Responding to Human Rights Judgments

Government Response to the Joint Committee on Human Rights' Thirty-first Report of Session 2007-08

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

By Command of Her Majesty
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Introduction

The Joint Committee on Human Rights (JCHR) published on 31 October 2008 its report *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*[1], the most recent in an approximately annual series of reports on this subject. This Paper sets out the Government's position on the implementation of human rights judgments; in doing so, it responds to the recommendations made by the Joint Committee in its most recent report, and a small number of outstanding matters from the preceding report[2] and other correspondence.

The Joint Committee's Report was also the subject of a debate in Grand Committee in the House of Lords on 24 November 2008[3], during which the Government set out its response to many of the Joint Committee's observations and recommendations; those points have nevertheless been addressed again in this Paper.

This Paper is divided into two principal parts. Following the summary and some general comments, the first main part addresses specific cases on which the Joint Committee has commented, while the second main part considers the wider system for responding to judgments of the European Court of Human Rights and declarations of incompatibility. Quotations from the Joint Committee are framed in boxes for ease of identification. Paragraph numbers cited refer to the Joint Committee's most recent Report, unless stated otherwise, and all references to Article numbers are to the European Convention on Human Rights (ECHR).

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[1] Thirty-first Report of Session 2007-08; HL Paper 173, HC 1078; available at http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/173/17302.htm

[2] *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, Sixteenth Report of Session 2006-07; HL Paper 128, HC 728; available at http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/12802.htm. The Government's response is at page 55 of the JCHR's most recent report (note 1 above).

[3] *Hansard*, column GC123

General comments

This Paper considers two particular types of human rights judgments:

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

The common feature of these judgments is that their implementation usually requires changes to legislation[4], policy or practice, or a combination thereof.

European Court of Human Rights judgments

The implementation – or "execution", as it is described in the ECHR – of judgments of the European Court of Human Rights is overseen by the Committee of Ministers of the Council of Europe. The Committee of Ministers is advised by a specialist Secretariat in its work overseeing the implementation of judgments.

The United Kingdom is obliged to implement judgments of the Strasbourg Court under Article 46 of the ECHR, which also establishes the authority of the Committee of Ministers to oversee this. There are three parts to the implementation of a Strasbourg judgment:

- the payment of *just satisfaction*, a sum of money awarded by the Court to the successful applicant;
- other *individual measures*, required to put the applicant so far as possible in the position they would have been had the breach not occurred; and
- *general measures*, required to prevent the breach happening again, or to put an end to breaches that still continue.

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

The Committee of Ministers closes its examination of cases when it is satisfied that the State in question has done everything necessary to implement an adverse judgment.

Taking into account the terms of reference of the Joint Committee and the scope of their Report, this Paper considers only the general measures element of the implementation of Strasbourg judgments.

Declarations of incompatibility

Under section 3 of the Human Rights Act 1998, legislation must be read and given effect, so far as it is possible to do so, in a way which is compatible with the Convention rights[5]. If it finds itself unable to do so in respect of primary legislation[6], a higher court[7] may make a declaration of incompatibility under section 4 of the Act.

Since the Human Rights Act came into force on 2 October 2000, 26 declarations of incompatibility have been made, of which 16 have become final (in whole or in part) and are not subject to further appeal. Information about each of the 26 declarations of incompatibility is set out as an annex to this paper.

A declaration of incompatibility expressly does not affect the continuing application of the provision in respect of which it is made, nor does it bind the parties to the proceedings in which it is made[8]; this respects the supremacy of Parliament in the making of the law. Unlike for judgments of the European Court of Human Rights, there is no legal obligation on the Government to take remedial action following a declaration of incompatibility, nor upon Parliament to accept any remedial measures the Government may propose. The Government has to date never refused to present remedial measures to Parliament following a final declaration of incompatibility.

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[5] The rights drawn from the ECHR listed in Schedule 1 of the Human Rights Act 1998

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

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

[8] Section 4(6) of the Human Rights Act

Remedial measures in respect of both declarations of incompatibility and European Court of Human Rights judgments may be brought forward by way of a remedial order under section 10 of the Human Rights Act[9].

Role of the Joint Committee on Human Rights

In respect of declarations of incompatibility, the Joint Committee has a specific role, under its terms of reference, in the scrutiny of remedial orders; the Government acknowledges that this extends to a wider role of examining the Government's response to declarations of incompatibility.

In respect of judgments of the European Court of Human Rights, the Joint Committee recognises[10] that the Committee of Ministers is the principal body overseeing their implementation. It is the Committee of Ministers whom the Government must satisfy as to its implementation of Strasbourg judgments, although the Government endeavours to inform the Joint Committee so far as possible of its plans for doing so; in particular, the Government intends to make its action plan for the implementation of each judgment available to the Joint Committee.

The Government regrets that, in some cases, it has not been possible for it to respond to the Joint Committee's correspondence, particularly on Strasbourg judgments, as quickly as the Committee would have liked. While we acknowledge the Committee's frustration, the Government reiterates that its overriding priority is to engage with the Committee of Ministers and its Secretariat in respect of the implementation of Strasbourg judgments.

The Government further regrets that it was unable to complete its response to the Joint Committee's previous Report[11] as it had hoped. While we responded promptly to all of the points on specific cases raised by the Joint Committee, we continue to consider whether there are any changes we wish to make to the internal system by which Strasbourg judgments and declarations of incompatibility are remedied. In

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[9] See page 32 below

[10] At paragraph 67

[11] See note 2 above

this respect, the Joint Committee's recommendations are being taken into account, and are addressed along with related matters in a later section of this Paper[12].

The Government's record on the implementation of judgments

The Government is committed to remedying breaches of human rights as quickly as possible. We generally have a strong record on doing so, as the Joint Committee[13] and the Committee of Ministers have acknowledged; we are particularly pleased that the Joint Committee has praised the Government's response to cases such as *ASLEF*[14] and *Clift and Hindawi*[15].

Some judgments of the European Court of Human Rights give rise to particularly difficult – and sometimes controversial – issues of principle. While the Government is committed to addressing these sensitive and complex issues, it can sometimes take longer for us to do so.

However, although the Joint Committee's report focuses on a small number of outstanding cases, many United Kingdom cases in Strasbourg have been discharged from scrutiny over the last two years. This shows that we are taking measures that the Committee of Ministers considers effective to remedy the breaches that have been found.

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[12] See page 31 below

[13] At paragraph 26

[14] See page 11 below

[15] See page 29 below

Consideration of specific cases

Access to artificial insemination (*Dickson v UK*)

The applicants, a prisoner serving a life sentence and his wife, requested access to artificial insemination. The refusal of their request by the Home Secretary was upheld in domestic judicial review. Overturning the decision of the Chamber in favour of the Government, the Grand Chamber of the European Court of Human Rights (ECtHR) found[16] that this decision constituted a breach of the applicants' rights under Article 8 (right to private and family life) on the basis that the Secretary of State's policy, which was to refuse permission unless there were exceptional circumstances, set the bar too high to allow proper consideration of the proportionality of any such decision.

> *The JCHR said:*
>
> It is clear that the Government must change its policy in response to this case. Any new policy will need to strike a fair balance between a legitimate public interest and the private interest of individual applicants, and will need to avoid placing an unreasonable burden of exceptionality on the applicants. We are concerned that the considerations identified are so broad that they allow the Secretary of State to give significant weight to considerations which the Grand Chamber counselled against…
>
> We have asked the Minister for further information on the steps that have been taken to publicise this proposed new policy approach, and on how it, and the previous policy, have been applied. We have also raised several questions about Convention compatibility and the application of this new policy approach in practice.

