



Ministry  
of Justice

# **Responding to Human Rights judgments**

Report to the Joint Committee on Human  
Rights on the Government's response to  
Human Rights judgments 2017–2018

November 2018

Cm 9728





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the Government's response to Human Rights judgments  
2017–2018

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

November 2018

Cm 9728



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## Introduction

This is the latest report to the Joint Committee on Human Rights 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.<sup>1</sup>

This report covers the period 1 August 2017 to 31 July 2018. Following the approach in previous reports, it is divided into three sections:

- general introductory comments, including **wider developments in human rights and the process for implementation of adverse judgments**
- **recent ECtHR judgments** involving the UK and **progress on the implementation of ECtHR judgments**
- **declarations of incompatibility** in domestic cases.

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

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<sup>1</sup> Previous reports are published at <https://www.gov.uk/government/collections/human-rights-the-governments-response-to-human-rights-judgments>

## General comments

This paper focuses on two types of human rights judgment:

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

An important aspect of these judgments is that their implementation may require changes to legislation, policy, practice, or a combination of these.

### 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 of the ECtHR is overseen by the Committee of Ministers of the Council of Europe under Article 46(2).

The Committee of Ministers is a body on which every member State of the Council of Europe is represented. It is advised by a specialist Secretariat (the Department for the Execution of Judgments) in its work overseeing the implementation of judgments.

There are three parts to the implementation of an ECtHR judgment which finds there has been a violation:

- the payment of *just satisfaction*, a sum of money which the court may award to the applicant
- other *individual measures*, required to put the applicant so far as possible in the position they would have been in, had the violation not occurred
- *general measures*, required to prevent the violation happening again or to put an end to an ongoing violation.

Past judgments are available from the online HUDOC database.<sup>2</sup> New judgments are announced a few days in advance on the ECtHR's website.<sup>3</sup>

The Department for the Execution of Judgments has a website explaining the process of implementation<sup>4</sup> and a database called HUDOC-EXEC which records details of the implementation of each judgment.<sup>5</sup>

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<sup>2</sup> <http://hudoc.echr.coe.int>

<sup>3</sup> <http://www.echr.coe.int/Pages/home.aspx?p=home>

<sup>4</sup> <http://www.coe.int/en/web/execution>

<sup>5</sup> <http://hudoc.exec.coe.int>



## Declarations of incompatibility

Under section 3 of the HRA, legislation must be read and given effect, so far as possible, in a way which is compatible with the Convention rights.<sup>6</sup> If a higher court<sup>7</sup> is satisfied that legislation<sup>8</sup> is incompatible with a Convention right, it may make a declaration of incompatibility under section 4 of the HRA. Such declarations constitute a notification to Parliament that the legislation is incompatible with the Convention rights.

A declaration of incompatibility does not affect the continuing operation or enforcement of the legislation in question, nor does it bind the parties to the proceedings in which it is made.<sup>9</sup> This respects the supremacy of Parliament in the making of the law. Under the HRA, there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose.

As there is no official database of declarations of incompatibility, a summary of all declarations and the Government's response is provided in Annex A to this report.

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<sup>6</sup> The rights drawn from the ECHR listed in Schedule 1 to the HRA.

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

<sup>8</sup> Either primary legislation, or subordinate legislation if the primary legislation under which it is made prevents removal of the incompatibility (except by revocation).

<sup>9</sup> Section 4(6) of the HRA.

## Wider developments in human rights

### Current Government policy on human rights

The Government is committed to furthering the United Kingdom's status as a global, outward-looking nation, playing an active, leading role in the world. We will continue to support an international order in which rules govern state conduct, and to champion the British values of freedom, democracy, tolerance and the rule of law. We will continue to comply with our international human rights obligations and take action to tackle any abuse of those rights.

The UK has a longstanding tradition of ensuring our rights and liberties are protected domestically and of fulfilling our international human rights obligations. We will give further consideration to our human rights legal framework when the process of leaving the European Union (EU) concludes, and consult fully on proposals in the full knowledge of the new constitutional landscape.

### European Convention on Human Rights

The Council of Europe and the ECHR have a leading role in the promotion and protection of human rights, democracy and the rule of law in wider Europe. The UK is committed to membership of the ECHR.

We welcome the adoption in April 2018 of the Copenhagen Declaration, which was adopted under Denmark's Chairmanship of the Committee of Ministers of the Council of Europe, and which carries forward the reform process of the Court given impetus by the Brighton Declaration under our Chairmanship in 2012. Our priority is to strengthen the Court and the Convention system, both to improve the Court's efficiency in light of its large backlog of pending applications, and to ensure that it can focus on the most important cases before it, underpinned by the principle of subsidiarity.

### Fundamental Rights in the EU

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.

The Charter of Fundamental Rights is the EU's catalogue of rights. It was given binding legal force in 2009 by the Lisbon Treaty. The Charter did not create any new rights, or extend the circumstances in which national laws can be challenged – it simply restated and made more visible the rights which already existed in EU law.

The Charter of Fundamental Rights is only one element of the UK's human rights architecture. Most of the rights protected in the Charter are also protected in UK law; most notably under the HRA and the devolution statutes, which give further effect to the ECHR; in the common law and via specific statutory protections (for example those in equalities legislation). International agreements to which the UK is a party also form part of the UK's human rights architecture.

In June 2018, ahead of the UK's departure from the EU in March 2019, the European Union (Withdrawal) Act was passed into law. The Act provides that the Charter will be not be retained in domestic law after EU exit.

The Government's intention is that, in itself, the non-incorporation of the Charter into UK law should not affect the substantive rights that individuals already benefit from in the UK, as the Charter was never the source of those rights. Each substantive right found in the Charter will be reflected in the domestic law of the UK, through retained EU law and existing domestic law.

Many of the rights in the Charter reflect general principles of EU law, including fundamental rights, as set out in CJEU case law. The Withdrawal Act retains the General Principles for interpretative purposes.

After exit day it will not, in general, be possible for individuals to bring a freestanding claim, or for our courts to quash an administrative action, or to disapply legislation on the grounds that it breaches one or more of the retained general principles of EU law. Individuals will still have access to existing domestic remedies and many of the general principles which constitute fundamental rights are equivalent to or based on rights in the ECHR which are protected in UK law via the HRA.

Additionally, however, for three years after exit day, the prohibition on general principles challenges will not apply, for claims relating to a pre-exit cause of action, provided they do not involve an Act of Parliament or a rule of the common law.

## **Reporting to United Nations (UN) Human Rights Monitoring Bodies**

The Government takes its international human rights obligations seriously and remains committed to continuing to play a full role in UN reporting and dialogue processes. Through delivering our obligations, we strengthen the UK's ability to hold other States to account, and we demonstrate our commitment to protecting human rights globally.

The UK also remains fully committed to the Universal Periodic Review process,<sup>10</sup> a unique mechanism for sharing best practice on human rights, and for promoting the continual improvement of human rights on the ground.

As part of the monitoring process, the UK Government is committed to constructive engagement with the UK's National Human Rights Institutions and interested non-governmental organisations.

From 1 August 2017 to 31 July 2018, the UK has completed the following milestones:

- August 2017: UK dialogue with the UN under the Convention on the Rights of Persons with Disabilities (Department for Work and Pensions lead)
- August 2017: Follow up information to the UN under the International Convention on the Elimination of All Forms of Racial Discrimination (Ministry of Housing, Communities and Local Government lead)
- August-September 2017: UK response to the recommendations under the 3<sup>rd</sup> Universal Periodic Review (Ministry of Justice lead)

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<sup>10</sup> Details can be found at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

## Responding to human rights judgments

- November 2017: UK 6<sup>th</sup> periodic report to the UN under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ministry of Justice lead)
- November 2017: UK 8<sup>th</sup> Periodic report to the UN under the Convention on the Elimination of All Forms of Discrimination Against Women (Government Equalities Office lead)
- July 2018: UK update to the UN on five thematic areas under the 3<sup>rd</sup> Universal Periodic Review (Ministry of Justice lead).

The UK expects to reach the following milestones in the period ahead:

- Follow up information to the UN under the Convention on the Rights of Persons with Disabilities (Department for Work and Pensions lead)
- UK response to the list of issues in advance of the dialogue with the UN in 2019 under the Convention on the Elimination of All Forms of Discrimination Against Women (Government Equalities Office lead)
- UK dialogue with the UN in 2019 under the Convention on the Elimination of All Forms of Discrimination Against Women (Government Equalities Office lead)
- UK dialogue with the UN in 2019 under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ministry of Justice lead)
- Mid-term report to the UN on all recommendations under the 3<sup>rd</sup> Universal Periodic Review (Ministry of Justice lead).

