Ministry of Justice

Responding to human rights judgments

Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021

December 2021

CP 562

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

December 2021

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Introduction

This is the latest report to the Joint Committee on Human Rights setting out the Government's position on the implementation of adverse human rights judgments from the European Court of Human Rights (ECtHR) and the domestic courts.[1]

This report covers the period from August 2020 to July 2021 (but also notes some developments since then that took place before the date of publication). Following the approach in previous reports, it is divided into three sections:

- a general introduction, including **wider developments in human rights**;
- recent **ECtHR judgments** involving the UK and progress on the implementation of ECtHR judgments; and
- **declarations of incompatibility** in domestic cases and the Government's response.

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

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

General comments

This paper focuses on two types of human rights judgment:

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

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

European Court of Human Rights judgments

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

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

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

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

Past judgments can be found on the HUDOC database.[2] New judgments are announced a few days in advance on the ECtHR's website.[3]

[2] http://hudoc.echr.coe.int

[3] http://www.echr.coe.int/Pages/home.aspx?p=home

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

Declarations of incompatibility

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

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

There is no official database of declarations of incompatibility, but a summary of all declarations is provided in Annex A to this report.

Coordination of implementation

Lead responsibility for implementation of an adverse judgment rests with the relevant government department for each case, while the Ministry of Justice provides light-touch coordination of the process.

Following an adverse ECtHR judgment against the UK, the Ministry of Justice liaises with the lead department to provide oversight of and advice on the implementation process and to assist with the drafting of Action Plans and updates which are required by the Committee of Ministers in its role of supervising the execution of judgments. The Ministry

4 http://www.coe.int/en/web/execution

5 http://hudoc.exec.coe.int

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

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

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

9 Section 4(6) of the HRA.

of Justice passes this information to the UK Delegation to the Council of Europe, which represents the UK at the Committee of Ministers' meetings.

It is not feasible for any one department to identify all the ECtHR judgments against other member States that may be relevant to the UK, so all departments are expected to identify judgments relevant to their area of work and disseminate them to bodies for which they are responsible as appropriate. The roles of the Foreign, Commonwealth and Development Office and the Ministry of Justice supplement and support this work.

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

Wider developments in human rights

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

The Government will continue to protect and respect human rights and liberties both domestically, and through our international obligations. We will maintain our leading role in the promotion and protection of human rights, democracy, and the rule of law.

The Government is also committed to furthering the UK's status as a global, outward-looking nation, playing an active, leading role in the world. We will continue to support an international order in which rules govern state conduct, and to champion the universal values of freedom, democracy, tolerance and the rule of law. We will continue to call on other countries to comply with their international human rights obligations, and to take action to tackle human rights violations globally.

European Convention on Human Rights

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

We welcomed the coming into force of Protocol No. 15 to the ECHR on 1 August 2021 following its ratification by all 47 States Parties. This concludes the last major reform from the Brighton Declaration, adopted under the UK's chairmanship of the Council of Europe's Committee of Ministers.

Protocol No. 15 recognises that the primary responsibility for protecting human rights under the ECHR falls to each individual State Party. It will improve the efficiency of the ECtHR by shortening the time limit for applications and ensuring that all applications have been properly considered by domestic courts. Additionally, it will modify rules regarding the appointment and retirement of judges of the Court, to enable them to serve for a full nine-year term and provide continuity.

Independent Human Rights Act Review

The Government launched the Independent Human Rights Act Review (IHRAR) in December 2020. The review examined the framework of the HRA, how it is operating in practice and whether any change is required.

Specifically, the review looked at two key themes, which are outlined in the Terms of Reference as follows:

- the relationship between domestic courts and the ECtHR;
- the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

The evidence-gathering phase of the review included a public Call for Evidence which received over 150 submissions. Evidence was also gathered via a series of Roundtables with interested parties, and public Roadshows hosted by universities across the UK. The Panel also considered the JCHR's IHRAR report alongside the other evidence gathered.

The Panel has submitted their final report to Government. The report will be published in due course, as will the Government's response.