[16] Application 44362/04, judgment of 4 December 2007

> We have also asked the Secretary of State to explain why he is the most appropriate person to take these decisions… At present, a new Human Fertilisation and Embryology Bill is being considered in the UK. We asked the Minister whether this Bill might be an opportunity to consider this issue in a wider statutory context, to aid transparency and to provide an opportunity for debate.
>
> We do not share the Government's confidence that the minor changes to existing policy agreed so far will be adequate to eliminate the risk of a further finding of a breach of the right to respect for private and family life of prisoners and their partners by the ECtHR. *(paragraphs 40-43)*

The Government has remedied the violation in *Dickson* by amending the policy, under which the Secretary of State will continue to make decisions based on the individual merits of each case. The Grand Chamber's judgment does not require primary legislation to be changed: it focused[17] on the point that the Secretary of State failed to consider the proportionality of the restrictions against the individual circumstances of the applicant. The remark that Parliament had not had an opportunity to weigh arguments of proportionality was incidental to the Court's decision.

The Strasbourg Court's judgment has been widely published; it was also disseminated to all prison governors in England and Wales, and drawn to the attention of other jurisdictions in the United Kingdom. Any prisoners and their partners who ask about access to artificial insemination, or who make a formal application, will be provided with details of the new policy.

The decision by the Secretary of State whether an individual prisoner should have access to treatment is in addition to requirements set by the regulator or the licensed provider in order to access fertility treatment services in the community (which apply irrespective of whether the applicant is a prisoner). Only the Secretary of State has the necessary breadth of knowledge relating to the prisoner and the establishment in which they are located, which is relevant to making decisions that impact on particular prisoners and their partners.

Whether a factor may be relevant to the public interest is a judgment for the Secretary of State in each individual case. While it is not possible to provide an

[17] At paragraph 83

exhaustive list of factors, the risk a prisoner poses to their partner is one that may need to be taken into account. Applicants are asked to provide information on the non-exhaustive list of policy considerations, or anything else that supports their case. No one factor takes precedence over the others and each case is decided on its merits against these equally weighted considerations. Given that the Secretary of State is a public authority for the purposes of making this decision, section 6 of the Human Rights Act requires that the decision be taken in a manner which is compatible with the Convention rights.

The steps that the Government has taken have fully addressed the concerns of the Strasbourg Court, and the Government therefore hopes the Committee of Ministers will soon agree to close this case.

Trade union membership (*ASLEF v UK*)

The trade union ASLEF was prevented by law from expelling a union member on the basis of his membership of the British National Party. The European Court of Human Rights found[18] this to be a breach of Article 11 (freedom of association).

The Government implemented the judgment through section 19 of the Employment Act 2008. This permits the expulsion of an individual from a trade union on grounds of their membership of a political party, if membership of that political party is contrary to a rule or an objective (provided the objective is reasonably practicable to ascertain) of the trade union; the decision to expel is taken fairly and in accordance with union rules; and the individual does not lose his livelihood or suffer other exceptional hardship by reason of not being or ceasing to be a member of the trade union.

> *The JCHR said:*
>
> Although the right to freedom of association confers on Trade Unions the broad general power to control membership, the judgment of the ECtHR in ASLEF is qualified by an exception to that rule based on the need to balance the right of the individual member to be treated fairly and not to suffer exceptional hardship as a result of exclusion. We welcome the Government's decision to include in the Employment Bill additional safeguards to reflect the individual right to freedom of association and to protect individuals from abuse of a dominant position by a particular Trade Union. The positive and consultative approach of the Department of Trade and Industry, and its successor, the Department for Business, Enterprise and Regulatory Reform, to providing a speedy and effective response to the judgment in ASLEF is a commendable example for other Government departments to follow. *(paragraph 45)*

The Government is pleased that the Joint Committee has recognised the effective implementation of this judgment. The Employment Act strikes a balance between different rights, including the right to freedom of association for trade unions and for individual members, as well as the right to freedom of belief.

The Government has sought to draft the provisions in section 19 in a way which goes with the grain of union practices and existing law. At the same time, we have

[18] Application 11002/05, judgment of 27 February 2007

tried to set the safeguards is as precise as possible to avoid creating room for mischievous litigation. The effect of section 19 is to provide greater freedom for trade unions to expel or exclude persons whose political party membership is in opposition to the union's political beliefs, provided they act responsibly.

The Government wishes to record its gratitude to the Joint Committee, and in particular Lord Lester and Lord Morris, for their work in assisting the development of this provision.

Prisoners' voting rights (*Hirst v UK*)

The European Court of Human Rights found[19] that the United Kingdom's bar of all convicted serving prisoners from voting breached Article 3 of the First Protocol (right to free elections).

The question of how, and how far, voting rights should be extended to serving prisoners is a sensitive and complex issue. The then Lord Chancellor, Lord Falconer, announced on 2 February 2006 that the Government would consult on the issues raised by this judgment in two stages. The first stage of the consultation, which concluded in March 2007, set out the principles behind the arguments for and against convicted prisoners retaining the right to vote whilst they are detained in prison, and the options available to the Government following the judgment. The Government will consider which legislative remedy is most appropriate once its proposals for implementing the judgment have been finalised following the second public consultation on this issue.

> *The JCHR said:*
>
> …The Government's change of approach and failure to set a concrete timetable for its response raises serious questions about its reluctance to deal with this issue. In our previous reports, we have drawn attention to a number of cases where significant delay in implementation has tarnished the otherwise good record of the United Kingdom in responding to the judgments of the European Court of Human Rights. For the most part, these cases have been legally straightforward, but politically difficult. This case appears destined to join a list of long standing breaches of individual rights that the current Government, and its predecessors, have been unable or unwilling to address effectively within a reasonable time frame. The Government should rethink its approach.

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

> We call on the Government to publish the responses to its earlier consultation and to publish proposals for reform, including a clear timetable, without further delay. A legislative solution can and should be introduced during the next parliamentary session. If the Government fails to meet this timetable, there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised. (*paragraphs 62-63)*

The Government remains committed to taking appropriate steps in respect of the judgement in *Hirst*, and to carrying out a second, more detailed, public consultation that takes account of the findings of the first stage consultation. The Government acknowledges that there has been a delay to the timetable originally envisaged for the conduct of that second consultation. The current intention is that the results of the first consultation will be published together with a second stage consultation document.

Since the judgment, the Government has kept the Committee of Ministers updated, including a detailed note in April of last year. A further brief update noting the Government's position was submitted in October ahead of the December meeting of the Committee of Ministers' Deputies. We will continue to keep the Committee of Ministers updated on our progress on this case, and have undertaken to submit further information in due course on the form and timing of a further consultation.

In implementing the judgment, the Government will need to take account of the wide spectrum of opinion on the issue, as well as the practical implications for the courts, for prison authorities and for the conduct of elections. The solution that we reach must respect the Court's judgment, and must also respect the traditions and context of the United Kingdom. As noted in the April update, the Government will consider the outcome of the consultation and will bring forward legislation to implement its final approach as soon as Parliamentary time allows.