## Coordination of the implementation of human rights judgments

There have been no significant changes to the Government's arrangements for coordinating the implementation of adverse judgments since the last report. Lead responsibility rests with the relevant government department for each case, while the Ministry of Justice provides light-touch coordination of the process.

Following an adverse ECtHR judgment against the UK, the Ministry of Justice liaises with the lead department to provide oversight of and advice on the implementation process and to assist with the drafting of Action Plans and updates which are required by the Committee of Ministers in their role of supervising the execution of judgments. The Ministry of Justice passes this information to the UK Delegation to the Council of Europe (UKDel), which represents the UK at the Committee of Ministers' meetings.

When a new declaration of incompatibility is made, the lead department is expected to bring it to the Joint Committee's attention. The Ministry of Justice encourages departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility.

More widely, the Ministry of Justice monitors cases involving other Council of Europe member States to identify those that have relevance for existing UK cases and issues, and informs other government departments as appropriate. However, it is not feasible for any one department to identify all the judgments that may be relevant, so all departments are expected to identify judgments relevant to their area of work and disseminate them to bodies for which they are responsible as appropriate. The Ministry of Justice's role supplements and supports this work.

## European Court of Human Rights judgments in UK cases in August 2017 – July 2018

The ECtHR handed down two judgments during the reporting period. The first was a standard individual application under Article 34 ECHR; the ECtHR found no violation of the applicant's ECHR rights. The second was a request under Rule 80(1) of the Rules of Court for a revision of an earlier judgment, and the ECtHR dismissed the request.<sup>11</sup>

### 1. Ndid (41215/14) – Chamber (First Section) – no violation

Handed down: 14/09/2017    Became final: 29/01/2018

The applicant was a Nigerian national who had a history of criminal offending including convictions for the supply of class A drugs, burglary and robbery. He was unsuccessful domestically in his appeals and challenges against deportation.

He complained to the ECtHR that the requirements of the amended Immigration Rules, namely that there should be 'exceptional circumstances' before his removal would be in breach of Article 8, imposed a higher standard than what was required under the ECHR, that standard being whether the deportation order had struck a fair balance between his right to private and family life, on the one hand, and the community's interests, on the other ('the proportionality test').

Secondly, he claimed that his deportation would constitute a disproportionate interference with his Article 8 right to respect for his family and private life (notably with his son who was born in 2012 to a British national with no connection to Nigeria), having particular regard to the fact that: he had lived in the UK for 28 years; his criminal offences had been committed when he had been either a minor or young adult; and he had not reoffended since his release in March 2011.

He also complained under Article 14, read together with Article 8, that he had been treated differently, without justification, from both a foreign criminal sentenced to less than four years' imprisonment, and a British national sentenced to more than four years' imprisonment, who could not be deported.

The ECtHR found by a 6:1 majority that there had been no violation of Article 8. The ECtHR considered that the domestic decision-makers had given thorough and careful consideration to the proportionality test required by Article 8, and the ECtHR could find no grounds to impugn the decision of the domestic authorities given Mr Ndid's continued criminality following the Secretary of State's warning of deportation in 2006. The ECtHR also rejected his Article 14 complaint as manifestly ill-founded pursuant to Article 35(3)(a).

The applicant's request for referral to the Grand Chamber was rejected.

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<sup>11</sup> Full details can be found on HUDOC (<http://hudoc.echr.coe.int>).

## **2. Ireland v UK (request for revision of the judgment of 18 January 1978) (5310/71) – Chamber (Third Section) – request dismissed**

Handed down: 20/03/2018    Became final: 10/09/2018

The Irish Government requested a revision of the 1978 judgment which found that five techniques of interrogation used by the UK in 1971 constituted a practice of inhuman and degrading treatment in violation of Article 3 ECHR but did not constitute a practice of torture.

Ireland argued that documents subsequently made available by the UK Government under the '30-year rule' might have had a decisive influence on the ECtHR if they had been disclosed in the original proceedings, in relation to the question whether or not the use of the five techniques amounted to torture.

The grounds for revision relied on by Ireland were that:

1. despite having information in its possession that the effects of the five techniques could be substantial, severe and long-lasting, the UK misled the European Commission of Human Rights (the Commission) and the ECtHR in downplaying those effects in the proceedings
2. the documents revealed that the UK had adopted a policy of withholding information from the Commission and the ECtHR on key facts concerning the five techniques.

The ECtHR found by a 6:1 majority that the documents submitted by Ireland did not contain sufficient *prima facie* evidence of the alleged new facts, namely that one of the experts relied on by the UK misled the Commission and the ECtHR as to the serious and long-term effects of the five techniques. It also held that documents submitted did not demonstrate facts that were unknown to the court when the original judgment was delivered.

The ECtHR observed that in the 1978 judgment, the ECtHR did not base its legal characterisation of the five techniques on their possible long-term effects on health. Any uncertainty as to their long-term effects could not therefore be considered a decisive issue. The 1978 judgment found that the difference between 'torture' and 'inhuman and degrading treatment' was a question of degree depending on the intensity of the suffering inflicted. There was no indication that findings on the severe and long-term psychiatric effects of the five techniques would have led to the court to reach the conclusion that the five techniques had to be characterised as torture.

Accordingly, the ECtHR held that the 1978 judgment must stand and Ireland's request for revision was dismissed. Ireland's request for referral to the Grand Chamber was rejected.

## The UK at the ECtHR: statistics from 1959 to 2017

The following tables summarise figures from the ECtHR's statistical reports to illustrate the number of applications made against the UK at the ECtHR from its initial establishment in 1959 until the end of 2017.<sup>12</sup> The tables show the outcomes of the applications, both the number that were declared inadmissible or struck out and the much smaller number that resulted in a judgment.

Applications have been on a general downward trend since 2010. Numbers in 2017 are only 15% of their peak in 2010. By population, the UK has the fewest applications of all States: 6 per million. The number for all States combined is 76 per million.

**Table 1. Applications against the UK allocated to a judicial formation<sup>13</sup>**

1959–2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
12,859	1,233	1,127	2,745	1,542	1,702	908	720	575	372	415	<b>24,198</b>

Due to the time lag between an application being allocated for initial consideration and a decision being made on its admissibility, the number of applications declared inadmissible cannot be directly compared to newly allocated applications on a year-by-year basis. However, it is noteworthy that the total number declared inadmissible during the years 2010–2017 is greater than the total number allocated.

**Table 2. Applications against the UK declared inadmissible or struck out<sup>14</sup>**

1959–2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
10,850	1,240	764	1,175	1,028	2,047	1,633	1,970	533	360	507	<b>22,107</b>

The numbers of judgments and adverse judgments continue to be low.

**Table 3. Judgments in UK cases (judgments finding violation)<sup>15</sup>**

1959–2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
368	36	18	21	19	24	13	14	13	14	5	<b>545</b>
(216)	(27)	(14)	(14)	(8)	(10)	(8)	(4)	(4)	(7)	(2)	<b>(314)</b>

<sup>12</sup> <http://echr.coe.int/Pages/home.aspx?p=reports>

<sup>13</sup> Source: Analysis of statistics 2017 and previous reports, pages 11 and 60. This is the first stage of consideration by the Court. Single judges can declare applications inadmissible or strike them out 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.

<sup>14</sup> Source: Analysis of statistics 2017 and previous reports, page 60.

<sup>15</sup> Source: Violations by Article and by State 2017 and previous reports; Violations by Article and by State 1959–2017 and previous reports. A judgment can cover more than one application.



## Ongoing applications against the UK: statistics for 2017

The number of ongoing applications against the UK under consideration by the ECtHR continues to fall both in absolute terms and as a proportion of all States' applications. For comparison, the UK population comprises 7.9% of the population of all States (Analysis of statistics 2017, page 11).

**Table 4. Caseload of the ECtHR at year end<sup>16</sup>**

Year	2012	2013	2014	2015	2016	2017
<b>UK</b>	3,308	2,519	1,243	256	231	130
<b>Total</b>	128,111	99,891	69,924	64,834	79,750	56,262
<b>Proportion</b>	2.6%	2.5%	1.8%	0.4%	0.3%	0.2%

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<sup>16</sup> Source: Analysis of statistics 2017 and previous reports, pages 12 and 60.

## The UK's record on the implementation of ECtHR judgments

At the end of 2017, the UK was responsible for 18 (0.2%) of a total 7,584 pending judgments before the Committee of Ministers (i.e. adverse judgments whose implementation is still being supervised). This is lower than for other States with a similar population (see Annex B).<sup>17</sup>

Further statistics and the numbers of pending judgments for all States for the years 2015–2017 can be found at Annex B. This annex also lists all judgments that found a violation against the UK that were still under the supervision of the Committee of Ministers at the end of July 2018.

