Court's decisions and judgments are available via a comprehensive searchable database²⁰ called HUDOC.

The following table was compiled from information held on HUDOC and lists the cases involving the UK where the Court has issued judgments between end of July 2013 and the beginning of August 2014.

¹⁷ <https://www.gov.uk/government/publications/report-to-the-jchr-on-the-government-response-to-human-rights-judgements-2011-12>

¹⁸ http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

¹⁹ <http://www.echr.coe.int/Pages/home.aspx?p=home>

²⁰ <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#>

ECtHR judgments in cases against the UK between 1 August 2013 and 31 July 2014²¹

	Case name	Originating court and application number	1. Original judgment date 2. Date judgment became final ²²	Brief summary/Outcome
1.	M.H	Court (Fourth Section) 11577/06	1. 22/10/2013 2. 22/01/14	<p>On 31 January 2003 the applicant was detained under s.2 of the Mental Health Act 1983 for 28 days for assessment. Her mother, as her nearest relative under that Act, exercised her right to make an order to discharge the applicant from detention, but as a consequence of a report by the medical officer (known as a “barring order”) this had no effect and her mother was prevented from making any further order for a period of 6 months from the date of the report. The applicant also had a right to apply to the Tribunal for a review of detention during first 14 days of detention.</p> <p>The ECtHR held there had been a violation of Article 5(4) (right to have lawfulness of detention speedily examined by a Court) during the initial period of detention from 31 January to 27 February 2003. The ECtHR accepted that in the case of a person with legal capacity, the right to apply to the Tribunal for discharge during the first 14 days of detention under section 2 of the 1983 Act would satisfy the requirements of Article</p>

²¹ Judgments in bold found a violation or violations against the UK.

²² Article 44 of the ECHR details the main circumstances in which a judgment becomes final. Grand Chamber judgments are final on the date they are issued. A Chamber judgment becomes final (a) when the parties to the case declare they will not seek referral to the Grand Chamber; (b) three months from the date of the judgment if no request for referral to the Grand Chamber is made; or (c) when the panel to the Grand Chamber rejects any request for referral.

In addition, within its competence as set out under Article 28(1)(b), a Committee may issue an unanimous judgment that is final when it is given.

	Case name	Originating court and application number	1. Original judgment date 2. Date judgment became final ²²	Brief summary/Outcome
				<p>5(4). But this remedy was not available in practice to the applicant because she lacked legal capacity.</p>
2.	JONES AND OTHERS	Court (Fourth Section) 34356/06 40528/06	1. 14/01/2014 2. 02/6/2014	<p>The British applicants alleged that while living in Saudi Arabia they were tortured by Saudi officials. No court has considered the substance of the torture allegations. Upon return to Britain, they sought to bring a civil claim for damages in the High Court but Saudi Arabia claimed immunity for both itself and its officials under the State Immunity Act 1978. The applicants challenged this on the grounds that upholding State immunity would deny them access to the courts, contrary to Article 6 (right to a fair trial). The Government intervened in the domestic proceedings, arguing State immunity should be upheld. The case reached the House of Lords in 2006, where it was held that both Saudi Arabia and its officials were entitled to immunity.</p> <p>The ECtHR found no violation of Article 6 (right to a fair trial). The applicants sought a referral to the Grand Chamber but this was refused.</p>
3.	THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	Court (Fourth Section) 7552/09	1. 04/03/2014 2. 04/06/2014	<p>The Church complained of being denied an exemption from business rates after unsuccessfully applying to have a temple removed from a list of premises liable to pay business tax on the grounds that it was a "place of public religious worship". In domestic proceedings, the House of Lords held it did not qualify as access to the temple was restricted to devout followers holding a special authorisation.</p> <p>It was argued refusal of the exemption amounted to discrimination on religious grounds, in breach of Article 14 (prohibition of discrimination) taken in conjunction with Article 9 (freedom of thought, conscience, and religion).</p>

	Case name	Originating court and application number	1. Original judgment date 2. Date judgment became final ²²	Brief summary/Outcome
				<p>The ECtHR held in relation to Article 14 that the claim of discrimination was unfounded on its merits since the law was applied equally to all religious organisations (including the Church of England in relation to its private chapels). The ECtHR also found any difference in treatment was reasonably/objectively justified since the purpose of the exemption was to benefit churches who worshipped with open doors.</p>
4.	NATIONAL UNION OF RAIL, MARITIME AND TRANSPORT WORKERS	Court (Fourth Section) 31045/10	1. 08/04/2014 2. 08/09/2014	<p>RMT complained the ban on secondary strike action was a violation of Article 11 (freedom of assembly and association).</p> <p>The ECtHR concluded that while the RMT's complaint about the ban on secondary action was admissible, there had been no violation of Article 11. RMT sought a referral to the Grand Chamber but this was rejected.</p>
5.	PAULET	Court (Fourth Section) 6219/08	1. 13/05/2014 2. 13/08/2014	<p>Applicant argued confiscation of his wages following conviction for obtaining employment using a false passport had been disproportionate as it amounted to the confiscation of his entire savings over nearly four years of genuine work, albeit that he had been working illegally.</p> <p>The ECtHR found a violation of Article 1 of Protocol 1 (protection of property - peaceful enjoyment of possessions).</p>
6.	McDONALD	Court (Fourth Section) 4241/12	1. 20/05/2014 2. 20/08/2014	<p>Applicant complained about a reduction in her weekly social care, which meant she was no longer provided with a night-time carer to assist her in using a commode.</p> <p>The ECtHR found a violation of Article 8 (respect for private life).</p>

The UK at the ECtHR between 1959 and 2013

The following tables use information published on the ECtHR's website to illustrate the number of applications made against the UK at the ECtHR between 1959 and the end of 2013. The tables show the outcomes of the applications, both in terms of the number that were declared inadmissible/struck out and the much smaller number that resulted in a judgment

Applications against the UK allocated to judicial formation²³

1959-1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011 ²⁴	2012	2013	Total
6197	442	625	479	986	687	744	1003	845	851	1233	1127	2744	1542	1701	908	22,114

Applications against the UK declared inadmissible or struck out

1959-1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
5213	223	466	529	737	863	721	732	963	403	1240	764	1175	1028	2047	1633	18,737

Judgments²⁵ in UK cases (judgment finding violation)

1959-2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Total
189 (103)	40 (30)	25 (20)	23 (19)	18 (15)	23 (10)	50 (19)	36 (27)	18 (14)	21 (14)	19 (8)	24 (10)	13 (8)	499 (297) (59%)

²³ The Court may sit in various judicial formations: single judge; in three judge Committees; in seven judge Chambers; and seventeen judge Grand Chambers.