Investigations into the use of lethal force (*McKerr*, *Jordan*, *Finucane*, *Kelly*, *Shanaghan* and *McShane v UK*)

These cases[20] concern the death of applicants' next-of-kin during security forces operations or in circumstances giving rise to suspicions of collusion of such forces in Northern Ireland.

The Court found shortcomings in the proceedings for investigating deaths giving rise to possible violations of Article 2 (right to life) including:

- lack of independence of the investigating police officers from security forces/police officers involved in the events;
- lack of public scrutiny and information to the victims' families concerning the reasons for decisions not to prosecute;
- the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;
- the soldiers / police officers who shot the deceased could not be required to attend the inquest as witnesses;
- the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings; and
- the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

The *McShane* case also concerns the finding by the Court of a failure by the respondent state to comply with its obligations under Article 34, in that the police had – albeit unsuccessfully – brought disciplinary proceedings against the solicitor

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[20] *McKerr v United Kingdom*, Application 28883/95, judgment of 4 May 2001
Jordan v United Kingdom, Application 24746/94, judgment of 4 May 2001
Finucane v United Kingdom, Application 29178/95, judgment of 1 July 2003
Kelly v United Kingdom, Application 30054/96, judgment of 4 May 2001
Shanaghan v United Kingdom, Application 37715/97, judgment of 4 May 2001
McShane v United Kingdom, Application 43290/98, judgment of 28 May 2002

who represented the applicant in national proceedings for having disclosed certain witness statements to the applicant's legal representatives before the European Court of Human Rights.

The JCHR said:

Our predecessor Committee raised concerns about the independence of inquiries under [the Inquiries Act 2005], including in respect of their independence from the executive and the ability of family members to participate in the inquiry. We reiterate those concerns.

We continue to regret the delay in providing Article 2 compliant investigations in respect of each of these cases. We recommend that the Government publish a full and up to date explanation of its approach to each case, including the reasons for continuing delay.

The Committee of Ministers is awaiting further information from the United Kingdom on the operation of both the Police Ombudsman and the Historical Enquiries Team. We call on the Government to address the concerns raised about independence and effective disclosure in its correspondence with the Committee of Ministers.

We look forward to the Government's response to the recent report of the Commons Northern Ireland Affairs Committee on the cost of policing the past in Northern Ireland. The Government should provide the Committee of Ministers with a copy of that Committee's report and its response. We urge the Ministry of Justice and the Northern Ireland Office to explain how the various pressures identified by that inquiry may impact on the functions and operational capabilities of the Police Ombudsman and the Historical Enquiries Team. The Government should also explain how this may affect information which the Government has previously provided to the Committee of Ministers in relation to these cases. *(paragraphs 65-70)*

The six Northern Ireland cases have presented particular challenges during their implementation. The Government has put together a detailed package of measures to implement the judgments, and many steps have already been taken. The Committee of Ministers has made clear in its public assessments that the United Kingdom has now met many of the requirements of the judgments. We will nevertheless work to resolve the outstanding measures. In particular, we are awaiting the outcome of either inquest proceedings or review by the Historical Enquiries Team in respect of four of the cases.

The Government considers that the United Kingdom's obligations in these cases arise out of Article 46 rather than Article 2. The Historical Inquiries Team (HET) is part of a process (which includes the Public Prosecution Service) aiming to ensure compliance with Article 2 so far as possible. There are certain inevitable limitations, particularly the HET's focus on the review of historical cases, which means they cannot satisfy the promptness requirement of Article 2. The Committee of Ministers is satisfied that steps have been taken to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition, and this general measure has subsequently been closed.

With regard to the *Jordan* case, much of the time taken in this case since it was referred to the coroner in 1993 has been as a result of requests from the family for adjournments, or while challenges to the inquest process by the family have been resolved. There have been at least ten such challenges, as well as proceedings seeking damages that were subsequently abandoned; many of these have gone to the House of Lords. A ruling by the Senior Coroner in June 2008 requiring the Chief Constable to provide him with the senior investigating officer's report was the subject of an application by the Chief Constable for leave to apply for judicial review. The application was refused on 19 September 2008 and the last date for an appeal was 10 December 2008. The Coroner had indicated that the inquest would commence in January. However, there are a number of issues arising from applications for the screening or anonymity of some police and military witnesses (including a PII application by the Police Service of Northern Ireland (PSNI)) and a preliminary hearing is scheduled for 22 January. Proceedings in respect of the inquest hearing have been delayed until at least March.

The *Kelly* case is subject to review by the HET. The review is now in the focused re-investigation stage and is almost complete, the Review Summary Report is well advanced, and there is ongoing engagement with the family representatives. The HET is waiting on one outstanding enquiry in order to move to delivery of the Review Summary Report or to undertake further work.

The *McKerr* case is now a matter for the Police Ombudsman for Northern Ireland, who is responsible for investigating deaths as a result of the actions of a police officer. The Ombudsman has given an assurance to expedite the case as best he can. The Office of the Ombudsman (OPONI) has obtained all relevant papers and is currently actively investigating the case, including looking at the circumstances through the scoping and review process. If new and compelling evidence is found which would warrant a full re-investigation then the OPONI will liaise with the Coroner to determine the way forward.

The Senior Coroner has decided to re-commence the inquest into the death of *McKerr*, but there have been delays following the Coroner's request for access to sensitive PSNI investigative material. Legal discussions continue on the disclosure of this material. The inquest is currently due to begin in 2009.

The HET has now finalised the Review Summary Report on the *Shanaghan* case which has been delivered to the Pat Finucane Centre. There has been some delay in finalising this case, as both OPONI and the HET have been working to address various questions raised by the family.

The *McShane* inquest concluded on 4 July 2008. The judicial review proceedings by the PSNI (challenging the Coroner's decision during the course of the inquest that the senior investigating officer's report should be disclosed to the next of kin) were dismissed by consent of the parties on 7 October 2008, with no prospect of an appeal. The United Kingdom authorities consider that the individual measures in relation to *McShane* have now been completed.

On the *Finucane* case, the Government considers that the conclusions of the extensive Stevens III investigation and the subsequent decision on prosecution complete the individual measures required in this case. The Government remains of the view that these individual measures should be closed.

The Government is satisfied that, in those cases in which Article 2 is engaged, the Inquiries Act 2005 is capable of being used to hold an inquiry that will discharge or contribute to the discharge of the state's obligations under that article to provide an effective official investigation. Existing inquiries under the Inquiries Act are independent and have full statutory powers to compel evidence. The Act places a statutory duty on the Minister to appoint a panel that is impartial.

With respect to the *Finucane* case, the Government is clear that the question of an inquiry is the result of a separate political commitment made by the British and Irish Governments at Weston Park and is not relevant to meeting the requirements of the European Court of Human Rights judgment in this case. The Government considers that the conclusions of the extensive Stevens III investigation and the subsequent decision on prosecution complete the individual measures required in this case.

In light of the Finucane family's continuing opposition to the establishment of an inquiry under the Inquiries Act, in Autumn 2006 the Government took the decision that it was not justifiable to continue to devote public money to preparations for an inquiry which the family would refuse to accept under the Inquiries Act. This was

not a decision not to hold the inquiry; it was a decision about the allocation of resources. It was always the case that the work could be resumed at a later date if progress were to be made towards a resolution.