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<sup>17</sup> Source: 11th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights', Table B.4. See <http://www.coe.int/en/web/execution/annual-reports>

## Consideration of adverse judgments that became final in August 2017 – July 2018

One adverse judgment became final in this period and therefore required the Government to take measures to implement it. The Committee of Ministers is satisfied that all required measures have been adopted and has closed its examination of the case.<sup>18</sup>

### 1. SMM (77450/12) – Chamber (First Section) – violation of Article 5

Handed down: 22/06/2017    Became final: 13/11/2017

The applicant was a Zimbabwean national who arrived in the UK in 2001 as a visitor, with six months' leave to enter, whose application for asylum was refused in 2005 on non-compliance grounds. He was served with notice of liability to removal, but in 2007 was convicted of a serious criminal offence and sentenced to three years' imprisonment. He made a second asylum claim while in prison, which was also refused. He was served with a notice of liability to automatic deportation, and remained in detention under immigration powers after completing his custodial sentence. He had been prescribed medication for serious mental illness and claimed to be at risk of torture in Zimbabwe. He complained to the ECtHR that his detention was in violation of Article 5, alleging that the Secretary of State failed to apply relevant policies, specifically those relating to mental health and victims of torture. He claimed that it had been unreasonable, arbitrary and disproportionate.

The ECtHR found a violation of Article 5(1) as the authorities did not act with sufficient 'due diligence' from 28 June 2010 to 8 February 2011. The ECtHR acknowledged that the conduct of the applicant contributed to the delay, however it considered that the Secretary of State should have taken more decisive steps to bring the decision-making process swiftly to a close. The ECtHR noted that whilst the applicant was considered sufficiently well to be detained it was accepted that he had serious mental health problems, making him vulnerable. There was therefore a heightened duty on the authorities to act with 'due diligence' in order to ensure that he was detained for the shortest time possible. The ECtHR also noted that the Government had chosen to put in place a system where there are no fixed time limits on immigration detention. Where an applicant is subject to an indeterminate period of detention, the necessity of procedural safeguards becomes decisive. Accordingly, the ECtHR considered that the necessity to ensure the effectiveness of the available procedural safeguards meant that there was a particular need for the authorities to act with appropriate due diligence in managing the decision-making process and following up the deadline ultimately imposed.

The ECtHR rejected the applicant's complaints concerning the 'lawfulness' and arbitrariness of his detention. The ECtHR noted that there was no suggestion that the authorities had at any time acted in bad faith, nor were the place and conditions of detention inappropriate for its purpose.

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<sup>18</sup> Full details can be found on HUDOC (<http://hudoc.echr.coe.int>) and HUDOC-EXEC (<http://hudoc.exec.coe.int>).

## Responding to human rights judgments

The applicant's request for referral to the Grand Chamber was refused.

The Government submitted an Action Report to the Committee of Ministers on 15 May 2018, explaining that, as set out in the Action Report for the related cases of *JN* (37289/12) and *VM* (49734/12), a number of measures are now in place to ensure that deportations of those in detention are pursued with sufficient diligence and that any new representations submitted by an individual in detention are considered rapidly.

The Committee of Ministers decided on 5 September 2018 to close its examination of the case.

## **Judgments that became final before August 2017 and are still under the supervision of the Committee of Ministers**

A number of judgments involve more complex issues and the process of implementation is ongoing.

### **1. McKerr Group (28883/95) – violation of Article 2**

This group of judgments arose from delays in the investigation of deaths in Northern Ireland.

#### **The Stormont House Agreement**

The Stormont House Agreement (SHA), which was agreed in December 2014, includes measures to address a number of issues relating to Northern Ireland's troubled past. These include refining the legacy inquest process and provision for a new body, the Historical Investigations Unit (HIU), to take forward investigations into outstanding Troubles-related deaths. The UK Government has indicated £150m of additional funding will be available for the SHA measures for dealing with the past. The UK Government has recently consulted on the proposals contained in a draft Bill which would establish, amongst other bodies, the HIU. The consultation closed on 5 October 2018 and the UK Government is now considering the responses.

The HIU would be an independent body. Officers investigating criminal allegations would have the powers and privileges of a police constable. The HIU would also provide dedicated family support staff, and the next of kin would be involved in the process from the beginning and would be provided with support. Oversight would be provided by the Northern Ireland Policing Board, and the HIU would be structurally and operationally independent from the police. This independence is intended to address the criticisms that had previously been made of the role of the Historical Enquiries Team (HET).

The UK Government will make full disclosure to the HIU, and the draft Bill includes provisions ensuring that the UK Government, its departments and agencies (including for instance The National Archives), the police, the security services as well as all Northern Ireland Executive departments (including for instance the Public Record Office of Northern Ireland) make available to the HIU any relevant information, documents or other material the HIU may reasonably require to carry out its investigations. Provision is also included in the draft Bill to prevent any damaging onward disclosure of information by the HIU.

As of 1 September 2018 there are in the region of 1,700 HET and Office of the Police Ombudsman for Northern Ireland (OPONI) cases outstanding. The HET was closed in December 2014 following restructuring within the Police Service for Northern Ireland (PSNI). The Legacy Investigations Branch of the PSNI continues to review cases within its remit and investigate where there is credible evidence in those cases at present.

On 17 November 2015, the 'Fresh Start' Agreement was reached following ten weeks of talks between the UK and Irish Governments and the Northern Ireland political parties. Unfortunately, although a great deal of progress was made during the negotiations on addressing Northern Ireland's past, it was not possible to achieve final agreement on those matters at that time. However, over the course of the political negotiations,

substantial areas of common ground were developed on the legacy institutions, including on a range of issues where progress had previously proved impossible. Contentious questions were worked through by all the parties in the spirit of moving things forward for families and victims.

The Secretary of State for Northern Ireland met with key stakeholders to work towards a political agreement on these issues. Even on the difficult question of how best to balance disclosure to families with the Government's national security duties, a number of options were suggested and constructively considered. While that issue was not resolved during the talks, all of the participants to the talks agreed on the need for further progress in order for Northern Ireland to be able to deal with the past and to deliver better outcomes for victims and survivors.

Since the Fresh Start Agreement the Secretary of State carried out a process of engagement to ensure that the views of victims are taken into account and that they could contribute, as those most affected, to the discussion on dealing with the past. As a consequence of that engagement the Secretary of State concluded that there was a desire for a public phase to enable discussion on the detailed proposals for addressing the past.

Following the resignation of the former deputy First Minister of Northern Ireland, Martin McGuinness, on 9 January 2017, a Northern Ireland Assembly election was held on 2 March 2017. Consequently, no further progress was made with political parties during the election campaign period. Following that election, the Secretary of State engaged in intensive talks with the political parties and the Irish Government to re-establish an inclusive devolved administration at Stormont. Whilst progress was made on a number of issues including legacy, significant gaps remained between the parties, and they were unable to form a devolved government by the deadline of 27 March 2017.

Unfortunately, it has still not proved possible for the Northern Ireland parties to reach an agreement that would allow the Executive to be restored. In the continued absence of an Executive, the UK Government took the decision that, even without an Executive, it was necessary to proceed with a public consultation on the proposals for addressing the legacy of the past in Northern Ireland that were set out in the SHA.

Building on the good progress made, as part of its commitment to consult publicly on the details of the SHA structures, on 11 May 2018, the UK Government launched the consultation entitled *Addressing the Legacy of Northern Ireland's Past*. This public consultation provided everyone with an interest, the opportunity to see the proposed way forward to address the legacy of the past and contribute to the discussion on the issues. A public phase has the potential to build greater confidence in the new bodies, particularly among the wide constituency of victims of the Troubles. The Northern Ireland (Stormont House Agreement) Bill published alongside the consultation, sets out draft legislation for four new institutions, each designed to address different aspects of the legacy of the past. The new institutions will be under legal obligations to operate in ways that are fair, balanced and proportionate. Central to these proposals is a new approach on how investigations into Troubles-related deaths are carried out through the HIU.

As part of this suite of new proposals to address the legacy of the Troubles, three other institutions would also be established.

The Independent Commission on Information Retrieval (ICIR) would be an independent institution, established by international agreement between the UK Government and the

Irish Government, to enable victims and survivors from the UK and Ireland to seek and privately receive information about the Troubles-related deaths of their relatives.<sup>19</sup> Engagement with the ICIR would be entirely voluntary and the ICIR would only seek information in those cases where families have submitted a request.

An Oral History Archive (OHA) would be an independent archive that would enable people from all backgrounds to share experiences and narratives related to the Troubles.