Single judges can declare inadmissible/strike out applications where this decision can be taken without further examination.

By unanimity, Committees take similar decisions to single judges but can also declare an application admissible and give a judgment if the underlying question is already well-established in the case-law of the Court.

Where neither a single judge nor a Committee has taken a decision or made a judgment, Chambers may decide on admissibility and merits.

²⁴ Figures for applications allocated to a judicial formation for 2006-10 and 2012-13 differ from those in last year's report following the receipt of updated information from the ECtHR's Registry.

²⁵ A judgment can cover more than one application.

Applications against the UK in 2013/14

Information provided by the Registry of the ECtHR states that on 17 November 2014 there were 73,650 applications pending before a judicial formation of the ECtHR. 1,223 of these were applications against the UK, representing approximately 1.7% of the total pending applications.

Of the applications pending against the UK, 52 have been deemed to be manifestly inadmissible and allocated to a Single Judge formation following initial assessment by the Registry. Although the assessment is not final until confirmed by the Single judge, it is likely these cases will be declared inadmissible in due course.

The remaining 1,171 applications were deemed to raise arguable complaints under the ECHR and therefore have been allocated to a Committee or a Chamber. However, the overwhelming majority, 1,025²⁶ applications, concern prisoner voting rights. If these are excluded from the total, on 17 November there were 146 applications against the UK that were pending before a judicial formation and which were deemed to be arguable.

A case deemed to be arguable following the Registry's initial assessment will not necessarily result in a violation. It may be declared inadmissible when a judge first examines it or, if it reaches the stage where it is communicated to the Government for observations, the ECtHR may find no violation after consideration of the parties' arguments.

In 2013, the ECtHR decided 1,652 applications made against the UK. It declared inadmissible or struck out 1,633 applications, found no violation of the ECHR in 5 judgments (covering 8 applications)²⁷ and found a violation in 8 judgments (11 applications). This means 0.66% of the applications against the UK decided in 2013 led to a finding of a violation.

In 2012, approximately 0.6% of the applications against the UK decided by the ECtHR led to a finding of a violation. The figure in 2011 was approximately 1% of the applications against the UK and approximately 1.3% in 2010.

Between 1959 and the end of 2013, the ECtHR allocated approximately 22,100 applications against the UK to a decision making formation and found a violation of the ECHR in 297 judgments. This means 1.34% of all UK applications allocated to a decision making formation during this period resulted in judgment finding a violation of the ECHR.

²⁶ Further detail on the outstanding prisoner voting cases can be found at page 29.

²⁷ A judgment can cover more than one application.

The UK's record on the implementation of ECtHR judgments

At 31 December 2013, according to the statistics in the latest annual report published by the Committee of Ministers of the Council of Europe,²⁸ the UK was responsible for 27 pending judgments before the Committee of Ministers, representing 0.25% of the overall total. This placed the UK twenty ninth of the forty seven States party to the ECHR in terms of pending judgments under the supervision of the Committee of Ministers. By way of comparison with other selected States, Italy was first with 2593 pending judgments, Turkey second with 1727, Germany twenty sixth with 31 and Liechtenstein forty seventh with no pending judgments. Further statistics taken from the annual report on the UK's performance and the complete list of pending judgments by State can be found at Annex B Tables One and Two.

A number of UK cases have been closed since the publication of the Committee of Ministers' annual report. Annex B Table Three contains a full list of the judgments that found a violation against the UK and which were still under the supervision of the Committee of Ministers at the beginning of December 2014.

The Committee of Ministers' annual report notes that of the 27 UK cases outstanding at 31 December 2013, 19 were leading cases (2012 figures were 17 leading cases out of 39 outstanding and the 2011 figures were 25 leading cases out of 40 outstanding). "Leading cases (or pilot cases)" were defined in the 1st Annual Report of the Committee of Ministers on the "Supervision of the execution of judgments and decisions of the European Court of Human Rights" covering 2007 as "cases evidencing a more systemic problem requiring general measures".

In terms of just satisfaction payments, the annual report notes that in 2013 14 out of 15 UK payments were made within the three month deadline. The Ministry of Justice will continue to monitor performance across Government to ensure that this record of prompt payment is maintained.

²⁸ The Committee of Ministers 7th annual report *Supervision of the execution of judgments of the European Court of Human Rights*, published in March 2014 and covering the year 2013: http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp

Consideration of judgments that have become final since the last annual report

Excessive delays in the investigation of deaths in Northern Ireland (Colette and Michael Hemsworth and McCaughey and others

Colette and Michael Hemsworth v UK²⁹

McCaughey and Others³⁰

Court: ECtHR (Chamber)

Case Summaries

Hemsworth: This case concerned the death of the applicant's relative who died on 1 January 1998 after suffering head injuries following a violent incident in Belfast on 7 July 1997. Mr Hemsworth was walking home at night when he was kicked and hit with a truncheon by police officers of the Royal Ulster Constabulary (RUC) who were chasing other people. There were a number of significant delays to the investigation into Mr Hemsworth's death, including lengthy delays in holding inquest hearings, the Coroner's initial refusal to call RUC witnesses and substantial adjournments waiting for the outcome of relevant court proceedings concerning coronial law and practice. An inquest jury finally rendered its verdict on 27 May 2011, finding that the injuries suffered as a result of the violent attack were most probably the underlying cause of Mr Hemsworth's death.

McCaughey and Grew: This case concerned the death of the applicants' relatives, Martin McCaughey and Desmond Grew, at the hands of British Army forces near Loughgall in Northern Ireland on 9 October 1990. The shootings were two of several which took place around that time and which gave rise to allegations of a shoot to kill policy by the security forces in Northern Ireland. On 11 October 1990 the IRA stated publicly that the deceased were IRA volunteers on active service at the time of their deaths.

The ECtHR noted that while the deaths occurred in 1990 the inquest hearing proper did not begin until March 2012, more than 21 years later. There were lengthy periods of delay, including very lengthy periods of inactivity and delays in dealing with disclosure and delays due to the applicants' and other legal actions that the ECtHR noted were necessary to drive forward their inquests and to ensure clarification of certain important aspects of coronial law and practice.

In both the *Hemsworth* and *McCaughey and Others* cases the ECtHR found a number of delays into holding inquests which were excessive and incompatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths in the sense that the investigation must be commenced promptly and carried out with reasonable expedition. Causes of delay included: periods of inactivity; the adequacy and timeliness of disclosure of material; lack of contact with families of victims; Director of

²⁹ Application number 58559/09, judgment final on 16 October 2013.