The Government has now resumed correspondence with the Finucane family's legal representatives about the basis on which a Finucane inquiry could be established. We have always made clear that if there is to be an inquiry it would have to be held under the Inquiries Act 2005. The Government can only take a decision on whether or not it remains in the public interest to hold an inquiry once we have held discussions with the family. We are sure that an inquiry under the Inquiries Act 2005 would provide a full, effective and independent investigation into the circumstances of Mr Finucane's death.

The Government is confident of the independence and effective disclosure of both the Police Ombudsman and the Historical Enquiries Team. Regarding operational independence, the HET reports directly to the Chief Constable. The HET is staffed by retired police officers from Scotland, Wales and England, serving police officers seconded from police forces across the United Kingdom, and a number of retired Royal Ulster Constabulary (RUC) officers (as well as several serving PSNI officers).

These latter officers work in a separate team and only on cases where families have raised no concerns about the independence of the investigation. The officers are required to declare any past interest in a case and no officer will work on a case in which they have previously been involved. If the family request that the officers working on their case be non ex-RUC or PSNI officers, then the HET will comply with that request.

The HET has a close working relationship with the Office of the Police Ombudsman for Northern Ireland. In cases where there are allegations about actions of police officers, the HET refers them to the OPONI and separate, parallel investigations are conducted. Currently the OPONI has a total of 63 cases which have been referred to them by the HET.

The Ombudsman may publish reports following investigations by virtue of the Police (Northern Ireland) Act 1998. Decisions as to when to publish such reports and which material to include in them are taken at the discretion of the Police Ombudsman. Nine such reports have been published to date, and the Ombudsman has made a number of recommendations to the police in these reports.

This kind of retrospective investigation illustrates the concrete results obtained by the OPONI in the investigation of historical cases. The results of the ongoing investigations referred to the OPONI by the HET may be published in future if the Police Ombudsman considers this appropriate.

The Policing Board's human rights advisers reported to the Board on 20 September 2007 that they "are satisfied that the requirement that PSNI personnel working in liaison with the Security Service remain subject to all legislation, policy and procedure governing PSNI actions (including the Human Rights Act 1998) along with their continued accountability to the Chief Constable, the Policing Board and the Police Ombudsman of Northern Ireland should ensure the necessary accountability."

The Government provided its response to the Northern Ireland Affairs Select Committee (NIAC) report on the Cost of Policing the Past on 30 September 2008. The report was very positive in relation to the historic work of both HET and the Police Ombudsman. A substantial budget of £34 million has been set aside for HET over the six years of the project and an additional £4.3 million has been set aside for the Police Ombudsman to investigate historic cases. The Chief Constable has also indicated his commitment to the project beyond the six years.

Although the investigation of historic matters remains a challenging task we do not anticipate any negative effect on either organisation as a consequence of any issues identified by the NIAC report. The report highlighted a number of areas where improvements may be possible and they are currently under consideration. As recognised by the NIAC report, the forthcoming report from the Consultative Group on the Past will provide the best platform from which we can move forward with these issues.

Security of tenure for Gypsies and Travellers (*Connors v UK*)

The European Court of Human Rights found[21] that the eviction of the applicant and his family from a local authority Gypsy and Traveller site was not attended by the requisite procedural safeguards, in that there was no requirement for the local authority to establish proper justification for the serious interference with the applicant's rights. The eviction therefore could not be regarded as justified by a "pressing social need", nor proportionate to the legitimate aim being pursued, and therefore breached Article 8 (right to private and family life).

> *The JCHR said:*
>
> The Government sought to extend the application of the Mobile Homes Act 1983 to residents of local authority Gypsy and Traveller sites, following a recommendation which our predecessor Committee made over four years ago. We welcomed these provisions but expressed our disappointment at the significant and unnecessary delay in resolving this issue. *(paragraph 71)*

Section 318 of the Housing and Regeneration Act 2008 will remove the exclusion for local authority Gypsy and Traveller sites from the Mobile Homes Act 1983. This will improve security of tenure for Gypsies and Travellers on local authority sites. The Government has recently undertaken a consultation on implementation of the 1983 Act on local authority Gypsy and Traveller sites, including proposals to address concerns raised by stakeholders and transitional provisions for existing residents on these sites.

[21] Application 66746/01, judgment of 27 August 2004

Corporal punishment of children (*A v UK*)

The European Court of Human Rights held[22] that the defence of reasonable chastisement, which provided certain adults with a defence against assault occasioning actual bodily harm (ABH) to a child, was in breach of the rights of children under Article 3 (freedom from inhuman or degrading treatment and punishment).

> *The JCHR said:*
>
> ...The information provided in [Crown Prosecution Service (CPS)] case notes did not show whether in [cases in which the reasonable chastisement defence may have been put forward where it is not legally available], defendants were acquitted as a result of wrongly raising this defence. We recommend that the CPS case notes should capture important information such as this to facilitate future research.
>
> We recommend that the Government explain clearly how it considers that the ECtHR would approach a case brought by a child who has been punished in accordance with Section 58 Children Act 2004, applied in accordance with the appropriate Charging Guidance.
>
> Clear concerns about the operation of Section 58 Children Act 2004 arise from the Government's recent review and the research of the CPS, particularly, from the suggestion that the defence of reasonable punishment has been raised in cases of child cruelty, or other cases where it should not be available. We believe that it is necessary for the Government to demonstrate that Section 58, in the way that it operates is compatible with our obligations, and therefore, we call on the Government to explain its view that these reviews show that the law operates in a way which provides an effective deterrent against any new breaches of the right to be free from inhuman and degrading treatment or punishment. *(paragraphs 77-80)*

The Government believes that the United Kingdom is now fully compliant with the European Court of Human Rights judgment in this case.

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[22] Application 25599/94, judgment of 23 September 1998

The Government, like many parents, does not condone smacking. We are very pleased that smacking has been reducing over time and we are determined, through supporting positive parenting, to encourage this trend. However, most parents do not support a ban, and we do not want to criminalise decent parents.

As noted by the Joint Committee[23], the Committee of Ministers reviewed this case in September 2008 and noted with satisfaction the legislative changes and the wide range of accompanying awareness-raising measures. They also took note of the pending judicial review in Northern Ireland and decided to resume consideration of this case in the light of the results of that judicial review at their second meeting of 2009 at the latest.

If the case of A came to court in the United Kingdom now with the same set of facts, we would expect the defendant to be charged with assault occasioning actual bodily harm, which carries a maximum sentence of five years' imprisonment. The defence of 'reasonable punishment', or 'justifiable assault' in Scotland, would not be available. This defence has been limited to cases of conduct charged as 'common assault', where the injury suffered is transient or trifling.

The Crown Prosecution Service (CPS) Charging Standard clarified, in relation to assaults on children, the boundary between common assault and assault occasioning actual bodily harm. This means that an injury which would lead to a charge of common assault against an adult would in most circumstances be charged as actual bodily harm, or higher, if the injury were inflicted against a child.

An assault by a parent on a child resulting in grazes, scratches, abrasions, minor bruising, swelling or superficial cuts will normally be charged as actual bodily harm, assuming the CPS is satisfied that the evidential and public interest tests in the Code for Crown Prosecutors are met.

It is clear therefore that section 58 of the Children Act 2004 has increased legal protection for children, and there are no reported significant problems with its operation.

Since carrying out its research, the CPS has issued a policy bulletin to all staff reminding them of changes made by section 58 and the revised Charging Standard.