The Implementation and Reconciliation Group (IRG) would be an independent institution to promote reconciliation, and to review and assess the implementation of the aforementioned three new institutions to deal with the past.

The consultation document also sets out the consequences of leaving the current system unchanged and acknowledges that some people have views on different ways to address the legacy of Northern Ireland's past not outlined in the consultation paper.

The UK Government's position is that the SHA and the measures set out in the draft Bill represent the best way forward when addressing the legacy of Northern Ireland's past and the legacy institutions have the potential to provide better outcomes for victims and survivors and for all those affected by the Troubles. However no final decisions have been taken pending consideration of responses to the consultation.

The Government offered to meet victims groups and other interested stakeholders throughout the consultation period, to ensure that the proposals were widely understood. Now that the consultation has finished, the Government will publish an analysis of the responses and set out how the Government proposes to respond. Depending on the responses, the Government would hope to proceed thereafter to present the legislation formally to Parliament.

### **The *McKerr* case**

The *McKerr* case is subject to on-going preparation for inquest in relation to disclosure of documents and other materials that date back to 1976. The case has not been listed for hearing yet but disclosure is ongoing. *McKerr* is materially linked to a number of other cases and the disclosure exercise involves several thousands of pages held by the PSNI and other departments and agencies.

PSNI initial disclosure was, some time ago, separated into 13 tranches because of the volume of material involved. Disclosure within Tranche 1–Tranche 12 remains to be perfected, though several tranches have been disseminated to families and other properly interested persons. Tranche 13 consists of a substantial volume of documents in respect of which the Coroner's Office has issued directions and a small amount of this material has also been furnished to families and other properly interested persons. Directions and queries have also issued to the PSNI in relation to the disclosure of further information deemed to be potentially relevant to the Coroner's investigation, some of which relates to the need to cross-reference identified information against additional cases in respect of ascertaining and analysing similar fact evidence.

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<sup>19</sup> [http://data.parliament.uk/DepositedPapers/Files/DEP2016-0057/Agreement\\_establishing\\_the\\_ICIR.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2016-0057/Agreement_establishing_the_ICIR.pdf)

The PSNI has recently allocated significant additional resources to address the delay in disclosure and response to coronial queries to date.

The Coroner's Office has also requested the disclosure of documents from across a number of government departments and agencies, including the Ministry of Defence, the Security Service, the Cabinet Office, the Northern Ireland Office, the Attorney General's Office, the Home Office, the Director of Public Prosecutions and the Office of the Police Ombudsman. As a result approximately 100 lever-arch folders of materials have been provided for consideration by the Coroner's Office legal team and the majority of materials from this body of documents have been considered and potential relevance indicated. The Coroner's Office has been notified that further materials are to be provided shortly in the progression of this exercise. Additionally, the Coroner's Office has identified a list of priority materials and sent it to all the agencies concerned to facilitate early disclosure of a small body of highly relevant material. The PSNI has now provided a large part of this highly relevant material. The other departments are considering the Coroner's Office requests that they process material ready for disclosure to families and other properly interested persons. To capture all potentially relevant material, departments and agencies, including the PSNI, have been directed to provide further specified disclosure and answer a number of outstanding queries.

Once the disclosure exercise is complete, the Coroner's Office should be in a position to advance a realistically achievable timeframe for hearing. Further dissemination of material to families is linked to an ongoing Public Interest Immunity process. Work is ongoing on the collation and analysis of material provided to the Coroner's Office to date, alongside internal cross-referencing and the preparation of chronologies and witness lists.

### **Measures to Address Delay**

The Lord Chief Justice (LCJ) of Northern Ireland became President of the Coroner's Court on 1 November 2015. The LCJ has appointed a High Court Judge as the Presiding Coroner to oversee the management of cases and consider issues relating to scope and disclosure. The Presiding Coroner in conjunction with the Lord Chief Justice will determine which cases will be listed for hearing and when.

When the LCJ assumed the Presidency of the Coroner's Court there were 55 legacy cases. Since then two further cases have been referred, and four cases have concluded. Of the 53 outstanding legacy cases involving 94 deaths, findings are awaited in three cases; partial findings have been delivered in one case; and two cases are at hearing. The Ballymurphy inquest, which involves 10 deaths and five cases, is due to commence in 2018. The cases progressed to date are the oldest in terms of the date of death, all dating back to the early 1970s.

Following a review of the state of readiness of the outstanding legacy cases, undertaken by Lord Justice Weir, and a series of meetings in Strasbourg, both in January 2016, the LCJ made his proposals. He proposed that with the support of a properly resourced Legacy Inquest Unit in the Northern Ireland Courts and Tribunals Service and co-operation from the relevant bodies including the PSNI and the Ministry of Defence, operating in conjunction with the other reform measures that he has recommended, it should be possible to complete the existing legacy inquest caseload within a period of five years, subject to the required resources being made available.

Criminal Justice Inspection Northern Ireland (CJINI) carried out an inspection of the arrangements in place in the PSNI to manage and disclose information in support of the



coronial process in Northern Ireland. The report was published on 8 December 2016 and made seven recommendations aimed at improving disclosure of information to the Coroner which will be key to completing the cases in line with Article 2 ECHR. Greater use is also planned of electronic data management, both within the new Legacy Inquest Unit and between organisations. An IT project is underway to procure a new case and disclosure management system to support the progression of legacy inquests in the Northern Ireland Courts and Tribunals Service. This will help to ensure that more effective use is made of resources within the organisations that contribute to the inquest process.

A new Coroner's Researcher took up post in May 2017, to assist in the discovery process of relevant material for inquests, and work is being progressed on Recommendation 7 of the CJINI Report in collaboration with the PSNI, to ensure early involvement of the Coroners Service in the discovery and disclosure process – providing more assurance and scrutiny and reducing delay in providing access to the material to Properly Interested Persons.

The projected time-frame remains five years for completion of the outstanding legacy inquest caseload with the required resources and co-operation in place as envisaged under the Lord Chief Justice's reform proposals.

In March 2016, the Northern Ireland Executive was asked by the Department of Justice (DoJ) to consider a proposed bid for funding for an initial phase of work which would aim to complete up to 16 legacy cases within a period of 19 months. Subsequent to that, the DoJ developed a revised funding bid for all current outstanding legacy inquests as part of the overall funding package for dealing with the past to the parties to inform the ongoing political talks in Northern Ireland.

This bid was not taken to the Executive Committee, as the First Minister at the time considered legacy inquest funding should be taken forward as a package with other legacy reform.

In March 2018, however, the Northern Ireland Court of Appeal in the Brigid Hughes Application for Judicial Review ([2018] NICA 26) directed that progress on securing funding for legacy inquests should not be linked with agreement on the overall legacy package but be taken forward as a separate issue. The judgment requires the relevant parties to reconsider their respective duties regarding the provision of additional funding to the Coroners Service for legacy inquests, and to consider what steps should be taken to ensure that legacy inquests can be carried out in a manner which complies with the UK's Article 2 obligations.

Legacy inquest reform is a devolved matter and the Northern Ireland Civil Service, in conjunction with key justice organisations, is currently developing a refreshed composite business case for legacy inquest funding. In parallel the UK Government is doing everything it can to work with the parties to restore devolved Government in Northern Ireland.

The UK Government continues to support reforms to the legacy inquest system in Northern Ireland to improve the way legacy inquests are conducted in accordance with the UK's international obligations.

## 2. Hirst (No.2), Greens & MT (74025/01, 60041/08) – violation of Article 3 of Protocol 1

**Hirst (No.2):** 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 by the ECtHR as a result of a successful challenge by Hirst, a prisoner. In October 2005, the Grand Chamber upheld the ruling that the UK's ban was in violation of Article 3 of Protocol 1. In its judgment, the Grand Chamber allowed the UK a 'wide margin of appreciation' in implementing *Hirst (No. 2)*.

**Greens and MT:** 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, sought to enrol on the electoral register, applications which were refused.

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 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 until 24 September 2013 when the Court decided to process these in due course. 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):** The UK intervened in the Italian prisoner voting case of *Scoppola (No 3)* and was represented by the Attorney General, Dominic Grieve QC at the Grand Chamber hearing of 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 blanket ban was in violation of Article 3 of Protocol 1, while recognising that national parliaments enjoyed a wide margin of discretion when it came to regulating prisoner voting, both as regards the types of offence that should result in the loss of a vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of law.

The 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 address 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.

**Clone cases:** On 12 August 2014, in the case of *Firth and Others v. the UK*<sup>20</sup> the ECtHR 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 in each of the ten cases, but did not award any damages or costs. The applicants sought referral of the judgment to the Grand Chamber, but this was refused and the judgment became final on 15 December 2014.