Reporting to United Nations (UN) Human Rights Monitoring Bodies

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

The Government also remains fully committed to the Universal Periodic Review process,[10] a unique mechanism for sharing best practice on human rights, and for promoting the continuous improvement of human rights on the ground.

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

[10] Details can be found at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

The UK at the ECtHR: statistics

The ECtHR publishes statistical reports for each calendar year. The following tables bring together data from these reports on the applications made against the UK at the ECtHR from its initial establishment in 1959 until the end of 2020, focusing on the last ten years.[11]

Applications

Applications have been on a general downward trend over the last ten years. By population, the UK has the fewest applications of all States at 4.5 per million. The number for all States combined is 49.8 per million.

Table 1. Applications against the UK allocated to a judicial formation[12]

1959–2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total
17,964	1,542	1,702	908	720	575	372	415	354	344	301	**25,197**

Due to the time lag between an application being allocated for initial consideration and a decision being made on its admissibility, the number of applications declared inadmissible cannot be directly compared to newly allocated applications on a year-by-year basis. However, it is noteworthy that the number declared inadmissible over the last six years is close to the number allocated.

Table 2. Applications against the UK declared inadmissible or struck out[13]

1959–2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total
14,029	1,028	2,047	1,633	1,970	533	360	507	358	347	280	**23,092**

11 http://echr.coe.int/Pages/home.aspx?p=reports

12 Source: Analysis of statistics 2020, pages 12 and 61, and previous reports. This is the first stage of consideration by the Court. Single judges can declare applications inadmissible or strike them out where this decision can be taken without further examination. By unanimity, Committees take similar decisions to single judges but can also declare an application admissible and give a judgment if the underlying question is already well-established in the case-law of the Court. Where neither a single judge nor a Committee has taken a decision or made a judgment, Chambers may decide on admissibility and merits.

13 Source: Analysis of statistics 2020, page 61, and previous reports. A few applications each year are struck out on the basis of a friendly settlement or unilateral declaration.

Judgments

The numbers of judgments and adverse judgments remain low.

Table 3. Judgments in UK cases (judgments finding violation)[14]

1959–2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total
443	19	24	13	14	13	14	5	2	5	4	**556**
(271)	(8)	(10)	(8)	(4)	(4)	(7)	(2)	(1)	(5)	(2)	**(322)**

Caseload

Having fallen in recent years, the number of ongoing applications against the UK under consideration by the ECtHR remains low both in absolute terms and as a proportion of all States' applications. For comparison, the UK population comprises 8.0% of the population of all States.[15]

Table 4. Ongoing caseload of the ECtHR at year end[16]

Year	2013	2014	2015	2016	2017	2018	2019	2020
UK	2,519	1,243	256	231	130	124	111	124
Total	99,891	69,924	64,834	79,750	56,262	56,365	59,813	62,000
Proportion	2.52%	1.78%	0.39%	0.29%	0.23%	0.22%	0.19%	0.20%

At the end of 2020, the UK was responsible for 15 (0.29%) of a total 5,233 pending cases before the Committee of Ministers (this includes both adverse judgments whose implementation is still being supervised and friendly settlements). This is lower than for other States with a similar population (see Annex B).[17]

Further statistics and the numbers of pending judgments for all States for the years 2018–2020 can be found in Annex B. This annex also lists all judgments that found a violation against the UK that were still under the supervision of the Committee of Ministers at the end of July 2021.

[14] Source: Violations by Article and by State 2020 and previous reports; Violations by Article and by State 1959–2020 and previous reports. This refers to judgments when given, not final judgments, and includes strike-out judgments following a friendly settlement. A judgment can cover more than one application.

[15] Source: Analysis of statistics 2020, page 12.

[16] Source: Analysis of statistics 2020, pages 13 and 61, and previous reports.