³⁰ Application number 43098/09, judgment final on 16 October 2013.

Public Prosecutions' decision-making; and, significantly, delays stemming from legal actions necessary to clarify coronial law and practice.

The applicants also complained about substantive and other procedural aspects of Article 2 but the ECtHR found these aspects inadmissible, on the basis that civil and other action was still pending or possible and so domestic remedies had not yet been exhausted.

The ECtHR held there had been a violation of the procedural requirements of Article 2 by reason of excessive investigative delay. It commented that throughout the relevant period it considered the inquest process itself was not structurally capable of providing the applicants with access to an investigation which would commence promptly and be conducted with due expedition. The ECtHR found that in order to comply with its judgment the State must take, as a matter of some priority, all necessary and appropriate measures to ensure that in these, and similar cases where inquests were pending, the procedural requirements of Article 2 were complied with expeditiously.

The ECtHR held no separate issue arose on the Article 13 right to an effective remedy.

Government Response: As noted in the judgment, inquests have taken place in both cases. In the Hemsworth case, the inquest, sitting with a jury, took place on 16 May 2011. It made findings as to the cause of death and those likely to be responsible and the Coroner referred the matter to the Public Prosecution Service. The Office of the Police Ombudsman for Northern Ireland has also begun an investigation.

In McCaughey and Others, the inquest, sitting with a jury, was held between 12 March and 2 May 2012. It gave a narrative verdict, subsequently challenged by the applicants.

In 2003, in response to earlier judgments in cases raising similar issues, the UK Government submitted an Action Plan to respond to issues identified by the Court regarding compliance with the procedural requirements of Article 2. There is now a separate Action Plan responding to the Hemsworth and McCaughey cases, developing on those measures by putting in place practical and proportionate steps to ensure investigation, coordination and disclosure issues are resolved, delivering timely access to justice for the families affected.

The Department of Justice, in developing the Action Plan, acknowledged that the current arrangements for dealing with the criminal justice aspects of the past are complex and can often fail to achieve satisfaction for victims and survivors in individual cases, damaging the wider objective of societal healing. This objective was also central to the All-Party Group, set up in July 2013 by the First and deputy First Ministers, under the chairmanship of Dr Richard Haass. The draft Haass proposals, published on 31 December 2013³¹, proposed establishing a new Historical Investigations Unit (HIU) to take forward the remaining caseload of the Historical Enquiries Team (HET) and the conflict-related cases being dealt with by Office of the Police Ombudsman of Northern Ireland (OPONI). These proposals sought to create organisations with the ability to undertake Article 2 compliant investigations and have the capacity to generate a more coherent, victim-focused response to the past. The Northern Ireland Parties have yet to reach agreement on the issues of the Past. These are being considered at the on-going fresh talks convened by the Secretary of State for Northern Ireland between the parties of the Northern Ireland Executive on the political and economic challenges they face.

³¹ <http://www.northernireland.gov.uk/haass.pdf>

Measures to Address Delay: Pending a decision on the Haass proposals, the following general measures are being implemented:

- *Improving the Speed of Disclosure* – The Police Service of Northern Ireland (PSNI) is in the processing of reviewing the resources for its Legacy Support Unit, which manages the PSNI's legal response to the disclosure process and ensures the effective and timely disclosure to the families of victims and to the Coroner. Progress will be considered by the Cross Agency Working Group (see below).
- *Cross-Agency Working Group:* a Cross-Agency Working Group focused on reducing delay by providing oversight and strategic direction across a number of work streams has been established. The Group has met a number of times to progress key issues. The Working Group reports to the Criminal Justice Delivery group, chaired by the Minister for Justice.
- *Addressing Delay in Inquest Proceedings:* The Department of Justice has received Royal Assent to the Legal Aid and Coroners' Courts Act. The Act will enable the Lord Chief Justice to introduce improved judicial case management in the Coroners' Courts.

The Department of Justice also recognises that the coronial law in Northern Ireland would benefit from review and updating, but acknowledges that the timing of any review will be a matter for the next Assembly mandate.

The Northern Ireland Courts and Tribunals Service, which provides administrative support to the Coroners Service is developing proposals to establish a Legacy Inquest Unit (LIU). It is envisaged the LIU would comprise a Senior Coroner assigned to Article 2 cases, a specialist investigative support team, legal and para-legal support staff along with a dedicated secure IT platform to manage sensitive material. Subject to securing necessary resources, the Department expects to start putting measures in place in 2015.

Improving OPONI Investigations: The Department of Justice brought a package of measures for the reform of OPONI to the Northern Ireland Executive, which considered it last month. The package did not gain the necessary support and was therefore voted down. The DOJ remains committed to progressing the package of measures but in the absence of political agreement will defer consideration until early in the next mandate or sooner if the political climate allows.

HET and HMIC report – The recommendations of the HMIC report were agreed and accepted by PSNI. The PSNI continues to meet its legislative responsibilities concerning the past, which include conducting investigations where there is new and compelling evidence, as well as its responsibilities in responding to the requirements of coronial inquests. The PSNI is proposing, following recent announcements on the increasing budgetary restraints likely to occur, to establish a smaller Legacy Investigations Branch (to replace the HET), which will meet obligations under Article 2 and incorporate requirements to review and investigate legacy cases. Recommendations and principles that applied to HET will apply to the new Branch.

Measures for Further Consideration: The Department of Justice is giving further consideration to other measures that could assist in reducing delay, drawing on the Criminal Justice Inspection Northern Ireland (CJINI) recommendations³² on the past.

³² <http://www.cjini.org/CJINI/files/8b/8b89d447-fb32-41d7-ae26-57b18509c8a2.pdf>

Right to have lawfulness of detention for the purposes of medical assessment speedily examined by a Court (MH)

MH v UK³³

Court: ECtHR (Chamber)

Case summary: The applicant was detained in a hospital under section 2 of the Mental Health Act 1983 for twenty-eight days for assessment.

The applicant's mother, as her nearest relative, exercised her right to make an order to discharge the applicant, but as a consequence of a report by a medical officer, this had no effect. The applicant's mother was prevented from making any further order for a period of six months from the date of the report.

The applicant had a right to apply for a review of her detention within fourteen days, but did not do so.

