



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 2018–2019**

October 2019

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of Justice

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Report to the Joint Committee on Human Rights on  
the Government's response to human rights judgments  
2018–2019

Presented to Parliament

by the Lord Chancellor and Secretary of State for Justice

by Command of Her Majesty

October 2019



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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 August 2018 to July 2019 (but also notes some developments since then that took place before the date of publication). 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**; and
- **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); and
- **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; and
- *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>

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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>

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>

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

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

<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 UK is committed to protecting and respecting human rights. We have a longstanding tradition of ensuring rights and liberties are protected domestically and of fulfilling our international human rights obligations. We have strong human rights protections within a comprehensive and well-established constitutional and legal system. In domestic law, rights are protected through the common law, the HRA and the devolution statutes as well as other legislation.

The Government is also 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 universal values of freedom, democracy, tolerance and the rule of law. We will continue to call on other countries to comply with their international human rights obligations, and to take action to tackle human rights violations globally.

## **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 and will remain a party to the ECHR after we have left the EU.

We welcome the adoption in April 2018 of the Copenhagen Declaration 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.

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

The Government takes its international human rights obligations seriously and remains committed to playing 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 continuous 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 2018 to 31 July 2019, the UK has completed the following milestones:

- September 2018: UK follow-up information to the UN under the Convention on the Rights of Persons with Disabilities (Department for Work and Pensions lead);
- November 2018: 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);
- February 2019: UK dialogue with the UN in 2019 under the Convention on the Elimination of All Forms of Discrimination Against Women (Government Equalities Office lead); and
- May 2019: 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).

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

- UK follow-up information to the UN under the Convention on the Rights of Persons with Disabilities (Department for Work and Pensions lead);
- UK mid-term report to the UN under the 3rd Universal Periodic Review (Ministry of Justice lead);
- UK periodic report under the International Convention on the Elimination of All Forms of Racial Discrimination (Ministry of Housing, Communities and Local Government lead);
- UK follow-up information to the UN under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ministry of Justice lead); and
- UK periodic report under the International Covenant on Civil and Political Rights (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>

# 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 its role of supervising the execution of judgments. The Ministry of Justice passes this information to the UK Delegation to the Council of Europe, 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 2018 – July 2019

The ECtHR gave five judgments in UK cases during the reporting period, each of which found violations of the ECHR. Four of these (*Miller and Others*, *Catt*, *Beghal*, *VM (no. 2)*) have become final and details are set out in the section on implementation. One (*Big Brother Watch and Others*) will not become final as the case has been referred to the Grand Chamber. A further 11 applications were declared inadmissible in reasoned admissibility decisions.<sup>11</sup>

## **Big Brother Watch and Others (58170/13, 62322/14, 24960/15)**

**Chamber (First Section) – violation of Articles 8 and 10**

**Judgment delivered on 13 September 2018; did not become final**

This case involved three joined applications. The applicants (journalists and human rights organisations) raised complaints about three different surveillance regimes in the UK:

- bulk interception of communications under section 8(4) of the Regulation of Investigatory Powers Act 2000 ('Regime 1');
- intelligence sharing with foreign governments ('Regime 2'); and
- the obtaining of communications data from communications service providers under Chapter II of the Regulation of Investigatory Powers Act 2000 ('Regime 3').

The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted or obtained by the UK intelligence services.

All three sets of applicants argued that the three regimes were in violation of Article 8. The second and third set of applicants argued that the three regimes were in violation of Article 10, where such surveillance related to their work as journalists and non-governmental organisations.

The third set of applicants argued that the domestic procedure for challenging surveillance measures was in violation of Article 6. They also argued that Regime 1 was in violation of Article 14 (when read with Article 8 and 10) in that it discriminated against people outside

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

the UK, whose communications were more likely to be intercepted and, if intercepted, selected for examination.

Regimes 1 and 3 have a statutory basis in the Regulation of Investigatory Powers Act 2000. The Investigatory Powers Act 2016, when it comes fully into force, will make significant changes to both regimes. The Court did not consider the changes to Regimes 1 and 3 in its assessment as the provisions in the 2016 Act amending the regimes were not yet in force at the time of the decision.

### **Regime 1**

The ECtHR held that operating a bulk interception scheme was not in itself in violation of Article 8 and Governments had a wide margin of appreciation in deciding what kind of surveillance scheme was necessary to protect national security. However, the operation of such systems had to meet six basic requirements, as set out in *Weber and Saravia v Germany* (54934/00).

Although the ECtHR was satisfied that the UK intelligence services take their Convention obligations seriously, it found in this case that there was inadequate independent oversight of the selection and search processes involved in the operation. Furthermore, there were no real safeguards applicable to the selection of related communications data for examination. Such failings meant that any interference was not 'necessary in a democratic society', and there had been a violation of Article 8.

In relation to Article 10, the ECtHR noted the absence of any published safeguards relating to the selection of confidential journalistic material or the protection of confidentiality where selected for examination. In view of the potential chilling effect that any perceived interference with the confidentiality of journalists' communications and, in particular, their sources might have on the freedom of the press, the ECtHR found that this regime was in violation of Article 10.

In respect of the Article 14 challenge by the third applicants, the ECtHR found that this argument had not been substantiated, and in any event, any interference was due to geographical location and not nationality, and so was justified. It held that this challenge was manifestly ill-founded.

### **Regime 2**

The ECtHR found that the procedure for requesting either interception or the transmission of intercepted material from foreign intelligence agencies was set out with sufficient clarity in domestic law and relevant codes of practice. It was also noted that there was no evidence of any significant shortcomings in the application and operation of this regime, or any evidence of abuse. Therefore, it was held that Regime 2 did not violate Article 8 or 10.

### **Regime 3**

The ECtHR noted that domestic law, as interpreted in light of recent CJEU judgments (see *Digital Rights Ireland* C-293/12 and C-594/12 and *SSHD v Watson and Others* C 698/15), required that any regime allowing access to data held by communications service providers had to be limited to the purpose of combating ‘serious crime’, and that access should be subject to prior review by a court or independent administrative body. The Government had conceded in the domestic case of *R (oao Liberty) v the Secretary of State for the Home Department and Others* [2018] EWHC 975 (Admin) that a very similar scheme introduced by the Investigatory Powers Act 2016 was incompatible with fundamental rights in EU law because it did not include these safeguards. As this regime permits access to retained data for the purpose of combating crime, rather than ‘serious crime’, and it is not subject to prior review by a court/administrative body, the ECtHR held that it cannot be ‘in accordance with the law’. Accordingly, the ECtHR found that there had been a violation of Article 8.