[17] Source: 14th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights 2020', Table C.3. See http://www.coe.int/en/web/execution/annual-reports

Recent ECtHR judgments

Five judgments in UK cases became final during the period August 2020 – July 2021. Four of these found violations of the ECHR, requiring the Government to take measures to implement them:

- *Unuane* (80343/17) – violation of Article 8
  Chamber (Fourth Section). Final judgment on 24 February 2021
- *Big Brother Watch and Others* (58170/13 etc.) – violation of Articles 8 and 10
  Grand Chamber. Final judgment on 25 May 2021
- *DS* (70988/12) – violation of Article 8
  Chamber (Fourth Section). Final judgment on 30 June 2021
- *VCL and AN* (77587/12, 74603/12) – violation of Articles 4 and 6
  Chamber (Fourth Section). Final judgment on 5 July 2021

and one did not:

- *MC* (51220/13) – no violation of Article 8 (criminal record disclosure)
  Chamber (Fourth Section). Final judgment on 30 June 2021.

A further four applications were declared inadmissible in reasoned admissibility decisions.

The adverse judgments and the Government's response are summarised below.[18]

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

1. Unuane (80343/17)

Chamber (Fourth Section) – violation of Article 8

Final judgment on 24 February 2021

The applicant complained that his deportation to Nigeria disproportionately interfered with his family and private life under Article 8. He further complained, under Article 8 taken alone and/or read together with Article 13, that domestic law had prevented the relevant decision-makers from conducting a detailed proportionality assessment.

The ECtHR found that there had been a violation of Article 8 and awarded the applicant €5,000 damages in just satisfaction. However, the ECtHR found that the domestic law provided an effective remedy for a breach of his rights under Article 8 and the complaint under Article 13 was therefore inadmissible as manifestly ill-founded.

Individual measures

On 3 February 2021 the Government informed the applicant's representatives that his Deportation Order had been revoked, that arrangements would be made to return him to the UK at the Government's expense and that he would be granted leave once back in the UK. The just satisfaction award was paid to his representatives on 15 February 2021.

On 17 February 2021 the applicant's representatives informed the Government that he had sadly passed away whilst in Nigeria. The date of death was recorded on the Death Certificate as 5 February 2021.

General Measures

The ECtHR did not consider that the Immigration Rules preclude the domestic courts and tribunals from employing the *Boultif* criteria for the purpose of assessing whether an expulsion measure was necessary and proportionate (para. 83). Rather, the ECtHR considered that, in the specific circumstances of this case, the seriousness of the particular offence(s) committed by the applicant was not of a nature or degree capable of outweighing the best interests of the children so as to justify his expulsion. It therefore considered that the applicant's deportation was disproportionate to the legitimate aim pursued and as such was not 'necessary in a democratic society' (para. 89).

The current 'Article 8 framework' sets out how the right of a foreign national offender to respect for a private and family life should be weighed against the public interest in their deportation. Paragraph A362 of the Immigration Rules[19] sets out that any Article 8 claim

[19] https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-13-deportation

considered on or after 28 July 2014, regardless of when it was made, must be considered in line with this framework.

The Article 8 framework is set out in part 13 of the Immigration Rules and, where a decision attracts a statutory appeal, the Tribunal (Immigration and Asylum Chamber) is required to take into account the provisions in part 5A of the Nationality, Immigration and Asylum Act 2002. Appeals that are before the First-tier Tribunal may be appealed on a point of law to the Upper Tribunal and thereafter, with permission, to the Court of Appeal and the Supreme Court. An appeal on a point of law to the higher courts may be brought on the ground that the First-tier Tribunal made a non-compliant finding or conducted a non-compliant assessment. The Secretary of State is bound to consider Convention representations, including those made shortly before the individual is due to be removed.

In the recent Supreme Court decision of *Sanambar*, an Article 8 deportation case (*Sanambar v Secretary of State for the Home Department* [2021] UKSC 30), the Court, in its judgment, affirmed at paragraph 49 that:

> ‘It is clear that a delicate and holistic assessment of all the criteria flowing from the Convention’s case law is required in order to justify the expulsion of a settled migrant like the appellant who has lived almost all of his life in the host country.’

The Court followed on at paragraph 50 to note the approach to the supervisory role of the ECtHR as restated in *Unuane*. The case of *Sanambar* will, of course, be referred to and where appropriate followed by the lower courts, including the Tribunal.