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[23] At paragraph 73

In respect of case notes, the CPS has confirmed that prosecutors are aware that they should endorse their files with the reasons for acquittal, if known, in every case, not just those where reasonable punishment has been raised as a defence. A policy bulletin sent to all prosecutors in July 2007 reminded them of the need for clear review endorsements in 'reasonable punishment' cases. The same policy bulletin informed prosecutors that all cases in which 'reasonable punishment' has been raised must be notified to the CPS who will log and monitor them. This will assist in any future research.

The Government cannot speculate on how the European Court of Human Rights might approach cases in the future. However, the Human Rights Act 1998 of course requires the domestic courts to take into account any judgment of the European Court of Human Rights in interpreting the Convention rights.

Access to social housing (*Morris v Westminster City Council*)

The Court of Appeal declared[24] that section 185(4) of the Housing Act 1996 incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Article 8 (right to private and family life) because it unjustifiably discriminates against British citizens who have a dependant child or pregnant spouse who is ineligible for assistance. The law was amended by Schedule 15 to the Housing and Regeneration Act 2008. The Act received Royal Assent on 22 July 2008 but Schedule 15 has not yet been brought into force.

> *The JCHR said:*
>
> We are not persuaded that the provisions in the Housing and Regeneration Act 2008 intended to respond to the declarations of incompatibility in the cases *Morris* and *Gabaj* entirely remove the risk that our domestic courts, or the ECtHR, will find a further violation of the right to enjoy respect for private and family life without unjustified discrimination. We recommend that the Government provide a fuller explanation of its view that these provisions are necessary and proportionate and therefore, compatible with the Convention. *(paragraph 95)*

The Government remains firmly of the view that a person who is in the United Kingdom illegally, or on condition of no recourse to public funds, should not be able to confer priority or entitlement for social housing on another person, including a British citizen who would not have such priority or entitlement in his own right. However, the Government accepts the courts' view that British citizens who are eligible for assistance and who have ineligible dependants should not be denied the provision of accommodation under the homelessness legislation.

Under the new provisions, British citizens who are owed the main homelessness duty under section 193(2) of the Housing Act 1996 will be entitled to be provided with accommodation under the homelessness legislation through reliance on a restricted person to convey priority need or homelessness status.

The Government acknowledges that the help these British citizens will get will be more restricted than the help given to other British citizens owed the main

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[24] [2005] EWCA Civ 1184; see also *R (Gabaj) v First Secretary of State*, 28 March 2006, unreported

homelessness duty (section 193(2) of the 1996 Act) who are not relying on a restricted person. However, the Government considers this difference in treatment is necessary, proportionate and justified on public policy grounds, to ensure that priority or entitlement for long-term social housing cannot be conveyed on another person by someone who is here illegally or with limited leave that includes a condition that they have no recourse to public funds.

However, the remedy will not mean that British citizens who are owed the main homelessness duty through reliance on a restricted person will be denied access to social housing. They will be eligible to apply for social housing and to have their needs considered on the same basis as other British citizen applicants who are not owed the homelessness duty. They will be entitled to be given reasonable preference for social housing if their circumstances mean they fall within any of the other reasonable preference categories: for example, because they need to move on medical or welfare grounds.

Moreover, local authorities will not be prevented from offering social housing to British citizens who are owed the main homelessness duty through reliance on a restricted person, as long as the offer is made in accordance with the priorities and procedures set out in the published allocation scheme.

But, so far as reasonably practical, authorities will be required to discharge the homelessness duty by arranging an offer of suitable accommodation in the private rented sector. This is necessary to avoid, so far as possible, the situation where such a person is provided with temporary accommodation with little prospect of moving on because he does not have sufficient priority for social housing under the allocation scheme.

The Government considers that its policy of ensuring that no one who is here illegally or on condition of no recourse to public funds should be able to confer priority or entitlement for social housing on someone else is justifiable and proportionate because of the scarcity of social housing, the high cost of provision at taxpayers' expense, and the economic and other long term benefits that a tenancy of social housing confers on the tenant.

The Government therefore considers that the provisions of Schedule 15 to the Housing and Regeneration Act 2008, which will ensure that families such as those in the case of *Morris* are provided with suitable accommodation but will limit their access to social housing, are necessary and proportionate and compatible with the Convention.

Sham marriages (*Baiai v Secretary of State for the Home Department*)

Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was declared[25] incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Articles 12 (right to marry), insofar as it discriminated between civil marriages and Church of England marriages.

> *The JCHR said:*
>
> The continued application of a provision of domestic legislation that the UK courts have decided is incompatible with the Convention is inconsistent with our commitments to give full effect to the protection of the Convention to all people in the UK. It leads not only to the continued likelihood that people in the UK may be treated in a way which breaches their fundamental rights but also that they will only be able to secure a remedy in Strasbourg.
>
> We note the Government's reference to its interim guidance on Certificates of Approval, which was designed to reduce the impact of the Certificate of Approval scheme, pending the decision of the House of Lords. However, we consider that it has no real implications for the ongoing discrimination identified by the Court of Appeal, which continues to mean those who wish to marry in a Church of England service are treated more favourably than others.
>
> The Government has not explained how any proposals to create a separate scheme for the Church of England would be justifiable and compatible with Article 14 ECHR. In the light of the outcome of the Government's appeal to the House of Lords, and the continued operation of the Certificate of Approval Scheme, we expect the Government's proposals for the removal of the discriminatory exemption for Church of England marriages, together with a full explanation of their compatibility with the Convention, to be published without delay. We call on the Government to send us its proposals as soon as they are available. *(paragraphs 101-106)*

The Government is committed to remedying the declared incompatibility with Article 14. We were awaiting the outcome of the House of Lords appeal, which was

[25] [2008] UKHL 53

the most efficient use of public resources in changing the law in this area; this judgment was given on 30 July 2008.

The UK Border Agency is liaising with relevant stakeholders and is considering the most appropriate way to remedy the incompatibility.

We are conscious of the House of Lords finding that the scheme could represent a disproportionate interference with Article 12 for those applicants who are needy and not able to afford the fee for a Certificate of Approval application, and are considering very carefully the implications of the House of Lords judgment in this respect. This aspect relates to the secondary legislation, and is separate from the declaration of incompatibility which of course concerns the primary legislation.

Early release of prisoners (*Clift and Hindawi v Secretary of State for the Home Department*)

The appellants were all former or serving prisoners. The issue 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[26] incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Article 5 (right to liberty) 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.

> *The JCHR said:*
>
> The declaration of incompatibility made in the joined cases of *Clift* and *Hindawi* involved a relatively straightforward legal problem with a comparatively simple solution. We welcome the Government's decision to introduce a similarly simple and speedy remedy in the Criminal Justice and Immigration Act. We have previously cautioned against using a large Government Bill to provide a remedy for a relatively simple issue. However, in this case, the Government's proposed interim administrative arrangements ensured that the incompatible provisions of the Criminal Justice Act 1991 had no substantive effects and the timing of the Criminal Justice and Immigration Bill was opportune. *(paragraph 107)*

The Government is pleased that the Joint Committee agrees that this incompatibility has been remedied.

[26] [2006] UKHL 54

Access to state pensions for citizens resident overseas (*Carson v UK*)

Mrs Carson, a recipient of the United Kingdom state pension living in South Africa, challenged (along with twelve others) the decision not to uprate her pension as incompatible with Article 14 (prohibition on discrimination in the protection of the Convention rights) read with Article 1 of the First Protocol (protection of property).