In respect of Article 10, the ECtHR noted that the relevant safeguards only applied when the purpose of such a request was to uncover the identity of a journalist’s source and did not apply in every case. In addition, there were no special provisions restricting access to the purpose of combating ‘serious crime’. As such, it was held that this regime was also in violation of Article 10.

### **The Article 6 complaint**

The ECtHR unanimously rejected the complaints of the third set of applicants that the domestic procedure for challenging secret surveillance measures was in violation of Article 6. It held that the Investigatory Powers Tribunal had extensive powers to consider complaints concerning wrongful interference with communications, and had access to both open and closed material. The restrictions to the applicant’s procedural rights had been both necessary and proportionate. This complaint was rejected as manifestly ill-founded.

### **Grand Chamber referral**

The applicants in the first and third of the joined cases requested referral of the case to the Grand Chamber, which was accepted on 4 February 2019, so the Chamber judgment will not become final. A Grand Chamber hearing was held on 10 July 2019 and judgment is awaited.

# The UK at the ECtHR: statistics from 1959 to 2018

The ECtHR publishes statistical reports for each calendar year. The following tables bring together data from these reports on the applications made against the UK at the ECtHR from its initial establishment in 1959 until the end of 2018, including the trend over the last ten years.<sup>12</sup>

Applications have been on a general downward trend since 2010. Numbers in 2018 are only 13% of their peak in 2010. By population, the UK has the fewest applications of all States at 5 per million. The number for all States combined is 52 per million.

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

1959–2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
14,092	1,127	2,745	1,542	1,702	908	720	575	372	415	354	<b>24,552</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 2010–2018 is greater than the total number allocated in that period.

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

1959–2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
12,090	764	1,175	1,028	2,047	1,633	1,970	533	360	507	358	<b>22,465</b>

The numbers of judgments and adverse judgments remain low.

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

<sup>13</sup> Source: Analysis of statistics 2018 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 2018 and previous reports, page 60.

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

<b>1959–2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>Total</b>
404	18	21	19	24	13	14	13	14	5	2	<b>547</b>
(243)	(14)	(14)	(8)	(10)	(8)	(4)	(4)	(7)	(2)	(1)	<b>(315)</b>

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<sup>15</sup> Source: Violations by Article and by State 2018 and previous reports; Violations by Article and by State 1959–2018 and previous reports. A judgment can cover more than one application.

## Ongoing applications against the UK: statistics for 2018

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 8.0% of the population of all States (Analysis of statistics 2018, page 11).

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

<b>Year</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
<b>UK</b>	3,308	2,519	1,243	256	231	130	124
<b>Total</b>	128,111	99,891	69,924	64,834	79,750	56,262	56,365
<b>Proportion</b>	2.6%	2.5%	1.8%	0.4%	0.3%	0.2%	0.2%

<sup>16</sup> Source: Analysis of statistics 2018 and previous reports, pages 12 and 60.

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

At the end of 2018, the UK was responsible for 12 (0.2%) of a total 6,151 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 2016–2018 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 2019.

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<sup>17</sup> Source: 12th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights', Table C.3. See <http://www.coe.int/en/web/execution/annual-reports>

# Consideration of adverse judgments that became final in August 2018 – July 2019

Four adverse judgments became final in this period and therefore required the Government to take measures to implement them: *Miller and Others*, *Catt*, *Beghal*, and *VM (no. 2)*.<sup>18</sup>

## 1. Miller and Others (70571/14 etc.)

**Committee (First Section) – violation of Article 3 of Protocol 1**

**Final judgment delivered on 11 April 2019**

This case concerns the ban on convicted prisoners voting during elections to the European Parliament on 22 May 2014, the Scottish Parliament on 5 May 2016 and the UK Parliament on 8 June 2017. The ECtHR found that at the date of the index elections (all of which preceded the package of measures adopted by the UK Government in 2018) the statutory ban on prisoners voting in elections, by reason of its blanket character, violated Article 3 of Protocol 1 (right to free elections).

The ECtHR held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants. In the event that any of the applicants are still detained, their eligibility to vote depends on the general measures adopted (see below). No other individual measures are required.

This is a historical repetitive case in the sense that the ECtHR was examining the right to vote of convicted prisoners in elections which took place between 2014 and 2017. In 2018, the UK Government adopted a package of administrative measures to respond to the violations found in the leading cases of *Hirst (no. 2)* and *Greens and MT* (covered on page 28).

After examination of those measures, the Committee of Ministers decided to close its supervision of the execution of the *Hirst (no. 2)* and *Greens and MT* Group on 6 December 2018. Given that the date of the index elections in *Miller and Others* precedes the adoption of those general measures, the UK Government does not consider that any further general measures are required.

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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>).

The Government considers that all necessary measures have been taken to implement the judgment and has submitted an Action Report to the Committee of Ministers requesting that it closes its supervision of the case.

## **2. Catt (43514/15)**

### **Chamber (First Section) – violation of Article 8**

#### **Judgment delivered on 24 January 2019; became final on 24 April 2019**

The applicant was an elderly pacifist who participated in demonstrations including protests organised by a group called Smash EDO. Whilst he had no criminal record and was not considered a danger to anyone, the protests involved disorder and criminality and information about the protests and members of Smash EDO was collected by the police and held on the database referred to in the proceedings as the domestic extremism database.

In 2010, the applicant requested that information relating to his attendance at demonstrations and events, mostly related to Smash EDO, between 2005 and 2009 be deleted from the database. The request was initially refused, however, following a review in 2012, records that referred primarily to him were deleted. Entries that made incidental reference to him did however continue to be retained on the database. He challenged this arguing that retaining the data was not necessary within the meaning of Article 8.

In March 2015 the Supreme Court held that the collection and retention of this information was in accordance with the law and proportionate, in particular, the invasion of privacy had been minor and the information was not intimate or sensitive. It found that there were good policing reasons for collecting and retaining such data and that there were sufficient safeguards in place as it was periodically reviewed for retention or deletion.

The ECtHR accepted the applicant's complaint, finding a violation of his Article 8 rights. The ECtHR agreed that there were good policing reasons why such data had to be collected and in the case of the applicant it had been justified because Smash EDO's activities were known to be violent and potentially criminal. However, they expressed concerns about the continuing retention of the data, given that there was no pressing need, after a time, to retain the data relating to him.