The ECtHR held that there had been a violation of Article 5(4) of the ECHR (right to have lawfulness of detention speedily examined by a Court during the initial period of detention). The ECtHR accepted that in the case of a person with legal capacity, the right to apply to the Tribunal for discharge during the first fourteen days of detention would satisfy the requirements of Article 5(4). But this remedy was not available in practice to the applicant because she lacked legal capacity. The applicant's mother's attempt to make an order for her discharge from the assessment detention was met with a "barring order". The ECtHR considered that the applicant could not, at this stage, have been reasonably expected to immediately get her mother, as her nearest relative, or the solicitors acting on her behalf to address a request to the Secretary of State for referral of her case to the Tribunal.

Government response: Since the events in this case took place the 1983 Act, which applies in England and Wales, has been substantially amended by the Mental Health Act 2007 to introduce provisions on independent mental health advocates (IMHAs). A local authority has a duty to make arrangements to enable IMHAs to be available to help patients liable to be detained under the 1983 Act (see section 130A of the 1983 Act). The arrangements should include help in obtaining information about and understanding any rights which might be exercised under the Act, which would include access to courts, and help, by way of representation or otherwise, in exercising those rights (see 130B(1) and (2) of the 1983 Act). There is a duty under section 130D of the 1983 Act for a specified person to take such steps as are practicable to ensure that a patient understands the help that is available to them from a IMHA and how to obtain that help.

These procedural safeguards ensure that the right guaranteed by Article 5(4) is "as nearly as possible as practical and effective" for detainees who lack the ability to exercise this right independently as it is for other detainees, as required by the judgment³⁴.

To further protect persons lacking capacity, the Government intends to make amendments to the relevant statutory guidance that applies in England; the "Code of Practice Mental Health Act 1983". The amendments will make clear that if a patient lacks

³³ Application number 11577/06, judgment final on 22 January 2014

³⁴ See paragraph 82 of the judgment

capacity to decide whether to seek help from an IMHA, an IMHA should be introduced to the patient so that the IMHA can explain what help they can offer. The Government will forward further information to the Committee of Ministers on the publication of the revised Code as soon as it is laid before Parliament. Once it is laid, the Government is satisfied no further general measures will be required in England to avoid a similar violation.

Wales

Wales has a separate Code, which provides that, hospital managers should always consider asking the Welsh Ministers to exercise their power to refer cases to a tribunal if a patient's rights under Article 5(4) of the European Convention on Human Rights might otherwise be at risk of being violated, and that such a referral should be made in cases where a patient lacks capacity to request a reference.

Scotland

Different legislation would apply in Scotland if a similar case occurred there. The Government is satisfied that the provisions of the relevant legislation, the Mental Health (Care and Treatment)(Scotland) Act 2003, means that no further changes are required in Scotland to avoid a similar violation.

Northern Ireland

The Department of Health, Social Services and Public Safety: Northern Ireland (DHSSPSNI) intends to address the issue of a detained patient who lacks capacity to make a referral to the Mental Health Review Tribunal (MHRT) in the forthcoming Mental Capacity Bill.

DHSSPSNI and the Department of Justice jointly launched this for public consultation³⁵ on 27 May 2014, which closed on 2 September 2014. It is the intention to introduce the draft Bill into the Northern Ireland Assembly in early 2015 with a view to enactment before the end of the current mandate (March 2016). The Government will forward information on the progress of the Mental Capacity Bill (Northern Ireland) to the Committee of Ministers.

Pending the introduction and subsequent enactment of the Mental Capacity Bill, the DHSSPSNI intends to issue non statutory Guidance, (drafts of which have already been prepared). This Guidance will remind relevant bodies and professionals in the field of their statutory duty under Article 27(2) (c) of the Mental Health (Northern Ireland) Order 1986 to take such reasonable steps as are practicable to ensure that the nearest relative of a detained patient is furnished with a written statement of his rights and powers under the Order. The Guidance intends to refer to Assistant Social Workers and Independent Advocates commissioned by the HSC Trust who can provide support to the nearest relatives when exercising those rights. The Guidance intends to alert Clinicians to the discretionary provision at Article 72 of the 1986 Order to refer a case to DHSSPS or the Attorney General for NI, particularly in a case where there is reason to think that a patient who lacks capacity to make a referral to the MHRT would wish to do so. The guidance will outline a referral mechanism and intends to include encouragement to make greater use of this provision in cases of concern. It outlines some of the matters which should be taken into account by a clinician when deciding whether to make a referral, including time elapsed since last referral and time until next mandatory consideration by the MHRT.

³⁵ <http://www.dhsspsni.gov.uk/showconsultations?txtid=68523>

Confiscation of wages/savings earned while in the UK illegally (Paulet)

*Paulet v the UK*³⁶

Court: ECtHR (Chamber)

Case summary: The applicant is an Ivoirian national and the case concerned the confiscation of his wages/savings following his conviction for obtaining employment using a false passport. He arrived in the UK in January 2001 and lived illegally at an address in Bedford. Between April 2003 and February 2007 he obtained three jobs using a false French passport. In June 2007 he pleaded guilty at Luton Crown Court to, among other offences, obtaining a pecuniary advantage by deception. He was subsequently sentenced to a total of 17 months' imprisonment and a confiscation order was imposed in the sum of £21,949.60, his savings from his four years of employment.

Relying on Article 1 of Protocol No. 1 (protection of property), the applicant complained that the confiscation order against him was disproportionate, submitting his case should have been distinguished from cases involving more serious criminal offences such as drug trafficking or organised crime.

In finding a violation of Article 1 Protocol 1 against the UK, the ECtHR noted that

“the violation found in the present case was procedural in character, based as it was upon the lack of a review of the confiscation order capable of satisfying the requirements of Article 1 of Protocol No. 1 to the Convention. It cannot be excluded that, had a sufficiently wide review been conducted by the domestic courts, this Court would have found an outcome involving confiscation of the applicant’s remaining assets, as occurred in the present case, to be consistent with the Convention”.

Government response: Taking account of the ECtHR’s findings, the Government’s analysis was that this case was in effect a historical violation, in that the domestic courts failed to apply the correct test for review in relation to applicant’s case. The correct test was subsequently set out in the Supreme Court case of *R v Waya*³⁷ in 2012.

Consequently, the Government’s assessment is that no further general measures are necessary in this case.