> *The JCHR said:*
>
> We do not wish to pre-empt the decision of the ECtHR in this or any other case. We recommend that, in cases such as these, the Government should consider urging the Court during the course of a lead case to treat it as a pilot judgment. In any event, the Court should be encouraged to give clear guidance on a suitable remedy in any case involving a significant substantive breach involving clone cases. We would hope that in any such case, procedural provision would be made to ensure that that those individuals involved in clone cases are given adequate opportunity to influence the approach of the Court. *(paragraph 124)*

The Government agrees that it is important that the European Court of Human Rights should be fully aware where a case has implications that go beyond the facts of the particular case, and that its judgment takes full account of those implications. In our view, the Court procedures already allow this because of the opportunity for both sides to make detailed observations before the Court (as indeed was done in the *Carson* case).

In the *Carson* case, the Government considered that there was no violation of the Convention. In its recent decision[27], the Chamber of the European Court of Human Rights found in the Government's favour. This judgment is however not yet final: the parties may seek referral to the Grand Chamber within three months of the judgment.

[27] Application 42184/05; judgment of 4 November 2008

Responding to judgments: the wider system

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

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

The Government's system for responding to judgments

The responsibility for responding to a human rights judgment falls primarily to the Government department responsible for the policy area to which it relates. The Ministry of Justice, working with the Foreign and Commonwealth Office in respect of Strasbourg judgments, performs a light-touch co-ordination role.

In a recent recommendation[28], the Committee of Ministers suggested that States may consider appointing a co-ordinator of national responses to European Court of Human Rights judgments.

> *The JCHR said:*
>
> We recommend… that the Ministry of Justice should adopt a coordinating role in relation to the Government's response to adverse human rights judgments, including judgments of the European Court of Human Rights. *(paragraph 18)*

The recommendation of the Committee of Ministers is of particular relevance to States in which, as a result of the way in which they organise their Government, there is no collective responsibility between ministers and between Government departments. States in which Government ministers represent different political parties as part of a coalition, without collective responsibility, have encountered difficulties in co-ordinating their response to Strasbourg judgments.

[28] Recommendation CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of the judgments of the European Court of Human Rights.

These circumstances do not apply to the United Kingdom, in which decisions on Government policy are made collectively, and in which the Government as a whole respects the international obligations of the United Kingdom. The Government is not therefore persuaded at this time that there would be any significant benefit in instituting a significantly stronger co-ordinating role than currently exists. However, we are considering how the Ministry of Justice might work more effectively with other Government departments to assist them in effectively and rapidly implementing the judgments for which they are responsible.

The JCHR said:

The Government should adopt a much clearer policy on systematically responding to declarations of incompatibility made by our domestic courts, including implementing the recommendations made by us and our predecessors, on the timetable for responding to these judgments.

It should also make greater use of remedial orders and should ensure that any legislative solution proposed by Government makes the necessary provision for a remedy for those applicants already adversely affected by the incompatible provisions.

We urged the Ministry of Justice to produce clear guidance on declarations of incompatibility and remedial orders and expressed our willingness to scrutinise draft guidance.

Where a legislative provision is declared incompatible with the Convention, the Government should closely monitor the application of that provision and its potential impact on individuals affected by its continuation in force. We recommended that these monitoring arrangements should include the collection of relevant statistics on the impact of incompatible statutory provisions. *(paragraph 6, citing previous Report)*

The Government's policy on responding to declarations of incompatibility, as set out above, is already clear. Departments are aware of the need to respond rapidly once a declaration of incompatibility is no longer subject to appeal, and the Ministry of Justice checks on the progress of remedial measures as appropriate.

A remedial order under section 10 of the Human Rights Act permits legislation that has been found to be incompatible with the Convention rights – whether in a judgment of the European Court of Human Rights or through a declaration of incompatibility – to be amended by secondary legislation that is subject to

enhanced Parliamentary scrutiny. It is an excellent tool for addressing incompatible legislation, and the Government is disappointed that it has not been able to make greater use of remedial orders.

However, as remedial orders cannot be amended in Parliament, they are not entirely suited to complex remedial measures; this may explain their limited use given the nature of the cases decided in recent years. Nevertheless, the Ministry of Justice reminds departments responsible for implementing European Court of Human Rights judgments and declarations of incompatibility of the utility of remedial orders for this purpose, and assists them if necessary in using them.

The Government already assesses the impact of incompatible provisions when determining how to remedy the incompatibility. While this may involve the collection of statistics, numbers alone rarely tell a complete story. Furthermore, if no appropriate systems for collecting statistics already exist in a given area, the Government has to determine whether their collection is an appropriate and proportionate commitment of public resources. This is therefore a decision that has to be taken on a case-by-case basis.

> *The JCHR said:*
>
> We recommended that the Government should aim to make a detailed decision on how to respond to a judgment of the ECtHR within three months and a declaration of incompatibility within six months.
>
> In complex cases, we recognise that the Government might need more time to consult with relevant stakeholders or to formulate an effective solution. However, an explanation for any delay should be provided within the timetables proposed. (*paragraph 6, citing previous Report)*

The length of time that each judgment takes to remedy depends on what needs to be done. In some cases, little or no amendment of legislation may be required, or the use of a remedial order may be appropriate. In other cases, primary legislation may require substantial amendment, or the subject to which the declaration relates may be sensitive or controversial. The need to take legal advice as to the precise requirements of certain judgments inevitably takes time as well.

Therefore, while the Government agrees with the Joint Committee that judgments should be addressed rapidly, it sees no benefit in adopting a “one size fits all” deadline for European Court of Human Rights judgments and declarations of incompatibility. In respect of Strasbourg judgments, the Government needs to

satisfy the Committee of Ministers that it is taking prompt and effective action to remedy the judgment, taking into account the particular circumstances; the Government applies this same standard to its approach to declarations of incompatibility.

The provision of information about judgments

The practice of the Ministry of Justice, like its predecessor departments responsible for the Human Rights Act, has been to prepare a listing of every declaration of incompatibility made, so far as it is aware.

> *The JCHR said:*
>
> This database, if regularly updated, can significantly increase the transparency of the Government's response to these important judgments. It is disappointing that this database does not appear to have been updated for a significant period of time: nor is it easily accessible on the new, redesigned, Ministry of Justice website. We recommend that the Ministry of Justice take steps to make it easier to find the database on their website, and that the database should be reviewed and updated on at least a quarterly basis. *(paragraph 82)*

The listing of declarations of incompatibility is updated regularly; each update is sent by officials at the Ministry of Justice to the Joint Committee's legal advisers. We regret that technical issues with the format of the document have lately prevented us from making a recent version available on the Ministry of Justice website, but officials are working to ensure that a version that meets accessibility standards can be published and updated.

The latest version of the listing, updated to 9 January 2009, is published as an annex to this Paper.

> *The JCHR said:*
>
> We recommended that the Ministry of Justice create a database on the implementation of outstanding ECtHR judgments against the UK, similar to its database on domestic declarations of incompatibility. *(paragraph 6, citing previous Report)*

Unlike for declarations of incompatibility, all judgments of the European Court of Human Rights against the United Kingdom are available in a single location on the Court's website[29]. Information concerning implementation of ECHR judgments where the Committee of Ministers has not yet adopted a final resolution can be found on the Committee's website[30]. There are also substantially more Strasbourg judgments than declarations of incompatibility. The Government does not therefore consider at this time that the creation and maintenance of a listing of such judgments would be an effective use of public resources.