The ECtHR considered that the continued retention of data in the applicant's case had been disproportionate because it revealed political opinions requiring enhanced protection, it had been accepted he did not pose a threat (taking account of his age) and there had been a lack of procedural safeguards, the only safeguard provided by the Management of Police Information Code of Practice being that data would be held for a minimum of six years and then reviewed. The ECtHR did not consider that this was applied in a

meaningful way as the decision to retain did not take account of the heightened level of protection it attracted as data revealing a political opinion. The ECtHR rejected the argument that it would be too burdensome to review and delete all entries on the database relating to the applicant; also, if this were accepted as a valid reason for non-compliance, that would create a route to allow violations of Article 8.

Work is ongoing to remove all references to the applicant from police records. The Government will submit an Action Plan to the Committee of Ministers shortly.

### **3. Beghal (4755/16)**

#### **Chamber (First Section) – violation of Article 8**

**Judgment delivered on 28 February 2019; became final on 28 May 2019**

The applicant, a French national residing in the UK, was examined under Schedule 7 to the Terrorism Act 2000 at East Midlands Airport when returning to the UK on 4 January 2011. She alleged that her examination gave rise to a violation of her rights under Articles 5 (right to liberty and security), 6 (right to a fair trial) and 8 (right to respect for private and family life).

The ECtHR held that there had been a violation of the applicant's Article 8 rights, as the Schedule 7 powers at the time of the examination were 'neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.' While it did not consider the absence of a requirement of 'reasonable suspicion' to have been fatal to the lawfulness of the regime, it did conclude that when considered alongside the fact that a person could be questioned under compulsion for up to nine hours without access to a lawyer, the powers 'were not "in accordance with the law".'

The ECtHR found that there was no need to consider the applicant's complaint under Article 5 (which was based on the same facts) and rejected her complaint under Article 6 on the basis that Article 6 was not engaged. The ECtHR stated that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Legislative changes have been made to Schedule 7 since the examination of the applicant, including changes to the examination and detention regime and the provision of additional safeguards. Specifically, the powers have been amended on the following three occasions:

#### **1) The Anti-Social Behaviour, Crime and Policing Act 2014**

- reduced the maximum period of examination from nine to six hours;

- extended to individuals detained at a port the statutory rights to have a person informed of their detention and to consult a solicitor privately;
- ensured access to legal advice for all individuals examined for more than one hour;
- clarified that the right to consult a solicitor includes consultation in person where practicable;
- introduced statutory review of the need to continue detention;
- introduced a statutory requirement for training and accreditation of examining and reviewing officers;
- established a statutory basis for undertaking strip searches of persons detained under Schedule 7 which requires reasonable grounds to suspect that the person is concealing something which may be evidence that the person is involved in terrorism and requires a supervising officer's authority;
- repealed the power to obtain intimate samples (e.g. blood, semen); and
- provided expressly that an examining officer may make and retain a copy of information obtained or found in the course of an examination.

## **2) The Counter-Terrorism and Security Act 2015**

- provided clarity as to where Schedule 7 can be used to examine goods.

## **3) The Counter Terrorism and Border Security Act 2019**

- clarified on the face of the legislation that there is a bar on the answers given in response to questioning under Schedule 7 from being used in a subsequent criminal trial;
- provided that the detention clock can be paused when a detained person is transferred from police custody to hospital. This aligns these provisions with those in the Police and Criminal Evidence Act 1984; and
- replaced the power that would allow a senior officer to direct that, in exceptional circumstances, consultation with a solicitor may only take place within the sight and hearing of a qualified officer, with a different power, which in the same exceptional circumstances, would allow a senior officer to direct that a different solicitor must be chosen.

The Government is satisfied that the legislative changes to the Schedule 7 regime through the 2014 and 2019 Acts have provided sufficient safeguards to better protect against arbitrary use of the powers and satisfy the Article 8 concerns raised in the judgment; most notably, the provisions of the 2014 Act that:

- require examining officers to detain a person if it is necessary to continue their examination beyond one hour;
- reduce the maximum period of examination from nine hours to six hours;
- require a periodic review of detention by a review officer; and
- provide the statutory right for a detainee to access a solicitor or have a named person informed of their detention

and also the provisions of the 2019 Act that guarantee the detainee's legal consultation will take place in private and clarify that answers given in response to questioning under Schedule 7 cannot be used in subsequent criminal proceedings.

The Schedule 7 Code of Practice, which has been revised to reflect the changes introduced by each of the 2014 and 2015 Acts, contains further clarification on how the powers are to be exercised and additional safeguards. For instance, the Codes are clear that Schedule 7 powers can only be used by police officers who have been accredited to a national standard and that selection for examination should not be arbitrary or for discriminatory reasons. Moreover, the Codes provide the examining officer with the discretion to allow a person who is examined but not detained, an opportunity to consult a solicitor despite not having a statutory right to do so. Indeed, they clarify that where reasonably practicable, a consultation should be permitted.

The Government intends to lay a new draft of the Schedule 7 Code of Practice before parliament in due course. This draft Code, which was subject to public consultation earlier this year, will reflect changes made by the Counter-Terrorism and Border Security Act 2019.

The Government considers that all necessary measures have been taken to implement the judgment and will shortly submit an Action Report to the Committee of Ministers requesting that it closes its supervision of the case.

#### **4. VM (no. 2) (62824/16)**

##### **Chamber (First Section) – violation of Article 5**

**Judgment delivered on 25 April 2019; became final on 25 July 2019**

The applicant was detained under immigration powers from 8 August 2008 to 6 July 2011 pending her deportation from the UK.

In her first application (*VM*, 49734/12), the applicant complained about her detention from 8 August 2008 to 28 April 2010. Whilst finding that the system of immigration detention in the UK did not in principle fall short of the requirements of Article 5, the ECtHR found that from 19 June to 14 December 2009, the applicant's detention was in violation of Article 5(1) due to the authorities' failure to pursue deportation with sufficient diligence and expedition. The ECtHR did not examine the period of detention after 22 July 2010, noting that this was the subject of separate litigation proceedings. The Committee of Ministers has closed its supervision of this judgment.

In the present application, the applicant complained that her detention between 22 July 2010 to 6 July 2011 had been arbitrary as the authorities had failed to act with appropriate due diligence.

The ECtHR held that the applicant's detention between 4 March 2011 and 6 July 2011 was unlawful due to deficiencies in the detention reviews. The ECtHR found that there had been a violation of Article 5(1) and awarded the applicant €3,500 in damages, which has been paid. The Government considers no further individual measures are required because the application related to an historic period of detention between 2010 and 2011.

The Government considers no further general measures to be necessary because the ECtHR held that the immigration detention system and the domestic remedies available to a detained person are in principle compatible with Article 5 (see *VM*, 49734/12). The violations found by the ECtHR in this present judgment arose from the deficiencies in the detention reviews by the authorities that did not make appropriate arrangements for the applicant's release during that period.