³⁶ Application number 6219/08, judgment final on 13 August 2014

³⁷ *R v Waya* [2012] UKSC 51

Reduction in the provision of night time care (McDonald)

*McDonald v the UK*³⁸

Court: ECtHR (Chamber)

Case summary: The case involves a challenge under Article 8 (right to private and family life) to the level of personal care provided by a local authority to a seriously incapacitated individual. The applicant applied to the Independent Living Fund for full day and night-time care. This was provided while the application was pending but, when it was eventually rejected, the applicant's night-time care service was withdrawn and replaced with the provision of incontinence pads. The ECtHR asked whether the withdrawal of the night-time care service was an unjustified interference with the applicant's right to privacy or, alternatively, whether there was a positive obligation under Article 8 to provide a level of service that enabled the applicant to live with dignity and, if so, whether that was breached. Previously, the case had been considered by the UK Supreme Court, which had concluded there was no breach of Article 8.

The ECtHR held that the reduction in the level of care provided to the applicant fell within the scope of respect for private life in Article 8. In doing so, it expressly agreed with Baroness Hale (dissenting in the Supreme Court) that considerations of human dignity were engaged when someone who could control her bodily functions was obliged to behave as if she could not. It implicitly disagreed with the Supreme Court majority's assessment on this point.

Having decided the reduction in care was an interference with respect for private life, the ECtHR assessed whether that interference was justified under Article 8(2) in respect of two distinct periods.

In respect of the period from 21 November 2008 to 4 November 2009, the Supreme Court had found that the local authority had been in breach of its own statutory duty to provide care in accordance with its own assessment of need. Therefore, if there were an interference with her Article 8 rights, this would not have been 'in accordance with the law' for this period. Therefore, the ECtHR found a breach in respect of this period.

However, in respect of the period from November 2009 onwards, the ECtHR accepted that the interference was both in accordance with the law and pursued a legitimate aim (namely the economic well-being of the State and the interests of other care-users). It decided that the reduction of care fell within the State's margin of appreciation and was a proportionate response and in doing so, the ECtHR noted the State has a 'particularly wide' margin of appreciation in a case such as this involving the assessment of priorities in the context of the allocation of limited resources

Government response: This was a case concerning the actions of a local authority which did not act in accordance with the law for a period. Otherwise the reduction in care was found to be within the law and within the State's margin of appreciation.

The provision of social care has been comprehensively reviewed as part of the reforms of social care being implemented by the Care Act, placing the well-being of the individual at

³⁸ Application number 4241/12, judgment final on 20 August 2014

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the heart of those reforms. Statutory guidance was published on 23 October along with regulations, in order to guide local authorities in the implementation of their responsibilities under the Care Act and regulations.

Consideration of other significant judgments that became final before 1 August 2013 and which are still under the supervision of the Committee of Ministers

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

*S & Marper v UK*³⁹

Court: ECtHR (Grand Chamber)

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

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

The Government has confirmed that DNA profiles and fingerprints which can no longer be retained under the provisions of the Protection of Freedoms Act are being removed from the national databases. This was completed by 31 October 2013, the date on which the Act was brought into force.

The Department of Justice in Northern Ireland brought forward broadly similar legislative proposals for Northern Ireland, which received Royal Assent on 25 April 2013 in the Criminal Justice (Northern Ireland) Act 2013. It had been hoped to commence these provisions in spring 2015 but an amendment to the primary legislation is currently being made and it is now expected that the provisions will be brought into operation in autumn 2015. This will coincide with the introduction of specific provisions to be made by the Government in the excepted/reserved field.

³⁹ Applications numbers 30562/04 and 30566/04, judgment dated 4 December 2008.

Extra-territorial effect of the Convention (Al Skeini)

*Al Skeini v UK*⁴⁰

Court: ECtHR (Grand Chamber)

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

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

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

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

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

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

Government Response: In March 2010 the Ministry of Defence announced the establishment of the Iraq Historic Allegations Team (IHAT). The IHAT was originally established to investigate alleged violations of Article 3, arising from mistreatment of individuals by British forces in Iraq during the period March 2003–July 2009. However, on 26 March 2012, the Minister for the Armed Forces stated that the judgment in *R(Ali Zaki Mousa) v Secretary of State for Defence & Anor* [2011] EWCA Civ 1334 obliged the authorities to

⁴⁰ Application 55721/07; judgment final on 7 July 2011.

undertake additional investigations concerning Article 2 and a new team was to be created within IHAT for this. Since then, significant additional resources have been made available to IHAT to progress all investigations, including the five Al Skeini cases.

The IHAT is lead by a civilian, who reports to the Provost Marshal (Navy), the head of the Royal Navy Police (RNP), following structural changes. It contains a number of investigations and case review teams staffed by a mix of RNP and civilian staff (paragraph 14 of the judgment). In the event of the work of the IHAT leading to prosecution or disciplinary proceedings, decisions on whether to prosecute will be taken by the Director of Services Prosecutions under the Armed Forces Act 2006.

A further judgment in *R(Ali Zaki Mousa(No.2)) v Secretary of State for Defence* [2013] EWHC 2941 (Admin) was delivered on 2 October 2013. The High Court ordered a rigorous examination of those cases which allege unlawful killing. In April 2014, a retired High Court Judge was appointed as Inspector to undertake a Coronial-style fatality investigation into the circumstances of each death. The first two such cases are currently under active consideration. The recommendations made by the Inspector will be considered by the Ministry of Defence for the implications they have on the Doctrine and military training that are already in-place.

Improvements have already been made in many areas of concern. Doctrine and military training are kept under constant review. Recommendations from ongoing internal reviews of detainee handling continue to be implemented. The first review of systemic issues that have been addressed by the Ministry of Defence was published in July 2014⁴¹.

Implementation of the recommendations made by the Public Inquiry into the death of Baha Mousa whilst in UK custody in Iraq in 2003 has been completed⁴².

Mechanisms are in place that will permit lessons to be continued to be learnt as they emerge from the ongoing IHAT investigations.

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

⁴¹ <https://www.gov.uk/government/publications/review-of-systemic-issues-arising-from-military-operations-overseas>

⁴² <http://www.bahamousainquiry.org/>

Prisoner voting (*Hirst (No 2)*, *Greens & MT* and *Scoppola (No 3)*)

*Hirst v the UK (No.2)*⁴³

Court: ECtHR (Grand Chamber)

Case summary: In March 2004, the UK's blanket ban on prisoner voting, under section 3 of the Representation of the People Act 1983, was found to be a violation of Article 3 of Protocol 1 ECHR by the ECtHR as a result of a successful challenge by a prisoner. In October 2005, the Grand Chamber upheld the ruling that the UK's ban was in breach of Article 3 of Protocol 1 to the ECHR (right to free and fair elections). In its judgment, the Grand Chamber allowed the UK a 'wide margin of appreciation'⁴⁴ in implementing *Hirst (No. 2)*. It also referred to the lack of a substantive debate in the UK Parliament on the continued justification for the ban in light of modern day penal policy and current human rights standards.