> *The JCHR said:*
>
> We recommended that the Ministry of Justice should provide us with copies of any ECtHR judgment against the UK within one month and any declaration of incompatibility within 14 days. They should inform us of the results of any appeal or hearing by the Grand Chamber of the ECtHR within one month of the decision of the final appeal court or the Grand Chamber.
>
> Once a judgment has become final, the Ministry of Justice should write to us to explain any measures the Government considers necessary to comply with the judgment and whether the Government intends to use the remedial order process.
>
> Information notes provided to the Committee of Ministers should routinely be copied to us. *(paragraph 6, citing previous Report)*

It is already the practice of the Government to draw declarations of incompatibility to the Joint Committee's attention, and to update them on later appeals. This is undertaken by the department with responsibility for the subject matter of the declaration of incompatibility. The Ministry of Justice also encourages lead departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility.

As noted above, all judgments of the European Court of Human Rights are available in full on its website; the Court also provides alerts by e-mail when judgments are due to be delivered. The Government does not therefore consider

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[29] The HUDOC database at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en may be queried by respondent State

[30] http://www.coe.int/T/E/Human_Rights/execution/

that it would be an appropriate use of public resources to duplicate these systems. Furthermore, the Joint Committee already receives a regular update from the Foreign and Commonwealth Office on new adverse decisions of the European Court of Human Rights against the United Kingdom.

The developing practice of the Committee of Ministers of the Council of Europe is to encourage the submission of an "action plan" by a State in respect of each judgment, setting out their proposed procedure for its implementation. The Government wholeheartedly supports this practice, and aims to submit action plans wherever possible. The Government further intends to make these action plans available to the Joint Committee.

> *The JCHR said:*
>
> We call on the Minister for Human Rights and the Secretary of State for Foreign Affairs to provide us with an annual report on adverse judgments, following the model adopted in the Netherlands. *(paragraph 14)*

As noted above, the Joint Committee already regularly receives, and has available to it, information about judgments against the United Kingdom. A report such as that envisaged by the Joint Committee would require a significant commitment of public resources, from which the Government considers there would be little additional benefit.

> *The JCHR said:*
>
> We look forward to assessing the Government's reaction to the work of the Parliamentary Assembly of the Council of Europe and its scrutiny of the execution of judgments of the European Court of Human Rights by the United Kingdom. We encourage the Government to engage positively with the new Rapporteur and intend to scrutinise the UK Parliamentary Delegation response to his introductory memorandum. *(paragraph 23)*

The Government was pleased to note that the Rapporteur is considering substantially fewer cases involving the United Kingdom than his predecessor, indicating the progress that the Government has made in completing the implementation of judgments. The Government has responded to the Rapporteur, and will make a copy of its response available to the Committee.

The JCHR said:

[The Committee of Ministers' Annual Report for 2007 on the Supervision of the Execution of Judgments of the European Court of Human Rights, March 2008.]

We suggest that some minor changes, such as an executive summary and a state-by-state review of cases monitored during the year would increase the accessibility and utility of the Annual Report and would make it more user friendly for stakeholders in Contracting States.

The most disappointing statistic to emerge from the Report is that the United Kingdom has the highest proportion of leading cases waiting for an acceptable resolution for longer than five years… We call on the Government to publish its response to the Annual Report of the Committee of Ministers on the Supervision of the Execution of Judgments of the European Court of Human Rights. In that reply, we recommend that the Government explain the reasons for any delay in relation to the introduction of general measures in each of the cases which have been subject to the supervision of the Committee of Ministers for longer than five years. *(paragraphs 24-28)*

The Government has drawn the Committee's suggestions to the attention of the Committee of Ministers' Secretariat. However, the Government would note that the report is intended to be a broad overview of the Committee of Ministers' work, and that the inclusion of information on each of the 47 Member States of the Council of Europe would substantially increase the scale of the report.

The statistic that the Joint Committee has selected about the proportion of leading cases waiting for resolution is somewhat misleading. While it is statistically accurate to say that, of 15 United Kingdom cases identified by the Committee of Ministers as leading cases, eight have been subject to supervision for more than five years, it should be noted that, in the Government's understanding, six of these cases are the Northern Ireland cases discussed elsewhere in this Paper[31] that have presented particular issues and challenges. The statistic selected by the Joint Committee does not therefore disclose a particular systemic problem on the part of the United Kingdom.

The Annual Report of the Committee of Ministers is not one to which any State is expected specifically to respond, and the Government does not intend to do so.

[31] See page 15

Declaration of incompatibility as an effective remedy

Article 35 of the ECHR requires that all available domestic remedies – that is, remedies available to the applicant in the State in question – must have been exhausted before an application is made to the European Court of Human Rights. In the jurisprudence of the Strasbourg Court, an applicant is obliged to seek a domestic remedy only if it is considered "effective" by the Court.

In the case of *Burden v UK*[32], the European Court of Human Rights was asked to reconsider its previous view that a declaration of incompatibility could never be considered an effective remedy, on the basis that there is no legal obligation on the Government to take remedial action following a declaration of incompatibility, nor upon Parliament to accept any remedial measures the Government may propose[33].

Although the Grand Chamber of the Court did not completely overturn this position, it endorsed the Chamber's view that

> It is possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure.[34]

The Grand Chamber further indicated that it

> notes with satisfaction that in all the cases where declarations of incompatibility have to date become final, steps have been taken to amend the offending legislative provision.[35]

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[32] Application 13378/05, judgment of 29 April 2008

[33] See page 5

[34] Note 32, at paragraph 36

[35] At paragraph 41

The JCHR said:

These findings should encourage the Government to adopt a consistent approach to declarations of incompatibility. We again recommend that the Government take steps to adopt an open, transparent policy. *(paragraph 84)*

The Government is of course pleased with the Grand Chamber's conclusion, which it considers an endorsement of its current approach to declarations of incompatibility.

Repetitive cases at the European Court of Human Rights

Where a case before the European Court of Human Rights discloses a systemic violation of the ECHR in a Member State that is likely to give rise to a large number of repetitive cases – often called "clone cases" – the Court has developed a practice by which it treats a leading case as a pilot judgment. In that judgment, the Court lays down guidelines within which the State is expected to set up a mechanism to settle the clone cases.

There have been only a small number of pilot judgments to date, none of which involved the United Kingdom. However, the Government supports the Court's developing practice in this area, which may help to address the workload issues facing the Court.

The JCHR said:

…We recommend that the Government's approach to clone cases should be more proactive. Government policy on settlement appears to be based upon the existence of an admissible application to Strasbourg. This places the onus on the individual who has been affected by a breach which has already been identified by the ECtHR to come forward and to invest time and money in the preparation of a claim. As legal proceedings develop and costs accumulate, settlement negotiations may become more difficult. *(paragraph 119)*

The Government takes proactive measures, so far as possible, to settle applications raising the same issue as an earlier case against the United Kingdom in which a violation has been found; the Joint Committee recognised this in respect

of the widowers' benefits cases[36]. However, these cases were not addressed under the pilot judgment procedure.