The Government considers that all necessary measures have been taken to implement the judgment.

# Judgments already under the supervision of the Committee of Ministers before August 2018

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

## 1. McKerr Group (28883/95 etc.)

This group of judgments found violations of Article 2 as a result of delays in the investigation of deaths in Northern Ireland.

### **Investigations into Troubles-related deaths**

In addition to its responsibility for modern-day criminal investigations, the Police Service of Northern Ireland (PSNI) has a duty to review historical cases related to the Troubles and, where credible investigative opportunities are identified, conduct further investigations. The legacy of the Troubles means that the number of historical cases for which the PSNI has responsibility is on a different scale from that faced by other UK Police Forces.

This work is taken forward by the PSNI's Legacy Investigation Branch (LIB) which currently has a caseload of 1,130 incidents involving the deaths of over 1,400 persons.

The extent of such a caseload poses a considerable financial and human resource challenge to present-day policing in Northern Ireland.

### **Stormont House Agreement proposals consultation**

There is a widely held view within Northern Ireland that, more broadly, further reforms are needed in addressing the legacy of the past – and the UK Government is committed to bringing forward these reforms.

As part of this commitment, last year, the UK Government consulted publicly on the draft legislative proposals to implement the four new legacy institutions set out in the 2014 Stormont House Agreement (SHA) and details of how the SHA structures would work. The consultation *Addressing the Legacy of Northern Ireland's Past* provided everyone with an interest with the opportunity to see the proposed way forward to address the legacy of the past and contribute to the discussion on the issues.

During the consultation, officials engaged with a wide range of stakeholders, victims' and survivors' groups, political parties, community groups and others; and attended over 30

events across Northern Ireland, Great Britain and Ireland. The consultation closed on 5 October 2018. Over 17,000 responses to the consultation were received with the vast majority of respondents supporting the need to reform the current system into investigating the past in Northern Ireland. While the consultation revealed broad support for the institutional framework of the SHA, it also exposed a number of areas of public concern, including how the institutions would interact, how their independence could be preserved and the overall time frame and costs. These issues require careful consideration before we can move forward.

Work is ongoing to ensure this consultation feedback is taken into account as we improve the legacy model set out in the draft Bill.

The UK Government is clear that whatever improvements to legacy processes are made will need to be in line with the principles which underpin the SHA. These principles will be central in ensuring that improved legacy institutions and support services are created in a manner which is fair, balanced and proportionate; secures consensus; and is fully compliant with our legal obligations.

It is the UK Government's intention to set how it intends to move forward in due course. The Secretary of State will continue to work closely with the Northern Ireland parties, ministerial colleagues, Parliamentarians, the Irish Government and key stakeholders to address these concerns and find a way forward which is effective, legally robust and commands consensus.

### **Individual cases**

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 yet been listed for hearing and 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 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. The PSNI has allocated significant additional resources to address the delay in disclosure and response to coronial queries to date. A significant number of responses

have been provided. However, further work is required to ensure the completeness of responses to the Coroner.

The Coroner 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 legal team and the majority of materials from this body of documents have been considered and potential relevance indicated.

The Coroner has been notified that further materials are to be provided shortly in the progression of this exercise. Additionally, in April 2016 a list of priority materials was drawn up and sent 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, albeit in a heavily redacted state, that will require to be reviewed at Public Interest Immunity hearings in due course. The other departments are considering the Coroner's requests that they process material ready for disclosure to families and other properly interested persons, and a small volume of material has been disclosed to families and other properly interested persons in this regard. Work continues to capture all potentially relevant material. Departments and agencies have received requests for further disclosure, and the PSNI has been directed to provide further specified disclosure and answer a number of outstanding queries. Work is ongoing to respond to these issues as expeditiously as possible.

Until the Coroner is furnished with all material necessary and this is made available in appropriate form to families and other properly interested persons, it is not possible to advance a realistically achievable timeframe for hearing. Work is ongoing on the collation and analysis of material provided to the Coroner to date, alongside internal cross-referencing and the preparation of chronologies and witness lists.

The cases were subject to a review hearing by the Presiding Coroner on 4 October 2019.

Separately, former Chief Constable Jon Boutcher, who leads Operation Kenova which is investigating the activities of the alleged state agent Stakeknife, is to head a separate investigation into the murder of three RUC officers at Kinnego Embankment in County Armagh on 27 October 1982. These deaths form part of the *McKerr* cases.

#### *Finucane v United Kingdom*

On 27 February 2019, the UK Supreme Court gave its judgment in the matter of an application by Mrs Geraldine Finucane for Judicial Review (Northern Ireland). Mrs Finucane challenged the decision by the Government not to hold a public inquiry into the death of her late husband Patrick Finucane, but instead establish an independent review.

The Supreme Court found that the various representations that had been made to Mrs Finucane did amount to a promise to establish a public inquiry into the death of her husband but that that promise had not been unfairly resiled from. The Supreme Court therefore found in favour of the Government on that point.

The Supreme Court also found that the UK had not satisfied its investigative obligations under Article 2 ECHR and section 6 of the Human Rights Act 1998.

The Supreme Court concluded: 'It does not follow that a public enquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the enquiries which preceded it to meet the procedural requirements of Article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.'

The UK Government is undertaking a review to enable it to reach a decision on what form of investigation, if any is now feasible, is required and will provide a further update once this work is complete.

### **Measures to address inquest 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 projected time-frame for completion of the outstanding legacy inquest caseload is set out in reform proposals from the LCJ.

Funding for the five-year plan was announced by the Department of Justice in Northern Ireland on 28 February 2019 to include a year of funding for the setup of the new Legacy Inquest Unit (LIU) and the recruitment of dedicated specialist staff in other justice agencies. The delivery of the LCJ's five-year plan begins in April 2020, which is the start of Year One of the Plan.

The LCJ's reform proposals include:

- the establishment of a dedicated LIU;
- oversight of all legacy cases by the Presiding Coroner; and
- improvements to case management, disclosure and case allocation arrangements.

The current caseload comprises 52 cases relating to 93 deaths. This includes three cases, relating to three deaths, referred by the Attorney General since December 2018. Findings are awaited in one case and it is expected they should be completed this calendar year. Seven cases are at hearing and it is expected that these cases will be completed and findings delivered in this financial year. Further legacy inquests will be listed, once the sequencing of cases is agreed by the Presiding Coroner following the review hearings into

all outstanding cases listed for September 2019. It is expected that ten of the remaining 44 cases will be completed in Year One (April 2020 to March 2021) of the Five Year Plan.