*Greens and M.T. v the UK*⁴⁵

Court: ECtHR (Chamber)

Case summary: This is a "pilot case", so called because it was used to decide how similar "clone cases" would be decided by the ECtHR. It concerned the blanket ban on voting imposed automatically on the applicants due to their status as convicted offenders detained in prison. The applicants, both prisoners in Scotland, were refused the right to enrol on the electoral register for domestic elections and elections to the European Parliament.

The ECtHR found the blanket ban under section 3 of the Representation of the People Act 1983 in violation of Article 3 of Protocol 1 to the ECHR and, pursuant to the judgment in *Hirst (No. 2)*, set a deadline of six months from 11 April 2011 for the UK to bring forward legislative proposals to end the blanket ban on prisoner voting. The Court declined to award compensation to the applicants and stayed around 2,400 "clone cases" brought by UK prisoners against the Government.

The Government sought deferral of the deadline specified in *Green & MT* in order to intervene in the case of *Scoppola (No 3)*.

*Scoppola v Italy (No 3)*⁴⁶

Court: ECtHR (Grand Chamber)

Case summary: UK intervened in the Italian prisoner voting case of *Scoppola (No 3)* and was represented by the former Attorney General, Dominic Grieve QC at the Grand Chamber's hearing on the case on 2 November 2011. On 22 May 2012, the Grand Chamber gave its judgment which reaffirmed its ruling in *Hirst (No 2)*, that the UK's

⁴³ Application 74025/01; judgment final on 6 October 2005.

⁴⁴ See footnote 11 at page 6 for explanation of 'margin of appreciation'.

⁴⁵ Applications 60041/08 & 60054/08; pilot judgment 23 November 2010, final on 11 April 2011.

⁴⁶ Application 126/05; judgment final on 22 May 2012.

blanket ban was in breach of Article 3 of Protocol 1 to the ECHR, while recognising that national parliaments enjoyed a wide margin of discretion when it came to regulating prisoner voting.

UK was granted a deferral of the deadline imposed by *Greens & MT*, and was given six months from 22 May 2012, to introduce proposals to remove the blanket ban.

Following the judgment in *Scoppola (No 3)*, the Committee of Ministers resumed its supervision of the UK's implementation of the *Hirst (No 2)* and *Greens & MT* judgments.

Government response:

After the ECtHR set a deadline for the introduction of legislative proposals to Parliament in the *Greens & MT* case, this Government published draft legislation in November 2012, which included options to enfranchise those sentenced to less than four years, those sentenced to less than 6 months, and an option to continue the ban. The Government set up a Joint Parliamentary Committee to carry out pre-legislative scrutiny on the draft Bill.

The Joint Committee published its report in December 2013, with a majority recommending that legislation be brought forward in the final session of this Parliament to enfranchise those sentenced to 12 months or less and those in the 6 months before they are scheduled to be released. The Government is considering the report but will not be able to legislate for prisoner voting in this Parliament. In September 2014, the Committee of Ministers decided to defer further discussion of the issue until September 2015.

On 12 August 2014, in the case of *Firth and Others v. the UK*⁴⁷ the ECHR passed judgment on the first batch of ten "clone cases" following on from *Greens & MT*. These cases related to prisoners unable to vote in the 2009 European Parliamentary elections. The ECtHR held that there was a violation of Article 3 of Protocol 1 to the ECHR in each of the ten cases, but did not award any damages or costs to the applicants, who sought referral of the judgment to the Grand Chamber⁴⁸.

More than half of the original *Greens & MT* "clone cases" have been declared inadmissible or struck out by the ECtHR. On 22 September 2014, the remaining 1,015 "clone cases" were communicated to the UK.⁴⁹ These cases relate to prisoners unable to vote in one or more of the 2009 European Parliamentary elections, the 2010 Parliamentary elections and the 2011 elections to the Scottish Parliament, the Welsh Assembly or the Northern Irish Assembly. The Government is currently awaiting the ECtHR's judgment on these cases.

⁴⁷ Applications nos. [47784/09](#), [47806/09](#), [47812/09](#), [47818/09](#), [47829/09](#), [49001/09](#), [49007/09](#), [49018/09](#), [49033/09](#) and [49036/09](#)

⁴⁸ On 16 December 2014, the ECtHR announced that the Panel that considers requests for referral to the Grand Chamber had rejected the request.

⁴⁹ [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"respondent":\["GBR"\],"documentcollectionid2":\["COMMUNICATEDCASES"\],"itemid":\["001-147091"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

Right to a review for “whole life tariff” prisoners (Vinter, Bamber and Moore)

*Vinter, Bamber and Moore v UK*⁵⁰

Court: ECtHR (Grand Chamber)

Case summary: Currently, the applicants are all serving sentences of life imprisonment for murder. They have been given whole life orders, meaning they cannot be released other than at the discretion of the Secretary of State on compassionate grounds (for example, if they are terminally ill or seriously incapacitated). Relying on Article 3 (prohibition of inhuman or degrading treatment) of the ECHR, all three applicants complained their imprisonment without hope of release is cruel and amounts to inhuman and degrading treatment.

The ECtHR found that whole life orders without a clear review or release mechanism at the point of sentence are a breach of Article 3 of the ECHR. That means essentially there needs to be a review that allows the domestic authorities to consider whether any changes in the whole life order prisoner are so significant as to mean that continued detention can no longer be justified on legitimate penological grounds.

Government response: The Government vigorously defended the case and was disappointed the Grand Chamber of the ECtHR took a different approach to the ruling of the lower Chamber, which found in the UK's favour. The judgment does not mean prisoners currently serving a whole life order must now be released or that they must all immediately come before the Parole Board for consideration of release. The ECtHR made clear that there was no prospect of imminent release for the three applicants in the case.

In February 2014, a specially constituted Court of Appeal in the UK heard appeals from whole life order prisoners Newell and McLoughlin⁵¹. The Court of Appeal upheld the domestic courts' power to impose a whole life order in especially serious cases and decided the current law provides a sufficient possibility for a review in exceptional cases. The Court of Appeal found such cases would need to be considered on a case by case basis, and it would: “be difficult to express in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life”.

The Government has submitted an action report to the Committee of Ministers in the light of the Court of Appeal's judgment setting out why it considers that no further general measures are necessary. It is now for the Committee of Ministers to consider the matter.