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<sup>20</sup> Applications 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09.

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.<sup>21</sup> These cases relate to prisoners unable to vote in one or more of the 2009 European Parliamentary elections, the 2010 UK Parliamentary elections and the 2011 elections to the Scottish Parliament, the Welsh Assembly or the Northern Irish Assembly.

## Implementation

In a statement to Parliament on 2 November 2017, the Secretary of State for Justice set out the Government's proposals to make administrative changes to address the *Hirst* judgment, while maintaining the bar on convicted prisoners in custody from voting. The Committee of Ministers noted with satisfaction the Government's proposed measures, encouraged the UK to implement them as soon as possible and asked the UK to provide an update on implementation by 1 September 2018. Operational guidance has now been amended to address an anomaly in the current system, where offenders who are released early back in the community before the end of the custodial part of their sentence under the home detention curfew scheme can vote, but prisoners in the community released on temporary licence cannot vote. The Government has also made clear to criminals when they are sentenced that while they are in prison they will lose the right to vote. This is intended to address a specific concern of the *Hirst* judgment that there was not sufficient clarity in confirming to convicted offenders that they cannot vote in prison.

The Government considers that all necessary measures have now been taken. An Action Report was submitted to the Committee of Ministers on 1 September 2018.

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<sup>21</sup> [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#{)

### **3. S and Marper (30562/04 and 30566/04) – violation of Article 8**

The applicants, both of whom had been arrested for but not convicted of criminal offences, sought to have their DNA samples, profiles and 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 Government brought forward legislative proposals to address the issue in England and Wales, and across the UK in respect of material collected under counter-terrorism powers, in the Protection of Freedoms Act 2012 (PoFA) which received Royal Assent 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 in England and Wales, DNA profiles and fingerprints which can no longer be retained under the provisions of PoFA have been removed from the national databases. This was completed by 31 October 2013, the date on which PoFA was brought into force.

The Northern Ireland Department of Justice (DoJ) was unable to secure the necessary legislative consent motion to allow the extension of PoFA to Northern Ireland in respect of material collected under policing powers there. Instead, the DoJ brought forward broadly similar provision in the Criminal Justice Act (Northern Ireland) 2013 (CJA), which received Royal Assent on 25 April 2013. However, the biometric retention provisions of CJA remain uncommenced.

As the provisions of both PoFA and CJA require the destruction of a large volume of existing DNA and fingerprints, there is a risk that the investigative role of the proposed Historical Investigations Unit (HIU) will be undermined should material potentially relevant to its work be destroyed. At the time of writing, the UK Government proposes to mitigate this risk by introducing statutory provision to allow for the retention of a copy of the relevant material for investigations within the remit of the HIU. This statutory provision would be made through the proposed Northern Ireland (Stormont House Agreement) Bill which was issued for public consultation on 11 May 2018. The consultation closed on 5 October 2018. The UK Government intends to seek to publish its response within 12 weeks and, depending on the consultation outcome, hopes to introduce the legislation thereafter.

In the interim, the UK Government has made provision through a transitional order to enable authorities in Northern Ireland to retain data collected under counter-terrorism powers in Northern Ireland before 31 October 2013 on a temporary basis. The UK Government has taken steps to renew this transitional order so that such material can continue to be held until October 2020.

Once statutory provision for the HIU's use of such material has been made, the DoJ will work to bring the legislative provisions of CJA into force.

#### **4. MGN Ltd (39401/04) – violation of Article 10**

The applicant, a publishing company, was a defendant in domestic privacy proceedings in 2005. Having lost the case, the applicant had to pay significant costs including ‘success fees’ of around £1,000,000. The ECtHR found a violation of Article 10, noting the chilling effect on freedom of expression if the fees were inflated by pressuring defendants to settle cases which could have been defended. It considered that the requirement that the applicant pay success fees was disproportionate having regard to the legitimate aims sought to be achieved and exceeded the broad margin of appreciation accorded in such matters.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) implements reforms to civil litigation funding and in particular to ‘conditional fee agreements’ (CFA) and success fees. This legislation was enacted on 1 May 2012 and is aimed at controlling the costs of litigation generally as well as, in particular, the costs that the other party may have to pay. It includes a variety of provisions to ensure the proportionality of costs; effective costs management and the encouragement of early settlements. However, following recommendations made in the context of a domestic inquiry (the Leveson Inquiry), entry into force of the relevant parts of the Act relating to defamation and privacy cases has been delayed until the introduction of a proposed costs protection regime which was the subject of a consultation process that closed on 8 November 2013. The Government is considering the way forward.

In addition, changes already introduced by the Defamation Act 2013 will help to reduce costs in defamation cases.

## **5. Hammerton (6287/10) – violation of Articles 6 and 13**

The applicant was committed to prison for three months for contempt of court after breaching an injunction and undertaking in the context of child contact proceedings. Due to procedural errors, he was not legally represented at the committal hearing, and the domestic courts later found that he had spent extra time in prison as a result of these errors, which were such that his rights under Article 6 ECHR as set out in the HRA (right to a fair trial) were breached. However, he was unable to obtain damages in the domestic courts to compensate for this breach, because section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to compensate a person to the extent required by Article 5(5) ECHR (deprivation of liberty).

The applicant complained to the ECtHR on the basis of Articles 5, 6, 13 and 14.

The ECtHR held that the applicant's right to liberty under Article 5 had not been violated. They held that the violation of Article 6 in this case did not amount to a 'flagrant denial of justice' and the detention could not be deemed arbitrary or unlawful and was therefore justified by Article 5(1)(a).

The ECtHR declared that there had been a violation of the applicant's right to a fair trial under Article 6 in respect of the applicant's lack of representation during his committal hearing.

The ECtHR also concluded that as the applicant could not obtain financial compensation for the 'lengthened deprivation of liberty' resulting from the violation of Article 6, he could not receive adequate redress in the domestic courts. Therefore, there was a violation of the applicant's right to an effective remedy under Article 13.

The applicant's claim under Article 14 was dismissed as manifestly ill-founded.

The Government considers that no general measures are required in respect of the Article 6 violation: the judgment of the Court of Appeal serves to address the legal situation in such cases.

To address the finding of an Article 13 violation, the Government has decided to amend section 9 HRA to allow an award of damages in a new set of circumstances. On 16 July 2018, the Government laid a paper with a draft of a proposed Remedial Order to make this amendment.

## Domestic cases: declarations of incompatibility made in August 2017 – July 2018

The domestic courts made two declarations of incompatibility under section 4 of the HRA during this period:

38. Smith v (1) Lancashire Teaching Hospitals NHS Foundation Trust; (2) Lancashire Care NHS Foundation Trust; (3) Secretary of State for Justice (*Court of Appeal*; [2017] EWCA Civ 1916; 28 November 2017)

39. Steinfeld and another v Secretary of State for International Development (*Supreme Court*; [2018] UKSC 32; 27 June 2018)

Details of all declarations of incompatibility made since the HRA came into force until the end of the reporting period are given in **Annex A**.

## Annex A: Declarations of incompatibility

Since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2017, 39 declarations of incompatibility have been made. As there is no official database of declarations of incompatibility, this annex is intended to provide a summary of all declarations in chronological order and the Government's response. References to Articles are to the Convention rights as set out in the HRA, unless stated otherwise.

Of these 39 declarations of incompatibility:

- 10 have been overturned on appeal (and there is no scope for further appeal): see numbers 1, 3, 6, 10, 15, 20, 24, 25, 28 and 31 below.
- 2 are currently subject to appeal: 33 and 34.
- No others still have the potential for an appeal.

Of the remaining 27 declarations of incompatibility:

- 5 related to provisions that had already been changed by primary legislation at the time of the declaration: 13, 14, 21, 22 and 32.
- 11 have been addressed by later primary or secondary legislation: 4, 5, 7, 8, 9, 11, 12, 16, 17, 18 and 27.
- 3 have been addressed by Remedial Order: 2, 19 and 26.
- 1 has been addressed by administrative measures: 23.
- 4 the Government has notified Parliament that it is proposing to address by Remedial Order: 29, 35, 36 and 37.
- 3 are under consideration: 30, 38, and 39.

One further declaration of incompatibility was made after the reporting period but before publication of this report. This will be covered in the next annual report:

40. Siobhan McLaughlin, *Re Judicial Review (Northern Ireland) (Supreme Court; [2018] UKSC 48; 30 August 2018)*

The Supreme Court by a 4:1 majority made a declaration that “section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 is incompatible with article 14 of the ECHR, read with article 8, insofar as it precludes any entitlement to widowed parent's allowance by a surviving unmarried partner of the deceased.”