The pilot judgment procedure by definition requires a lead case to be determined by the Strasbourg Court, and for a violation to be found. While the Government would, as always, engage constructively with the Court in its deliberations on a case suitable for the pilot judgment procedure, the Government would also wish to defend vigorously any case in respect of which it does not agree that a violation has occurred.

[36] At paragraph 118

Annex: Declarations of incompatibility

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

- 17 have become final (in whole or in part) and are not subject to further appeal;
- 8 have been overturned on appeal, of which 2 remain subject to further appeal; and
- 1 remains subject to appeal.

Of the 17 declarations of incompatibility that have become final:

- 10 have been remedied by later primary legislation (which in relation to 2 cases is not yet in force);
- 1 has been remedied by a remedial order under section 10 of the Human Rights Act;
- 3 relate to provisions that had already been remedied by primary legislation at the time of the declaration;
- 1 is the subject of public consultation (in conjunction with the implementation of a judgment of the European Court of Human Rights); and
- 2 are under consideration as to how to remedy the incompatibility.

Information about each of the 26 declarations of incompatibility is set out below in chronological order. All references to Articles are to the Convention rights, as defined in the Human Rights Act 1998, unless stated otherwise.

This information was last updated on 21 January 2009, and will not reflect any changes after that date.

Contents

14. R (on the application of Wilkinson) v Inland Revenue Commissioners
    (Court of Appeal, upholding Moses J; [2003] EWCA Civ 814; 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 2003)
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
    (Court of Appeal, upholding Keith J; [2005] EWCA Civ 1184; 14 October 2005)
18. R (Gabaj) v First Secretary of State
    (Administrative Court; unreported; 28 March 2006)
19. R (on the application of Baiai and others) v Secretary of State for the Home Department and another
    (Silber J; [2006] EWHC 823 (Admin); 10 April 2006)
20. Re MB
    (Sullivan J; [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
    (Stanley Burnton J; [2006] EWHC 2886 (Admin); 16 November 2006)
22. R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another
    (House of Lords; [2006] UKHL 54; 13 December 2006)
23. Smith v Scott
    (Registration Appeal Court, Scotland; [2007] CSIH 9; 24 January 2007)
24. Nasseri v Secretary of State for the Home Department
    (McCombe J; [2007] EWHC 1548 (Admin); 2 July 2007)
25. R (Wayne Thomas Black) v Secretary of State for Justice
    (Court of Appeal; [2008] EWCA Civ 359; 15 April 2008)
26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department
    (Lord Justice Latham, Mr Justice Underhill and Mr Justice Flaux; [2008] EWHC 3170; 19 December 2008)

1. R (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions

Divisional Court, Harrison J & Tuckey LJ; [2001] HRLR 2; 13 December 2000

The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.

The Divisional Court declared that the powers were in breach of Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker. A number of provisions were found to be in breach of this principle, including the Town and Country Planning Act 1990, sections 77, 78 and 79.

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

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

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

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

Sections 72 and 73 of the Mental Health Act 1983 were declared incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.

The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712), which came into force on 26 November 2001.

3. Wilson v First County Trust Ltd (No.2)

Court of Appeal; [2001] EWCA Civ 633; 2 May 2001

The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement with the result that it could not be enforced.

Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 of the First Protocol by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditor's enjoyment of contractual rights.

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

* * * * *

4. McR's Application for Judicial Review

Kerr J; [2002] NIQB 58; 15 January 2002

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

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

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

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

Court of Appeal, upholding Sullivan J; [2002] EWCA Civ 158; 22 February 2002

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

The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was declared incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of the First Protocol as it imposed an excessive burden on the carriers.

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

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6. Matthews v Ministry of Defence

Keith J; [2002] EWHC 13 (QB); 22 January 2002

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

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

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

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

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

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

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

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

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8. R v Secretary of State for the Home Department, ex parte D

Stanley Burnton J; [2002] EWHC 2805 (Admin); 19 December 2002

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

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

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

9. Blood and Tarbuck v Secretary of State for Health

Sullivan J; unreported; 28 February 2003

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

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

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

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10. R (Uttley) v Secretary of State for the Home Department

Moses J; [2003] EWHC 950 (Admin); 8 April 2003

The case concerned a prisoner who argued that his release on license was an additional penalty to which he would not have been subject at the time he was sentenced.

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

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

11. Bellinger v Bellinger

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

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

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

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

* * * * *

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

Maurice Kay J; [2003] EWHC 1094 (Admin); 16 April 2003

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

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

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

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

Court of Appeal, upholding Moses J; [2003] EWCA Civ 875; 18 June 2003

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

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

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

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

Court of Appeal, upholding Moses J; [2003] EWCA Civ 814; 18 June 2003

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

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

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

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

Court of Appeal; [2004] EWCA Civ 1609; 3 December 2003

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

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

(i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the Mental Health Review Tribunal but the incompetent patient is incapable of exercising that right; and

(ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).

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

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

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

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

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

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

17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State

Court of Appeal, upholding Keith J; [2005] EWCA Civ 1184; 14 October 2005

18. R (Gabaj) v First Secretary of State

Administrative Court; unreported; 28 March 2006

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

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

The law was amended by Schedule 15 to the Housing and Regeneration Act 2008. The Act received Royal Assent on 22 July 2008 but Schedule 15 has not yet been brought into force.

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

Silber J; [2006] EWHC 823 (Admin); 10 April 2006

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

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

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

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20. Re MB

Sullivan J; [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

Stanley Burnton J; [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. The Government is considering how to rectify the incompatibility.

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

House of Lords; [2006] UKHL 54; 13 December 2006

This was a conjoined appeal in which the appellants were all former or serving prisoners. The issue on appeal was whether the early release provisions, to which each of the appellants was subject, were discriminatory.

Sections 46(1) and 50(2) of the Criminal Justice Act 1991 were declared incompatible with Article 14 taken together with Article 5 on the grounds that they discriminated on grounds of national origin.

The provisions in question had already been repealed and replaced by the Criminal Justice Act 2003, save that they continued to apply on a transitional basis to offences committed before 4 April 2005. Section 27 of the Criminal Justice and Immigration Act 2008 therefore amended the Criminal Justice Act 1991 to remove the incompatibility in the transitional cases. The amendment came into force on 14 July 2008, but reflected administrative arrangements addressing the incompatibility that had been put in place shortly after the declaration was made.

23. Smith v Scott

Registration Appeal Court, Scotland; [2007] CSIH 9; 24 January 2007

This case concerned the incapacity of convicted prisoners to vote under section 3 of the Representation of the People Act 1983.

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

The Government is currently engaged in a process of consultation on how to respond to *Hirst*, so as to provide the public debate on this issue that had been identified as lacking by the Strasbourg Court's judgment. The outcome of this process will also determine the Government's response to the declaration in *Smith*.

24. Nasseri v Secretary of State for the Home Department

McCombe J; [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 of 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 has been granted permission to appeal to the House of Lords.

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25. R (Wayne Thomas Black) v Secretary of State for Justice

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

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

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

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

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

Lord Justice Latham, Mr Justice Underhill and Mr Justice Flaux; [2008] EWHC 3170; 19 December 2008

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

Section 82(1) of the Sexual Offences Act 2003 was declared incompatible with Article 8 to the extent that indefinite notification periods are not subject to any review mechanism whereby the proportionality of the notification requirements can be evaluated.

The Government was granted leave to appeal to the Court of Appeal on 19 December 2008.

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