The LIU has been set up by the Northern Ireland Courts and Tribunals Service. Work is continuing to ensure that it is appropriately staffed and resourced by April 2020 to provide legal, administrative and investigative support, as required, to the Presiding Coroner and to Coroners dealing with particular legacy inquests.

A Legacy Inquests Implementation Steering Group has been established within the Department of Justice to coordinate, direct and oversee the implementation of the Plan. Good progress has already been made and work is on track to ensure that the Five Year Plan will get underway in April 2020 to complete all outstanding legacy inquest cases by 2025.

A Judge-led Legacy Inquests hearing, supported by the LIU, was held by the Presiding Coroner on 7 June 2019 to which she invited all the Next of Kin of the deceased and all Properly Interested Persons / justice partners.

At the hearing she gave an update on her forthcoming review of outstanding cases in September 2019.<sup>19</sup> The Presiding Coroner also provided a general update on preparatory work to be undertaken in advance of individual case review hearings and progress on implementation of the LIU, including recruitment, accommodation, planned reforms for managing disclosure and material and the sequencing of cases.

Work has been progressed with all state agencies to identify the key electronic databases and hard copy storage facilities where it is presently understood materials are stored relating to legacy cases in line with the LCJ's reform proposals.

Work is also being progressed to develop and implement judicial case management / disclosure and witness protocols to set a clear pathway and defined timeframe to how legacy inquests will be progressed and managed. These are being consulted on and will be finalised in advance of sequencing decisions.

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.

### **Review and update of coronial law in Northern Ireland**

The requirement for the review and update of Coronial Law in Northern Ireland was reflected in the Coroners Service for Northern Ireland review report. A scoping study for a review of the Coroners legislation has been completed.

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<sup>19</sup> <https://judiciaryni.uk/sites/judiciary/files/media-files/Presiding%20Coroner%27s%20Statement%20-%20State%20of%20Readiness%20Event%20-%207%20June%202019.pdf>

## **2. Hirst (no. 2) and Greens and MT Group (74025/01, 60041/08 etc.)**

### **Violation of Article 3 of Protocol 1 – closed on 6 December 2018**

**Hirst (no. 2):** On 30 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. On 6 October 2005, the Grand Chamber confirmed 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 judgment, 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 UK 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 and 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 and 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 and 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.

More than half of the original *Greens and 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 then Secretary of State for Justice set out the UK 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 UK 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.

On 6 December 2018 the Committee of Ministers noted it was satisfied that all necessary measures had been taken and decided to close its supervision of this group of judgments.

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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.

<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, on 4 December 2008 the Grand Chamber of 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) into Troubles-related deaths will be undermined should material potentially relevant to its work be destroyed. The UK Government proposed 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, statutory provision for which would be contained within the draft Northern Ireland (Stormont House Agreement) Bill which was issued for public consultation on 11 May 2018. The consultation ran for a total of 21 weeks and closed on 5 October 2018.

The UK Government published a summary of responses to the consultation on 5 July 2019 which will inform development of the legislation thereafter.

In light of the continued delay commencing CJA, the Police Service of Northern Ireland has taken an operational decision to implement the new retention rules on a non-statutory

basis. This will enable existing and new data to be retained broadly in accordance with the CJA rules. It is anticipated that this process will come into operation in Spring 2020. In advance of the commencement of this operational policy and to avoid any adverse impact on the projected work of the HIU, when established, a 'snapshot' of the biometric material currently held will be created and retained for use by the HIU.

In addition, the UK Government has made provision through a transitional order to enable authorities in Northern Ireland to retain biometric 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 judgment became final on 18 April 2011.

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 was delayed pending the introduction of a proposed costs protection regime which was the subject of a consultation process that closed on 8 November 2013.

Having considered the responses to the consultation, the Government decided on a different approach that will give effect to our legal obligations and help to control costs. The Government announced on 29 November 2018<sup>22</sup> that it would commence section 44 of LASPO for defamation and privacy claims. This section provides that the lawyer’s success fee is no longer recoverable from the losing party. The provision came into force for new cases on 6 April 2019<sup>23</sup> – the Common Commencement Date for new regulations. The effect of this provision is that media defendants will not have to pay 100% success fees for CFAs entered into after that date.

The Government will keep in place, at least for the time being, the existing costs protection regime, namely the recoverability of after the event (ATE) insurance premiums for these cases. ATE insurance covers the risks of having to pay the other side’s costs in unsuccessful cases. This approach – of abolishing recoverability of the CFA success fee, but retaining it for the ATE insurance premium – will protect access to justice, since parties

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<sup>22</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-11-29/HCWS1125/>

<sup>23</sup> <http://www.legislation.gov.uk/ukxi/2018/1287/contents/made>

with good cases can still benefit from recoverable ATE insurance in respect of adverse costs.

The Government has now reviewed the impacts of the reforms in Part 2 of LASPO. The review excluded defamation and privacy claims as one of three initial exceptions in Part 2. The review, published on 7 February 2019<sup>24</sup>, concluded that, on the evidence available, the Part 2 reforms had, on balance, successfully met their objectives.

In addition, the Defamation Act 2013 introduced a requirement in defamation proceedings for the claimant to show that the publication of the statement concerned has caused or is likely to cause serious harm to his or her reputation. This raises the bar for bringing a defamation claim and will help to discourage trivial or unmeritorious claims being brought. Provisions for defamation claims to be heard by a judge rather than a jury should also help reduce costs in defamation cases, for example by allowing for early resolution of disputes about meaning.

The Government considers that all necessary measures have been taken to implement the judgment. An Action Report was submitted to the Committee of Ministers on 4 September 2019 requesting that it closes its supervision of the case.

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<sup>24</sup> <https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo>

## **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. He was not legally represented at the committal hearing, and the domestic courts found that he had spent extra time in prison as a result of procedural errors during his committal proceedings, which were such that his rights under Article 6 were breached. However, he was unable to obtain damages in the domestic courts to compensate for the breach of Article 6 (that resulted in the extra time spent in prison) 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).

In 2016, the ECtHR found a breach of Article 6 and adopted the finding of the domestic court that the applicant had spent extra time in prison as a result. The ECtHR found that the applicant's inability to receive damages in the domestic courts in the particular circumstances of his case led to a violation of Article 13 (right to an effective remedy). The ECtHR awarded a sum in damages which has been paid. The judgment became final on 12 September 2016.

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. The Joint Committee published its report on the proposal on 21 November 2018, and the Government laid its response and a redrafted Remedial Order on 15 October 2019.

## 6. SMM (77450/12)

### Violation of Article 5 – closed on 5 September 2018

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.