In addition, the ECtHR is considering the case of Arthur Hutchinson⁵², who like Vinter, Bamber and Moore was sentenced to life imprisonment and is the subject of a whole life order. In this case, the Government has submitted observations setting out its view that the Court of Appeal's judgment has clarified the operation of the domestic law and has invited the ECtHR to find no violation of Article 3 as a consequence.

⁵⁰ Application numbers 66069/09 130/10 3896/10, Grand Chamber judgment of 09/07/2013.

⁵¹ R -v- Ian McLoughlin and R -v- Lee William Newell [2014] EWCA Crim 188

⁵² Application number 57592/08 lodged on 10 November 2008 and communicated to the UK on 22 July 2013

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

There has been one new declaration of incompatibility under section 4 of the HRA between August 2013 and July 2014 in:

- R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions

(Administrative Court; [2014] EWHC 2182; 4 July 2014)

Further details are given in Annex A. This declaration of incompatibility is still subject to further appeal.

In addition, a further declaration of incompatibility was made by the High Court under section 4 of the Human Rights (Bailiwick of Guernsey) Law 2000:

- R (on the application of Barclay and another) v Secretary of State for Justice and Lord Chancellor and others

(Administrative Court; [2013] EWHC 1183; 9 May 2013)

The High Court declared that the relevant law was incompatible with Article 6 of the ECHR in respect of the remuneration of the office of the Seneschal, the Chief Judge of the court of Sark. The High Court certified its decision involved a point of law of general importance, which allowed the Secretary of State for Justice and others to appeal directly to the Supreme Court, where the appeal was heard on 30 June 2014.

The Supreme Court's judgment was issued on 23 October and set aside the declaration. The Supreme Court found that the complaint in this case should have been made to Guernsey's own court under Guernsey's own human rights law and, if necessary, appealed to the Privy Council, which formally approves legislation from the Channel Islands.

Annex A: Declarations of incompatibility

Since the Human Rights Act 1998 came into force on 2 October 2000, 29 declarations of incompatibility have been made. Of these:

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

Of the 20 declarations of incompatibility that have become final:

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

Information about each of the 29 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.

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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 Articles 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 Article 6 and Article 1 of the First Protocol by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditor's enjoyment of contractual rights.

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

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4. **McR's Application for Judicial Review**

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

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

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

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

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

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

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

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 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 licence was an additional penalty to which he would not have been subject at the time he was sentenced.

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

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

11. *Bellinger v Bellinger*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 2 of the Mental Health Act 1983 was declared incompatible with Article 5(4) of the ECHR in so far as:

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

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

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

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

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

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

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

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

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

&

18. R (Gabaj) v First Secretary of State

Administrative Court; unreported; 28 March 2006

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

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

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

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

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

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

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

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

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

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20. Re MB

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

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

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

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

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

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

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

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

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

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

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 a convicted prisoner who was unable to register to vote at the Scottish Parliament elections in May 2003 under section 3 of the Representation of the People Act 1983.

The Court ruled that as part of the Court of Session for the purposes of section 4 of the HRA it had the power to make a declaration of incompatibility under that section. It held that the Scottish Parliament was a legislature for the purposes of section 3 of the Representation of the People Act 1983 and, therefore, declared that section 3 was incompatible with Article 3 of Protocol 1 ECHR on the grounds that it imposed a blanket ban on convicted prisoners voting in the Scottish Parliament elections. This declaration was substantially similar to the judgment of the ECtHR in the earlier case of *Hirst v the UK (No. 2)* (Application 24035/01; 6 August 2005).

The Government has been considering the issue of prisoners' voting rights and the outcome of this process will determine the Government 's response to the declaration in *Smith* and the ECtHR's decision in *Hirst (No 2)* and its pilot judgment in *Greens & MT v UK* (Applications: 60041/08 and 60054/08; 23 November 2010).

Further information about the Government's response to the judgments in *Hirst (No. 2)*, *Greens & MT* and *Scoppola (No 3)* can be found at pages 28 and 29 of this report.

On 16 October 2013, the UK Supreme Court handed down its judgment on a further legal challenge relating to prisoner voting rights in *Chester & McGeoch*⁵³. The Court applied the principles in *Hirst (No 2)* and *Scoppola (No 3)* regarding the blanket ban on voting, but declined to make any further declaration of incompatibility. The Supreme Court took the view that the incompatibility of the blanket ban on prisoner voting in the UK with the ECHR was already the subject of a declaration of incompatibility made by the Registration Appeal Court in *Smith v Scott* and was under review by Parliament and that, in those circumstances, there was no point in making a further declaration of incompatibility.

⁵³ R. (on the application of Chester) v Secretary of State for Justice; Supreme Court [2014] UKSC 25

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 Hoffmann 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 Hoffmann 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. At the time, there was no statutory mechanism for reviewing indefinite notification requirements.

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

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

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

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

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

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

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

28. R on the application of T, JB and AW v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice

Court of Appeal; [2013] EWCA Civ 25; 29 January 2013

The applicants argued that the provisions of the Police Act 1997 and Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 with regard to blanket disclosure of convictions and cautions are incompatible with the Article 8 right to private life.

The Court of Appeal found the Police Act 1997 and the Exceptions Order to the Rehabilitation of Offenders Act 1974 (ROA) incompatible with Article 8 on the grounds that blanket disclosure of all cautions and convictions is disproportionate.

The Court did not prescribe any solution, instead stating that it would be “for Parliament to devise a proportionate scheme” and directed that its decision should not take effect until the Supreme Court determined the Government’s application to appeal.

While the Government’s application to appeal to the Supreme Court was outstanding, changes were made to the Exceptions Order and to the Police Act by secondary legislation in response to the Court of Appeal judgment, and came in to force on 29 May 2013.

The Supreme Court heard the case on 13/14 December 2013 and issued its judgment on 18 June 2014. Overall it upheld the declaration of incompatibility with Article 8 in respect of the Police Act 1997. It also held that, in its application to the case of T, the Exceptions Order to the Rehabilitation of Offenders Act was incompatible with Article 8 but significantly decided that no judicial remedy was required in respect of the Order. Therefore, the Secretary of State for Justice’s appeal against the Court of Appeal’s declaration that the Exceptions Order was ultra vires was successful.

While the Supreme Court noted that the Exceptions Order had been amended following the Court of Appeal judgment to provide that some spent convictions and cautions would not need to be disclosed, it did not carry out any in-depth analysis of the new regime or comment on its compatibility with Article 8.