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6. Matthews v Ministry of Defence  
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7. R (on the application of Anderson) v Secretary of State for the Home Department  
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8. R (on the application of D) v Secretary of State for the Home Department  
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9. Blood and Tarbuck v Secretary of State for Health  
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10. R (on the application of Uttley) v Secretary of State for the Home Department  
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- 33. R (on the application of P and A) v Secretary of State for the Home Department and Others**  
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*(Court of Appeal; [2017] EWCA Civ 1916; 28 November 2017)*
39. **Steinfeld and another v Secretary of State for International Development**  
*(Supreme Court; [2018] UKSC 32; 27 June 2018)*

**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 incompatible with 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 incompatible, including the Town and Country Planning Act 1990, sections 77, 78 and 79.

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

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

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

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

Sections 72 and 73 of the Mental Health Act 1983 were declared incompatible with 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 Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditor's enjoyment of contractual rights.

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

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

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

The case concerned a man who was charged with the attempted buggery of a woman. He argued that the existence of the offence of attempted buggery was in violation 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 Protocol 1 as it imposed an excessive burden on the carriers.

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

#### **6. Matthews v Ministry of Defence**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **9. Blood and Tarbuck v Secretary of State for Health**

*Unreported; 28 February 2003*

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

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

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

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

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

The case concerned a prisoner who argued that his release on 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 ECtHR had already identified the absence of any system for legal recognition of gender change as a violation of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004, which came into force on 4 April 2005.**

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

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

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

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

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

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

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

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

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

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

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

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

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

Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were found to be in violation of Article 14 in combination with Article 8 and Article 1 of Protocol 1 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) in so far as:

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

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



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

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

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

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

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

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

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

&

## **18. R (on the application of 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 HRA.

**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 25 April 2011 and came into force on 9 May 2011. This abolished the Certificate of Approval scheme so that those subject to immigration control who wish to marry in the UK and the Isle of Man will have the freedom to give notice of marriage without having first to seek permission of the Secretary of State.**

### **20. Re MB**

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

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

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

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

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

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

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

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

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

**22. R (on the application of 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 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).

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*.<sup>22</sup> 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.

**The Government considered this declaration alongside the ECtHR's decision in *Hirst v UK (No.2)* and its pilot judgment in *Greens & MT v UK* which are covered in the section on ECtHR judgments.**

**In a statement to Parliament on 2 November 2017, the Secretary of State for Justice set out the Government's proposals to make administrative changes to address the *Hirst* judgment, while maintaining the bar on convicted prisoners in custody from voting.**

**Operational guidance has now been amended to address an anomaly in the current system, where offenders who are released early back in the community before the end of the custodial part of their sentence under the home detention curfew scheme can vote, but prisoners in the community released on temporary licence cannot vote. The Government has also made clear to criminals when they are sentenced that while they are in prison they will lose the right to vote. This is intended to address a specific concern of the *Hirst* judgment that there was not sufficient clarity in confirming to convicted offenders that they cannot vote in prison.**

#### **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.

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<sup>22</sup> R. (on the application of Chester) v Secretary of State for Justice; Supreme Court [2014] UKSC 25

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 violation should generally be demonstrated on the facts for a declaration to be issued) and that the structure of the HRA suggests that 'a declaration of incompatibility should be the last resort.'**

## **25. R (on the application of Wayne Thomas Black) v Secretary of State for Justice**

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

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

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

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

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

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

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

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

**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 HRA. 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 violated Article 6 and had the potential to give rise to violations 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 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 and Article 1 of Protocol 1.

The 2013 Act retrospectively validates notifications and sanctions decisions made under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ('the ESE Regulations'). The ESE Regulations were declared *ultra vires* in R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions [2013] EWCA Civ 66.

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

The Government appealed the judgment to the Court of Appeal and the claimants filed a counter-appeal. The Court joined this case with *Jeffrey and Bevan v Secretary of State for Work and Pensions* and upheld the declaration of incompatibility: [2016] EWCA Civ 413.

The Court of Appeal stated that it believed that the High Court was right to hold that the enactment of the 2013 Act gave rise to a breach of Article 6(1) in the case of Mr Hewstone, and that it also believed it gave rise to a breach 'in the cases of all other JSA [Jobseeker's Allowance] claimants who had filed appeals against sanctions imposed under the 2011 Regulations prior to its [the 2013 Act's] coming into force.'

The declaration of incompatibility affects a limited group of claimants: those who had lodged an appeal of a sanction decision that had been made under the ESE Regulations whose appeal had not been finally determined, abandoned or withdrawn by 26 March 2013 (the date the 2013 Act came into force).

**The Government has decided to address this incompatibility by amending the 2013 Act. A paper with a draft of a proposed Remedial Order to address the incompatibility was laid before Parliament on 28 June 2018. This will restore claimants' right to a fair hearing and give the Secretary of State for Work and Pensions the power to revise or supersede the sanction decision where the claimant had an appeal of a sanction decision (made under the ESE Regulations) still in the Tribunal system where the claimant had appealed a sanction decision (made under the ESE Regulations) by 26 March 2013 and that appeal had not been finally determined, abandoned or withdrawn by 26 March 2013.**

### **30. *Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya***

*Court of Appeal; [2015] EWCA Civ 33; 5 February 2015*

The Court of Appeal held that sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 are incompatible with Article 6 ECHR in so far as they barred two members of the service staff of foreign missions (Libya and Sudan) bringing employment claims in the UK courts. In so far as those claims fell within the scope of EU law (e.g. Working Time Directive claims), there was also a violation of Article 47 of the Charter of Fundamental Rights.

In terms of remedy, the Court of Appeal made a declaration of incompatibility in respect of sections 4(2)(b) and 16(1)(a) of the 1978 Act. For the same reasons, the Court found that those provisions of the 1978 Act were incompatible with EU law. In respect of those employment claims which were within the scope of EU law, the Court disapplied the provisions in so far as they barred the claims, which meant the claims could be brought by the claimants.

**The Foreign Secretary appealed to the Supreme Court which dismissed the appeal and upheld the declaration of incompatibility: [2017] UKSC 62.**

**The Government is considering its response.**



### **31. Northern Ireland Human Rights Commission, Re Judicial Review**

*High Court of Northern Ireland; [2015] NIQB 102; 16 December 2015*

The Northern Ireland Human Rights Commission brought a legal challenge to the courts in Northern Ireland seeking a declaration that Northern Ireland's abortion laws, being sections 58 and 59 of the Offences against the Person Act 1861 and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945, are incompatible with Articles 3, 8 and 14.

The High Court held that the failure to provide exceptions to the prohibition of abortion in cases where there is a fatal foetal abnormality or where the pregnancy is a result of sexual crime, up to the date when the foetus becomes capable of existing independently of the mother, was incompatible with Article 8.

The Department of Justice and the Attorney General for Northern Ireland appealed to the Court of Appeal which overturned the declaration of incompatibility, concluding that it was not 'institutionally appropriate' for the Court to intervene at that stage ([2017] NICA 42).

The Northern Ireland Human Rights Commission appealed to the Supreme Court which dismissed the appeal on the basis that the Northern Ireland Human Rights Commission did not have standing to bring the case because there 'must be an actual or potential victim of an unlawful act to which the proceedings relate' ([2018] UKSC 27).

However, the Supreme Court went on to indicate that, in its view, the current Northern Ireland abortion laws are disproportionate and incompatible with Article 8 insofar as they prohibit abortion in the case of (a) fatal foetal abnormality, (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. The Court did not consider that the law in the abstract is incompatible with Article 3.

### **32. David Miranda v Secretary of State for the Home Department**

*Court of Appeal; [2016] EWCA Civ 6; 19 January 2016*

Mr Miranda was examined under Schedule 7 to the Terrorism Act 2000 by the Metropolitan Police at Heathrow Airport on 18 August 2013. Schedule 7 allows an examining officer to stop and question and, when necessary, detain and search individuals travelling through border control areas to determine whether they appear to be someone who is or has been involved in the commission, preparation or instigation of acts of terrorism.

During his period of examination, Mr Miranda was questioned and items in his possession were taken from him. Mr Miranda is the spouse of Glenn Greenwald, a journalist who at the time was working for *The Guardian*. The information taken included encrypted material derived from data from the National Security Agency of the United States that had been obtained by Edward Snowden. This included US intelligence material, some of which formed the basis of articles that appeared in *The Guardian* on 6 and 7 June 2013. Mr Miranda was accepted to be carrying the material in order to assist Mr Greenwald in his journalistic activity.

The Court held that Schedule 7 was incompatible with Article 10, in relation to journalistic material, as it was not subject to adequate safeguards against arbitrary use.