The applicant's request for referral to the Grand Chamber was refused and the judgment became final on 13 November 2017.

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.

## Domestic cases: declarations of incompatibility made in August 2018 – July 2019

The domestic courts made two declarations of incompatibility under section 4 of the HRA during this period. In addition, one declaration of incompatibility at the end of the last reporting period was omitted from last year's report:

40. *K (A Child) v Secretary of State for the Home Department*  
(Administrative Court; [2018] EWHC 1834 (Admin); 18 July 2018)
41. *Siobhan McLaughlin, Re Judicial Review (Northern Ireland)*  
(Supreme Court; [2018] UKSC 48; 30 August 2018)
42. *R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*  
(Administrative Court; [2019] EWHC 452 (Admin); 1 March 2019)

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 2019, 42 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 42 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;
- 5 related to provisions that had already been amended by primary legislation at the time of the declaration: 13, 14, 21, 22 and 32;
- 2 are currently subject to appeal: 40 and 42;
- 6 have been addressed by Remedial Order: 2, 19, 26, 35, 36 and 37;
- 11 have been addressed by later primary or secondary legislation (other than by Remedial Order): 4, 5, 7, 8, 9, 11, 12, 16, 17, 18 and 27;
- 1 has been addressed by various measures: 23;
- 2 the Government has notified Parliament that it is proposing to address by Remedial Order: 29 and 38; and
- 5 are under consideration: 30, 33, 34, 39 and 41.

## Contents

Cases which have been updated since last year's report are indicated in **bold type**.

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

14. R (on the application of Hooper and Others) v Secretary of State for Work and Pensions  
*(Court of Appeal; [2003] EWCA Civ 875; 18 June 2003)*
15. R (on the application of MH) v Secretary of State for Health  
*(Court of Appeal; [2004] EWCA Civ 1609; 3 December 2004)*
16. A and Others v Secretary of State for the Home Department  
*(House of Lords; [2004] UKHL 56; 16 December 2004)*
17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (no. 3)  
*(Court of Appeal; [2005] EWCA Civ 1184; 14 October 2005)*
18. R (on the application of Gabaj) v First Secretary of State  
*(Administrative Court; unreported; 28 March 2006)*
19. R (on the application of Baiai and Others) v Secretary of State for the Home Department and another  
*(Administrative Court; [2006] EWHC 823 (Admin); 10 April 2006)*
20. Re MB  
*(Administrative Court; [2006] EWHC 1000 (Admin); 12 April 2006)*
21. R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills  
*(Administrative Court; [2006] EWHC 2886 (Admin); 16 November 2006)*
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)*
23. **Smith v Scott**  
***(Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007)***
24. Nasser v Secretary of State for the Home Department  
*(Administrative Court; [2007] EWHC 1548 (Admin); 2 July 2007)*
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)*
26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department  
*(Administrative Court; [2008] EWHC 3170 (Admin); 19 December 2008)*

27. R (on the application of Royal College of Nursing and Others) v Secretary of State for Home Department  
*(Administrative Court; [2010] EWHC 2761 (Admin); 10 November 2010)*
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)*
29. **R (on the application of Reilly (no. 2) and Hewstone) v Secretary of State for Work and Pensions**  
*(Administrative Court; [2014] EWHC 2182 (Admin); 4 July 2014)*
30. **Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya**  
*(Court of Appeal; [2015] EWCA Civ 33; 5 February 2015)*
31. Northern Ireland Human Rights Commission, Re Judicial Review  
*(Queen's Bench Division (NI); [2015] NIQB 102; 16 December 2015)*
32. David Miranda v Secretary of State for the Home Department  
*(Court of Appeal; [2016] EWCA Civ 6; 19 January 2016)*
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)*
35. **Z (A Child) (no. 2)**  
*(Family Court; [2016] EWHC 1191 (Fam); 20 May 2016)*
36. **R (on the application of Johnson) v Secretary of State for the Home Department**  
*(Supreme Court; [2016] UKSC 56; 19 October 2016)*
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)*
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)*

40. **K (A Child) v Secretary of State for the Home Department**  
*(Administrative Court; [2018] EWHC 1834 (Admin); 18 July 2018)*
41. **Siobhan McLaughlin, Re Judicial Review (Northern Ireland)**  
*(Supreme Court; [2018] UKSC 48; 30 August 2018)*
42. **R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department**  
*(Administrative Court; [2019] EWHC 452 (Admin); 1 March 2019)*

**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:

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

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 (taken together with Article 8) 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 (taken together with Article 8) 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 October 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>25</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.

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

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

In a statement to the UK 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 UK 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 franchise for local elections and Devolved Assembly/Parliaments in Wales and Scotland is now devolved (following the implementation of the Scotland Act 2016 and the Wales Act 2017). Accordingly, electoral legislation in relation to prisoner voting for these elections is a matter for the Welsh Assembly/Government and Scottish Parliament/Government.

#### **24. Nasser v Secretary of State for the Home Department**

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

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

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

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

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

On declarations of incompatibility more generally, Lord Hoffmann said that they would *normally* concern a real Convention right in issue in the proceedings, not a hypothetical Convention right (i.e. a 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 (Admin); 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 (Admin); 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 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 would 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.

The Joint Committee on Human Rights published its report on 31 October 2018, stating their view that the proposed draft Remedial Order adequately remedies the incompatibility and recommending that it be approved by Parliament.

The Government laid its response and a revised draft Remedial Order on 5 September 2019. The initial proposed draft Remedial Order restored the right to a fair hearing for ESE Regulation appeal cases because the appellants in the Court of Appeal case were appealing sanctions decisions made under these Regulations. Since then, an Upper Tribunal Judge questioned whether a limited group of Mandatory Work Activity (MWA) appeal cases might also be included, as their rights under Article 6(1) may arguably also have been affected by the 2013 Act.

The Government believes that certain MWA Regulation sanction appeal cases are in a similar position to the ESE sanction appeal cases that were specifically examined by the Court of Appeal. The Government has therefore revised the draft Remedial Order to ensure that claimants who had a pending sanctions appeal under the ESE Regulations or under the MWA Regulations in the Tribunal system on 26 March 2013 who were affected when the retrospective provisions of the 2013 Act came into effect are included in the draft Remedial Order.