29. R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions

(Administrative Court; [2014] EWHC 2182; 4 July 2014)

The claimants sought a declaration of incompatibility on the ground that the Jobseekers (Back to Work Schemes) Act 2013 (“the 2013 Act”) was incompatible with their rights under Article 6 (right to a fair trial) and Article 1 of the First Protocol (protection of property) to the ECHR.

The case followed that of R (Reilly & Wilson) v The Secretary of State for Work and Pensions [2013] UKSC 68; [2013] 3 WLR 1276 where the Court of Appeal, and later the Supreme Court, held the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (“the 2011 Regulations”) to be ultra vires and certain notification letters to be deficient.

The 2013 Act came into force after the Court of Appeal judgment and had the effect of retrospectively validating the 2011 Regulations, which the Court of Appeal had held to be ultra vires and the notification letters that had failed to comply with the requirements of reg. 4 of the 2011 Regulations.

The judgment found the 2013 Act was incompatible with the claimants’ rights under Art. 6(1) and a declaration of incompatibility was granted. However, it was decided that Article 1 of the First Protocol was not engaged.

The Government is appealing the judgment to the Court of Appeal and the claimants have filed a counter-appeal.

Annex B: Statistical information on the implementation of European Court of Human Rights judgments⁵⁴

Table 1: UK Performance

Statistic	UK performance		
	2011	2012	2013
New Cases			
i) Total number of new UK cases	19	13	17
ii) Leading UK cases	9 of 19	5 of 13	14 of 17
Final Resolutions	2011	2012	2013
i) Total number of cases	48	14	30
ii) Leading cases among UK cases	33	14	13
Pending Cases	2011	2012	2013
i) Total number of cases	40	39	27
ii) Leading cases among UK cases	25	17	19
Payment of just satisfaction	2011	2012	2013
i) Within deadline	8	15	14
ii) Payment was late	0	6	1
iii) Pending cases waiting confirmation of payment at end 2012	10	2	2
Amount of just satisfaction (€)	2011	2012	2013
Total amount paid by the UK	454, 457	418, 220	1, 139, 706
Average execution time	2011	2012	2013
Leading UK cases pending <2yrs	16	8	12
Leading UK cases outstanding 2–5yrs	4	4	3
Leading UK cases outstanding >5yrs	5	5	4

⁵⁴ Data in both tables taken from the 7th Annual Report of the Committee of Ministers on the “Supervision of the execution of judgments and decisions of the European Court of Human Rights” and shows the position at 31 December 2013.

http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf

Table 2: Judgments under supervision of the Committee of Ministers at the end of 2013 by State Party to the Convention

Ranking in terms of cases under supervision at end 2013	State	Pending cases			
		Total No. of cases		of which Leading cases ⁽ⁱ⁾	
		2012	2013	2012	2013
1.	Italy	2569	2593	62	69
2.	Turkey	1861	1727	178	188
3.	Russian Federation	1211	1325	157	170
4.	Ukraine	910	957	106	127
5.	Poland	908	764	76	60
6.	Romania	667	702	88	84
7.	Greece	478	495	59	61
8.	Bulgaria	366	357	108	99
9.	Hungary	251	285	24	35
10.	Slovenia	241	271	16	17
11.	Republic of Moldova	233	239	70	72
12.	Croatia	122	158	46	55
13.	Serbia	105	123	32	29
14.	Portugal	123	117	15	8
15.	"The former Yugoslav Republic of Macedonia"	122	97	21	24
16.	Azerbaijan	63	81	25	33
17.	Austria	54	63	19	23
18.	Slovak Republic	48	60	14	17
19.	Belgium	48	58	17	21
20.	France	64	50	42	27
21.	Latvia	33	47	24	38
22.	Finland	54	42	11	11
23.	Armenia	31	38	14	19
24.	Lithuania	31	36	13	19
25.	Albania	29	34	17	18
26.	Bosnia and Herzegovina	24	33	18	12
27.	Germany	103	31	17	17
28.	Spain	26	31	15	17
29.	Georgia	24	30	18	21
30.	UK	39	27	17	19
31.	Czech Republic	111	27	20	9
32.	Malta	24	22	14	13
33.	Netherlands	14	16	9	13
34.	Montenegro	9	15	8	10
35.	Ireland	11	13	3	5

Responding to human rights judgments

Ranking in terms of cases under supervision at end 2013	State	Pending cases			
		Total No. of cases		of which Leading cases ⁽ⁱ⁾	
		2012	2013	2012	2013
36.	Switzerland	8	11	8	8
37.	Luxembourg	11	10	3	2
38.	Estonia	8	8	6	5
39.	Cyprus	32	6	8	6
40.	Iceland	6	6	5	5
41.	Sweden	9	5	8	4
42.	Denmark	7	3	7	1
43.	Norway	2	3	2	3
44.	San Marino	3	2	1	2
45.	Andorra	1	1	1	1
46.	Monaco	1	1		
47.	Liechtenstein				
	Total	11099	11018	1431	1496

Table 3: Judgments finding a violation against the UK under supervision of the Committee of Ministers at the beginning of December 2014

	Case name	Application number	Judgment final on	Procedure
1.	Al Skeini	55721/07	07/07/2011	Enhanced
2.	Greens and MT	60041/08, 60054/08	11/04/2011	Enhanced
3.	Hirst No.2	74025/01	10/06/2005	Enhanced
4.	McKERR GROUP (McKerr, Jordan, McShane, Shanaghan, Kelly and others, Finucane)	McKerr - 28883/95 Jordan - 24746/94 Kelly - 30054/96 Shanaghan - 37715/97 McShane - 43290/98 Finucane - 29178/95	McKerr, Jordan, Kelly, Shanaghan 04/08/2001 McShane 28/08/2002 Finucane 01/10/2003	Enhanced
5.	M.M.	24029/07	29/04/2013	Enhanced
6.	McCaughey and Others & Collette and Michael Hemsworth	58559/09; 43098/09	Both judgments final on 16/10/2013	Enhanced
7.	McDonald	4241/12	20/08/2014	Standard
8.	MGN	39401/04	18/04/2011 Just satisfaction judgment delivered 12/06/2012	Standard
9.	M.H.	11577/06	22/01/2014	Standard
10.	Paulet	6219/08	13/08/2014	Standard
11.	S & Marper	30562/04 and 30566/04	04/12/2008	Standard
12.	Vinter, Bamber and Moore	66069/09, 130/10 and 3896/10	09/07/2013	Standard

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