The Court's judgment concerned Schedule 7 as it was at the time of the Miranda examination, which took place in August 2013. Since that time, Schedule 7 has been amended, as has the Schedule 7 Code of Practice for Examining and Review Officers.

Paragraph 40 of the Code now states:

*'examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984 (PACE).'*

Section 11(1)(c) of the Police and Criminal Evidence Act 1984 includes journalistic material within the meaning of 'excluded material'.

### **33. R (on the application of P and A) v Secretary of State for the Home Department and Others**

*Administrative Court; [2016] EWHC 89 (Admin); 22 January 2016*

&

### **34. R (on the application of G) v Constable of Surrey Police and Others**

*Administrative Court; [2016] EWHC 295 (Admin); 19 February 2016*

Under the Rehabilitation of Offenders Act 1974, after a certain period of time most convictions and all cautions become 'spent' and are protected from disclosure. However, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 provides that, in certain circumstances and for certain sensitive professions, spent convictions and cautions are not protected from disclosure and can be taken into account.

Following the decision of the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, amendments were made to the Police Act 1997, which sets out the information to be included on a criminal record certificate issued by the Disclosure and Barring Service, and the Exceptions Order to reduce the number of convictions and cautions which are disclosed.

P & A challenged the revised approach to disclosure where an individual has more than one conviction. G challenged the refusal of the Chief Constable to exercise her discretion to expunge records of his reprimand received for a specified offence from the police national computer and the subsequent disclosure of the record.

In both cases the High Court held that there are insufficient safeguards included in the disclosure scheme such that it is still not 'in accordance with the law' for the purposes of Article 8 in the claimants' case. They made a declaration of incompatibility to this effect.

The Government appealed the decisions to the Court of Appeal and the cases were joined with the related cases of *W* and *Krol*. The effect of both declarations was stayed pending the outcome of the appeal.

The Court of Appeal found that the rules providing for indefinite disclosure of (i) multiple convictions, and (ii) a conviction or caution for a specified offence, do not take sufficient account of relevant factors to ensure that the proportionality of the interference with Article 8 is adequately examined: [2017] EWCA Civ 321.

**The Government was granted permission to appeal the decision to the Supreme Court. The case was heard in June 2018 and is currently awaiting judgment from the Supreme Court. The effect of the declarations has been stayed pending the outcome of the appeal.**

### **35. Z (A Child) (No 2)**

*Family Court; [2016] EWHC 1191 (Fam); 20 May 2016*

A declaration of incompatibility was sought in this matter on the basis that section 54 of the Human Fertilisation and Embryology Act 2008 was a discriminatory interference with a single person's rights to private and family life, and therefore incompatible with Articles 8 and 14. Under section 54 of the 2008 Act only couples (and not single people) can obtain a parental order following a surrogacy arrangement. This contrasts with adoption where single people are able to adopt. The case came following an application to read section 54 compatibly with the Convention under section 3 of the HRA – which was rejected.

Shortly prior to the hearing the Secretary of State for Health conceded that the unavailability of parental orders to single people following a surrogacy arrangement was in violation of Article 14 (taken with Article 8). The Secretary of State made it clear that in their view the policy did not violate Article 8 taken on its own, as there was no right to be conferred parenthood using this particular legal mechanism. The result was a declaration by the court that section 54(1) and (2) of the 2008 Act are incompatible with the rights of the applicant and his child under Article 14 (taken with Article 8) insofar as they prevent the applicant from obtaining a parental order.

**A paper with a draft of a proposed Remedial Order to address the incompatibility was laid before Parliament on 29 November 2017. Following the Joint Committee's report, the Government laid a revised draft Remedial Order before Parliament on 19 July 2018. The Government is preparing the legislation which is needed to support the amendments made by the Remedial Order. The intention is to lay the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 before Parliament in the autumn, for debate with the Remedial Order at the end of the 60 day laying period for the Order.**

### **36. R (on the application of Johnson) v Secretary of State for the Home Department**

*Supreme Court; [2016] UKSC 56; 19 October 2016*

Mr Johnson was born in Jamaica in 1985 to a Jamaican mother and British father who were not married to one another. As a result of the legislation in place at the time, he did not acquire British nationality at birth, although he would have obtained citizenship if his parents had been married. His father moved to the UK with him when he was four. Under the policy in place at the relevant time, Mr Johnson would have been granted British citizenship had an application for registration as a British citizen been made while he was

still a child, provided that, if over 16, he was of good character. But no application was made.

He was subsequently convicted of manslaughter for which he was sentenced to nine years' imprisonment. In 2011, he was issued with a deportation order on the ground that he was liable to automatic deportation as a 'foreign criminal' under section 32(5) UK Borders Act 2007. Mr Johnson argued that deportation would violate Article 14 (taken with Article 8), given that he would not have been liable to deportation had his parents been married to one another. The Secretary of State reconfirmed her decision and also certified that Mr Johnson's claim was clearly unfounded, thereby removing his right of in-country appeal against her decision.

The High Court held that discrimination against a child of unmarried parents at birth and thereafter violated Mr Johnson's Convention rights, and quashed the certificate. The Court of Appeal allowed the Secretary of State's appeal, holding that there had been no violation of Mr Johnson's rights at the relevant time, namely his birth, which was long before the HRA came into force.

The Supreme Court unanimously allowed the appeal, finding that Mr Johnson's liability to deportation by reason of the accident of his birth outside wedlock is unlawfully discriminatory, in violation of Article 14 (taken with Article 8). The court also made a declaration that the statutory requirement that a person in Mr Johnson's position must also be of good character in order to be granted British citizenship is incompatible with Article 14 (taken with Article 8). The incompatible provision is paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserts into section 41A of the 1981 Act (the requirement to be of good character) a reference to sections 4F, 4G, 4H and 4I, which relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth.

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### **37. Consent Order in R (on the application of David Fenton Bangs) v Secretary of State for the Home Department**

*Administrative Court; claim number CO/1793/2017; 4 July 2017*

Mr Bangs is a US citizen who claimed to have arrived in the UK in 1979, aged 11 years old. He was granted indefinite leave to remain on arrival to the UK. Mr Bangs' mother was British and his father was American. Between 1983 and 1990 he was convicted of a series of offences culminating in two convictions for murder. He was sentenced to a life sentence with a minimum term of imprisonment of 12 years and 1 day. In May 2004 he was released from prison on life licence.

In May 2013, as a result of his arrest for a suspected public order offence, Mr Bangs' life licence was revoked and he was recalled to prison. In August 2013 the Secretary of State invited Mr Bangs to make representations as to why he should not be deported from the UK. He stated he had a claim to private and family life under Article 8.

Mr Bangs was convicted for the public order offence and later released from custody in March 2014. In April 2015 he was detained under immigration powers and served with a notice of a decision to make a deportation order. He was invited to make submissions and again raised his Article 8 claim.

The Secretary of State refused Mr Bangs' human rights claim and made a deportation order and certified his claim under section 94B of the Nationality, Immigration and Asylum Act 2002. The effect was Mr Bangs would be removed pending the outcome of his appeal.

Mr Bangs issued his human rights claim in the Upper Tribunal of the Immigration and Asylum Chamber. Permission was initially refused but in May 2016 he was granted permission to appeal. In March 2017 Mr Bangs submitted amended grounds of claim in accordance with a consent order agreed by both parties. They raised an argument in reliance on *Johnson* (above).

The Secretary of State accepted Mr Bangs' evidence that his mother was British and as such that his deportation would be contrary to Article 14 (taken with Article 8). On that basis the Secretary of State agreed to the making of a declaration of incompatibility in the terms of the consent order: 'Section 47(1) of the Borders, Citizenship and Immigration Act 2009 is incompatible with Article 14, read with Article 8, of the European Convention on Human Rights, in so far as it introduces into the British Nationality Act 1981 a new section 41A applying a "good character" requirement for applications for registration under section 4C of the British Nationality Act 1981.'

This mirrored the approach in *Johnson*, where the Supreme Court declared as incompatible the provision of primary legislation which introduced the good character requirement in question.

**A paper with a draft of a proposed Remedial Order to address these incompatibilities was laid before Parliament on 15 March 2018.**

**38. Smith v (1) Lancashire Teaching Hospitals NHS Foundation Trust;  
(2) Lancashire Care NHS Foundation Trust; (3) Secretary of State for Justice**

*Court of Appeal; [2017] EWCA Civ 1916; 28 November 2017*

The substantive claim in this case related to the death of Ms Smith's cohabiting partner as a result of clinical negligence. Liability was admitted by the first and second defendants and the substantive claim was settled. A declaration of incompatibility was sought in relation to the provisions in section 1A of the Fatal Accidents Act 1976 which govern the award of bereavement damages in England and Wales. The bereavement damages award is set by Order of the Lord Chancellor, and is currently only available to the wife, husband or civil partner of the deceased; and where the deceased was a minor who was never married or had a civil partner, to his or her parents, if he or she was legitimate; or to his or her mother, if illegitimate.