### **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 options for addressing the declaration of incompatibility.

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

*Queen's Bench Division (NI); [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*

These cases challenged the related schemes for criminal records disclosure under the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. The schemes relate to an individual's obligation to self-disclose and the inclusion of criminal record information on certificates issued by the Disclosure and Barring Service (DBS) respectively. The cases were heard by the Supreme Court on appeal from the Court of Appeal which had previously held that there were insufficient safeguards contained within the schemes such that they were not 'in accordance with the law' and that the schemes were disproportionate as they failed to sufficiently distinguish convictions and cautions that are relevant to and necessary for the purpose for which they are disclosed. The Northern Ireland case of *Gallagher* was joined on appeal for the Supreme Court hearing.

The Supreme Court disagreed with the lower courts in respect of its approach to the legality test and found the schemes to be 'in accordance with the law' for the purpose of Article 8. It did however dismiss the Government's appeal, finding the schemes to be disproportionate in two respects and affirmed the lower courts' declarations of incompatibility with Article 8 in relation to (i) the requirement under the schemes to disclose all convictions where the individual has more than one conviction and (ii) the

inclusion of reprimands and warnings issued to under 18s within the schemes: [2019] UKSC 3.

The Government is considering the detail of this judgment and the options for remedying the incompatibility.

### **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.

To address this, the Government amended the Human Fertilisation and Embryology Act 2008 by Remedial Order to enable a sole applicant to obtain legal parenthood after a surrogacy arrangement. The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 was made on 20 December 2018 and came into force on 3 January 2019.

The Government also introduced a new set of parental order regulations to replace the Human Fertilisation and Embryology (Parental Order) Regulations 2010 (as provided for under the 2008 Act), to apply modified adoption legislation to those applying for parental orders, and so extend these provisions to sole applicants.

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

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

&

**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 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 identified by the Court 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. The Court observed that these sections relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth.

Contrary to the terms of the Supreme Court's declaration of incompatibility, section 4F of the Act does not relate to persons who would have automatically become British citizens had their parents been married to one another at birth. Rather, it provides a registration route for persons born before 1 July 2006 who would currently be entitled to be registered as a British citizen under section 1(3) or 3(2) or (5) of, or paragraph 4 or 5 of Schedule 2 to, the Act but for their parents' marital status.

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.

The Government addressed these declarations of incompatibility by amending the British Nationality Act 1981 by Remedial Order to remove the good character requirement for British citizenship in the following applications for registration:

- section 4F of the 1981 Act on the basis the person would be entitled to register under paragraph 4 or 5 of Schedule 2 to the Act; and
- sections 4C, 4G, 4H and 4I of the Act.

The approach taken in respect of section 4F reflects the fact that registration for the children of married parents pursuant to section 1(3) or 3(2) or 3(5) of the Act is subject to the good character requirement. Maintaining the good character requirement in these areas (section 1(3), 3(2) and 3(5)) for children of unmarried parents will ensure that persons applying to be so registered are not placed in differing positions due to their parents' marital status.

However, consistent with the fact that there is no good character requirement in respect of registration pursuant to paragraph 4 or 5 of Schedule 2 to the Act, which concern statelessness, the Remedial Order removes the good character requirement from registration pursuant to section 4F where the provision under which the person would otherwise be entitled to be registered is paragraph 4 or 5 of Schedule 2.

The British Nationality Act 1981 (Remedial) Order 2019 came into force on 25 July 2019.

### **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.

A paper with a draft of a proposed Remedial Order to address the incompatibility was laid before Parliament on 8 May 2019. The Government proposes to amend section 1A of the 1976 Act to make bereavement damages available to claimants who cohabited with the deceased person for a period of at least two years immediately prior to the death. The proposed amendment also provides that in instances where both a qualifying cohabitant and a spouse is eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award should be divided equally between the eligible claimants.

The Joint Committee on Human Rights published its report on the proposal on 16 July 2019, which the Government is now considering.

### **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 then Prime Minister announced that the Government would extend civil partnerships to opposite-sex couples.

The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 received Royal Assent on 26 March 2019. Section 2 of the Act enables the Secretary of State to make regulations to amend the Civil Partnership Act 2004 so that two people who are not of the same sex are eligible to form a civil partnership in England and Wales. It requires the Secretary of State to make the regulations so as to come into force no later than 31 December 2019.

The Government set out its proposals for implementing opposite-sex civil partnerships in England and Wales in the document *Implementing Opposite-Sex Civil Partnerships: Next Steps*, published on 10 July 2019. The relevant regulations were laid in Parliament on 21 October 2019.

#### **40. K (A Child) v Secretary of State for the Home Department**

*Administrative Court; [2018] EWHC 1834 (Admin); 18 July 2018*

The case of “K” relates to a child who is not a British citizen by birth because his mother was married to someone other than his British father at the time of his birth.

Changes to the British Nationality Act 1981 from 1 July 2006 amended the definition of “father” within section 50(9A) of that Act. For a child born after that date their father is the husband of their mother or, if there is no husband, a person who satisfies the relevant proof as to paternity (essentially the biological father). In the case of K the child’s biological father was a British citizen, but the mother was married to a non-British citizen. The non-British husband is treated as the “father” for nationality purposes. K therefore had no entitlement to British citizenship; however, they could apply for registration as a British citizen under a discretionary provision. There is a fee for applications under this provision, and children aged 10 and over are also subject to the good character requirement.

The Court was clear that the legislation could only be interpreted to mean that the husband of the mother (where the mother was married) must be the child’s father for nationality purposes. The Court accepted that the aims of that section were legitimate social policy goals: that each child should be limited to two parents for nationality purposes, and that there should be reasonable legal certainty as to who shall be treated as parents. It also accepted that it is reasonable to presume that a child born within marriage is a child of that

marriage, and that to displace that presumption it is reasonable to require an application process. However, it went on to make a declaration that the definition of father under section 50(9A) of the British Nationality Act 1981 was incompatible with Article 14 (read with Article 8) in circumstances where the mother of the child was married to someone other than the biological father at the time of the child's birth. This was on the basis that whilst there was a route to registration for such children (section 3(1) of the 1981 Act), this was a discretionary provision and not an entitlement. Such children did not therefore have an adequate remedy against the discrimination which they faced.

The Government is in the process of appealing this judgment to the Court of Appeal, with a hearing due to take place in November 2019.

#### **41. Siobhan McLaughlin, Re Judicial Review (Northern Ireland)**

*Supreme Court; [2018] UKSC 48; 30 August 2018*

Bereavement Benefits can be paid when a person's spouse or civil partner dies. Siobhan McLaughlin cohabited with her partner for over 20 years in Northern Ireland, and following his death in 2014 was left as the sole carer for their 4 children. Her claim for Widowed Parents Allowance (WPA) was refused as they were not married or in a civil partnership when he died. She challenged this in the Northern Ireland Courts, winning in the High Court but subsequently losing on appeal.