The Court of Appeal held that the provisions of section 1A(2)(a) of the 1976 Act are incompatible with Article 14 read with Article 8 because they deny the award of bereavement damages to a person who was living with the deceased in the same household as an unmarried partner for at least two years prior to the death.

**The Government is considering the options for addressing the incompatibility.**

**39. R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)**

*Supreme Court; [2018] UKSC 32; 27 June 2018*

Civil partnerships were introduced through the Civil Partnership Act 2004 (CPA) in order to enable same-sex couples to formalise their relationships at a time when marriage was not available to them. Same-sex marriage was subsequently introduced through the Marriage (Same-Sex Couples) Act 2013. Following this, civil partnerships remained available only to same-sex couples.

The appellants, a committed opposite-sex couple ideologically opposed to marriage, claimed that the fact that they were prohibited from entering a civil partnership breached their rights under Article 14 taken with Article 8. The Secretary of State accepted that enactment of the Marriage (Same-Sex Couples Act) 2013 brought about an inequality of treatment which engaged Article 14, when taken together with Article 8, but argued that this could be addressed by either extending the right to form a civil partnership to opposite-sex couples or by abolishing or phasing out civil partnerships. The ongoing difference in treatment was therefore justified by the need to take time to decide how best to eliminate it.

The Court found that taking time to evaluate whether to abolish or extend civil partnerships did not constitute a legitimate aim as there is an insufficient connection between that aim and the discriminatory treatment, which the Secretary of State is required to justify. The Secretary of State had also failed to show that a fair balance had been struck between the interests of the appellants and those of the community. Accordingly, the Court made a declaration that sections 1 and 3 of the Civil Partnership Act 2004, to the extent that they preclude a different-sex couple from entering into a civil partnership, are incompatible with Article 14 taken with Article 8.

**On 2 October 2018, the Prime Minister announced that the Government will extend civil partnerships to opposite-sex couples. We intend to consult to enable us to introduce legislation in the next Parliamentary Session to bring about the necessary changes.**

## Annex B: Statistical information on implementation of ECtHR judgments

Data in tables 1 and 2 are taken from the Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (<http://www.coe.int/en/web/execution/annual-reports>), Tables A.4, C.4, B.4, E.1, F.2 and F.1. Data for 2015 are from the 10th Annual Report, data for 2016 and 2017 are from the 11th Annual report.

**Table 1: UK Performance**

<b>New cases</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Total number of UK cases	5	7	5
of which leading cases	2	6	1
<b>Cases closed by final resolution</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Total number of UK cases	12	5	8
of which leading cases	4	4	6
<b>Pending cases</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Total number of UK cases	19	21	18
of which leading cases	8	11 <sup>23</sup>	7
<b>Leading cases pending by length of time</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Leading UK cases pending <2yrs	2	4	1
Leading UK cases pending 2–5yrs	3	1	1
Leading UK cases pending >5yrs	3	5	5
<b>Payment of just satisfaction</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Paid within deadline	2	4	5
Paid late	0	0	1
Awaiting confirmation of payment	1	1	2
<b>Just satisfaction</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Total amount paid by the UK (€)	23,450	74,900	222,677

<sup>23</sup> This is greater than the sum of the three figures below as one case was not classified by length of time.

**Table 2: Judgments under supervision of the Committee of Ministers at the end of years 2015–2017 by State Party to the Convention**

Ranking by 2017 pending cases	State	All pending cases			of which leading cases		
		2015	2016	2017	2015	2016	2017
1	Russian Federation	1549	1573	<b>1689</b>	197	204	<b>216</b>
2	Turkey	1591	1430	<b>1446</b>	178	182	<b>177</b>
3	Ukraine	1052	1147	<b>1156</b>	144	146	<b>136</b>
4	Romania	652	588	<b>553</b>	76	72	<b>58</b>
5	Italy	2421	2350	<b>389</b>	81	70	<b>54</b>
6	Greece	302	311	<b>305</b>	52	50	<b>55</b>
7	Republic of Moldova	270	286	<b>271</b>	79	80	<b>76</b>
8	Bulgaria	272	290	<b>207</b>	89	94	<b>77</b>
9	Hungary	388	440	<b>205</b>	43	54	<b>54</b>
10	Azerbaijan	147	168	<b>197</b>	45	53	<b>54</b>
11	Croatia	162	180	<b>185</b>	70	74	<b>63</b>
12	Serbia	248	162	<b>148</b>	29	26	<b>19</b>
13	Poland	346	225	<b>126</b>	35	34	<b>31</b>
14	Slovak Republic	71	59	<b>63</b>	27	10	<b>9</b>
15	'The Former Yugoslav Republic of Macedonia'	123	66	<b>52</b>	29	28	<b>25</b>
16	Slovenia	309	49	<b>50</b>	20	21	<b>20</b>
17	Albania	49	50	<b>48</b>	18	10	<b>9</b>
18	Finland	42	41	<b>42</b>	13	12	<b>13</b>
19	Belgium	50	51	<b>39</b>	13	14	<b>13</b>
20	Portugal	129	41	<b>38</b>	12	13	<b>14</b>
21	Georgia	38	39	<b>36</b>	22	15	<b>13</b>
22	France	69	58	<b>34</b>	41	28	<b>16</b>
23	Latvia	63	53	<b>33</b>	50	41	<b>25</b>
24	Austria	42	31	<b>32</b>	22	14	<b>15</b>
25	Spain	34	41	<b>31</b>	18	17	<b>19</b>
26=	Bosnia and Herzegovina	26	31	<b>30</b>	11	11	<b>11</b>
	Lithuania	31	27	<b>30</b>	24	20	<b>21</b>
	Armenia	25	19	<b>30</b>	12	12	<b>11</b>
29=	Germany	20	27	<b>18</b>	17	21	<b>16</b>
	United Kingdom	19	21	<b>18</b>	8	11	<b>7</b>
31	Montenegro	17	16	<b>14</b>	13	6	<b>3</b>
32	Malta	23	12	<b>13</b>	11	7	<b>8</b>
33	Netherlands	9	10	<b>12</b>	9	8	<b>10</b>
34	Switzerland	14	7	<b>9</b>	13	7	<b>7</b>
35	Cyprus	7	9	<b>8</b>	4	5	<b>4</b>
36=	Czech Republic	9	10	<b>7</b>	7	6	<b>7</b>



Ranking by 2017 pending cases	State	All pending cases			of which leading cases		
		2015	2016	2017	2015	2016	2017
	Ireland	6	6	7	2	2	3
38	Iceland	5	1	4	2	1	2
39=	Estonia	11	5	2	8	4	2
	Liechtenstein	1	2	2	1	1	1
	Sweden	3	2	2	3	2	2
42=	San Marino	2	2	1	2	2	1
	Denmark	0	1	1	0	1	1
	Monaco	0	0	1	0	0	1
45=	Andorra	1	2	0	1	2	0
	Luxembourg	1	1	0	1	1	0
	Norway	3	1	0	3	1	0
	<b>Total</b>	<b>10652</b>	<b>9941</b>	<b>7584</b>	<b>1555</b>	<b>1493</b>	<b>1379</b>

**Table 3: Judgments finding a violation against the UK under supervision of Committee of Ministers at the end of July 2018**

	Case name	Application	Final judgment
<b>Enhanced Procedure</b>			
<b>1</b>	<b><i>McKERR GROUP:</i></b> McKerr Jordan Kelly and Others Shanaghan McShane Finucane Collette and Michael Hemsworth McCaughey and Others	28883/95 24746/94 30054/96 37715/97 43290/98 29178/95 58559/09 43098/09	04/08/2001 04/08/2001 04/08/2001 04/08/2001 28/08/2002 01/10/2003 16/10/2013 16/10/2013
<b>2</b>	<b><i>HIRST/GREENS AND MT GROUP:</i></b> Hirst No.2 Greens and MT Firth and Others McHugh and Others Millbank and Others	74025/01 60041/08 47784/09 51987/08 44473/14	06/10/2005 11/04/2011 15/12/2014 10/02/2015 30/06/2016
<b>Standard Procedure</b>			
<b>3</b>	<b>S and Marper</b>	30562/04 and 30566/04	04/12/2008
<b>4</b>	<b>MGN Ltd</b>	39401/04	18/04/2011
<b>5</b>	<b>Hammerton</b>	6287/10	12/09/2016
<b>6</b>	<b>SMM (closed 05/09/2018)</b>	77450/12	13/11/2017



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