The Supreme Court declared that the requirement in Section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 for a marriage/civil partnership as a qualifying condition of WPA was incompatible with Article 14, read with Article 8. The Supreme Court said: "The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another."

The Government is considering the options for addressing the incompatibility.

#### **42. R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department**

*Administrative Court; [2019] EWHC 452 (Admin); 1 March 2019*

The case concerned the right to rent scheme which imposes duties on landlords and agents to check the immigration status of tenants and other occupiers before renting property to them. The challenge was brought on the basis that the scheme allegedly causes landlords to commit nationality and/or race discrimination against those who are

entitled to rent with the unintended effect that non-white British citizens are less likely to be able to find homes.

The court made an Order declaring that sections 20–37 of the Immigration Act 2014 are incompatible with Article 14 in conjunction with Article 8. It also made an Order declaring that rolling out the scheme from England to Wales, Scotland or Northern Ireland without further evaluation would be irrational and a breach of section 149 of the Equality Act 2010.

The Government has been granted permission to appeal on all grounds. The appeal hearing is listed at the Court of Appeal on 14 and 15 January 2020.

## 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>). The source table is indicated in brackets. ‘Case’ in these statistics refers to a judgment or decision of the ECtHR.

**Table 1: UK Performance**

<b>New cases (B.3)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Total number of UK cases	7	5	2
of which leading cases	6	1	0
<b>Cases closed by final resolution (D.3)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Total number of UK cases	5	8	8
of which leading cases	4	6	2
<b>Pending cases at year end (C.3)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Total number of UK cases	21	18	12
of which leading cases	11 <sup>26</sup>	7	5
<b>Leading cases by time pending (F.1)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Leading UK cases pending <2yrs	4	1	0
Leading UK cases pending 2–5yrs	1	1	1
Leading UK cases pending >5yrs	5	5	4
<b>Payment of just satisfaction (G.2)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Paid within deadline	4	5	2
Paid late	0	1	1
Awaiting confirmation of payment	1	2	1
<b>Just satisfaction (G.1)</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>
Total amount paid by the UK (€)	74,900	222,677	6,120

<sup>26</sup> This is greater than the sum of the three figures below as one case was not classified by length of time.

**Table 2: Pending cases at year end by State (C.3)**

Ranking by 2018 pending cases	State	All pending cases			of which leading cases		
		2016	2017	2018	2016	2017	2018
1	Russian Federation	1,573	1,689	<b>1,585</b>	204	216	211
2	Turkey	1,430	1,446	<b>1,237</b>	182	177	162
3	Ukraine	1,147	1,156	<b>923</b>	146	136	123
4	Romania	588	553	<b>309</b>	72	58	61
5	Hungary	440	205	<b>252</b>	54	54	51
6	Italy	2,350	389	<b>245</b>	70	54	57
7	Greece	311	305	<b>238</b>	50	55	47
8	Bulgaria	290	207	<b>208</b>	94	77	90
9	Azerbaijan	168	197	<b>186</b>	53	54	55
10	Republic of Moldova	286	271	<b>173</b>	80	76	53
11	Poland	225	126	<b>100</b>	34	31	31
12	Croatia	180	185	<b>91</b>	74	63	45
13	Serbia	162	148	<b>60</b>	26	19	12
14	North Macedonia	66	52	<b>52</b>	28	25	17
15=	Georgia	39	36	<b>41</b>	15	13	15
	Lithuania	27	30	<b>41</b>	20	21	19
17	Albania	50	48	<b>37</b>	10	9	9
18=	Armenia	19	30	<b>36</b>	12	11	13
	Slovak Republic	59	63	<b>36</b>	10	9	7
20	Portugal	41	38	<b>34</b>	13	14	16
21	France	58	34	<b>32</b>	28	16	17
22	Finland	41	42	<b>29</b>	12	13	9
23	Bosnia and Herzegovina	31	30	<b>24</b>	11	11	9
24	Malta	12	13	<b>23</b>	7	8	12
25	Belgium	51	39	<b>21</b>	14	13	11
26	Spain	41	31	<b>20</b>	17	19	14
27	Austria	31	32	<b>19</b>	14	15	10
28	Germany	27	18	<b>18</b>	21	16	15
29	Slovenia	49	50	<b>13</b>	21	20	10
30	<i>United Kingdom</i>	21	18	<b>12</b>	11	7	5
31	Cyprus	9	8	<b>9</b>	5	4	7
32	Switzerland	7	9	<b>8</b>	7	7	8

Ranking by 2018 pending cases	State	All pending cases			of which leading cases		
		2016	2017	2018	2016	2017	2018
33=	Czech Republic	10	7	7	6	7	4
	Latvia	53	33	7	41	25	5
	Netherlands	10	12	7	8	10	3
36	Montenegro	16	14	4	6	3	3
37=	Iceland	1	4	3	1	2	3
	Ireland	6	7	3	2	3	3
	Sweden	2	2	3	2	2	3
40	Liechtenstein	2	2	2	1	1	1
41=	Estonia	5	2	1	4	2	1
	Luxembourg	1	0	1	1	0	1
	Norway	1	0	1	1	0	0
44=	Andorra	2	0	0	2	0	0
	Denmark	1	1	0	1	1	0
	Monaco	0	1	0	0	1	0
	San Marino	2	1	0	2	1	0
	<b>Total</b>	<b>9,941</b>	<b>7,584</b>	<b>6,151</b>	<b>1,493</b>	<b>1,379</b>	<b>1,248</b>

**Table 3: Judgments finding a violation against the UK under the supervision of the Committee of Ministers at the end of July 2019**

Case name	Application	Final judgment
<b>Enhanced Procedure</b>		
<b>1</b> <i>McKerr Group</i>		
McKerr	28883/95	04/08/2001
Jordan	24746/94	04/08/2001
Kelly and Others	30054/96	04/08/2001
Shanaghan	37715/97	04/08/2001
McShane	43290/98	28/08/2002
Finucane	29178/95	01/10/2003
Collette and Michael Hemsworth	58559/09	16/10/2013
McCaughey and Others	43098/09	16/10/2013
<b>Standard Procedure</b>		
<b>2</b> S and Marper	30562/04 and 30566/04	04/12/2008
<b>3</b> MGN Ltd	39401/04	18/04/2011
<b>4</b> Hammerton	6287/10	12/09/2016
<b>5</b> Miller and Others	70571/14 etc.	11/04/2019
<b>6</b> Catt	43514/15	24/04/2019
<b>7</b> Beghal	4755/16	28/05/2019
<b>8</b> VM (no. 2)	62824/16	25/07/2019

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