The Government notes the findings in *Unuane* and that the ECtHR agreed with the UK’s position that the domestic legislative framework for the consideration of Article 8 factors in deportation cases facilitates decisions that are compliant with Article 8 of the Convention. The Home Office has already circulated the *Unuane* judgment to its senior deportation casework staff who approve and finalise deportation decisions and will ensure that the judgment is cascaded to its first line deportation caseworkers (those who give initial consideration to a case and provide draft decisions for senior caseworker approval) and to Presenting Officers, who present cases to the Tribunal on behalf of the Secretary of State.

The Government considers that all necessary measures have been taken to implement the judgment. An Action Report was submitted to the Committee of Ministers on 7 April 2021 requesting that it closes its supervision of the case. Further information on the domestic framework was submitted on 17 August 2021. On 13 October 2021, the Committee of Ministers was satisfied that all necessary measures had been taken and decided to close its supervision of the judgment.

2. Big Brother Watch and Others (58170/13, 62322/14, 24960/15)

Grand Chamber – violation of Articles 8 and 10

Final judgment on 25 May 2021

This litigation was made up of three linked cases launched in response to the Snowden leaks in 2013. The cases were referred to the Grand Chamber following the Chamber judgment delivered on 13 September 2018, summarised in the 2018–2019 report.[20]

These cases each challenged elements of the UK's investigatory powers regime under the previous legal framework, the Regulation of Investigatory Powers Act 2000 (RIPA), in respect of their lawfulness under Articles 8 and 10. Specifically, the cases focused on bulk interception, international intelligence sharing, and targeted acquisition of communications data. The cases were brought by the privacy campaign group, Big Brother Watch and other similar organisations.

The judgment was broadly in line with the previous Chamber ruling, concluding that bulk interception is not in itself a violation of the ECHR and that the international intelligence sharing regime does not, in any respect, violate the ECHR. The Grand Chamber accepted that bulk interception is a critical tool for the identification of new threats in the digital domain. However, the Grand Chamber did find violations of Articles 8 and 10 in relation to specific aspects of both the bulk interception and targeted communications data acquisition regimes in RIPA.

RIPA has now been largely replaced by the Investigatory Powers Act 2016 (IPA), which included enhanced safeguards. The IPA introduced a 'double lock' which requires warrants for the use of these powers to be authorised by a Secretary of State and approved by a judge. The Investigatory Powers Commissioner also ensures robust independent oversight of how these powers are used. Most of the deficiencies are dealt with by the IPA. The Data Retention and Acquisition Regulations 2018 also enhanced the safeguards for the IPA's Communications Data regime by introducing a serious crime threshold and independent authorisation of communications data requests.

In consultation with the Investigatory Powers Commissioner, the Government has been working to address the remaining few violations relating to aspects of the bulk interception regime that are not deemed to be addressed by the IPA. These relate to additional details that should be included in warrant applications, additional protections for confidential journalistic material and prior internal authorisation for the use of certain methods used to select bulk intercept material for examination. An action plan was submitted to the Committee of Ministers on 25 November 2021.

[20] https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2018-to-2019

3. DS (70988/12)

Chamber (Fourth Section) – violation of Article 8

Final judgment on 30 June 2021

This case concerned the past disclosure of the applicant's criminal record information and the amended disclosure regime which had entered into force after the ECtHR judgment in *MM v UK* (24029/07). The applicant complained that the provisions of the Police Act 1997 regulating disclosure of criminal record information violated her right to respect for private life as protected by Article 8. As a result, her conditional discharge had been unlawfully disclosed. She further alleged that the post-29 May 2013 disclosure regime remained incompatible with Article 8 on account of the eleven-year period which must elapse before a conviction no longer needs to be disclosed and because she does not know what information would be disclosed about her in an enhanced criminal record certificate (ECRC).

In May 1990, the applicant was given a six-month conditional discharge in respect of a criminal offence relating to property damage. At the time, she was advised by a police officer that the conditional discharge would be deleted from her criminal record after six months. In January 2010, the applicant was asked by her employer to apply for an ECRC. Pursuant to the legislation then in force, all previous convictions were subject to mandatory disclosure in criminal record certificates. In July 2010, the conditional discharge appeared on the ECRC provided.

In July 2012, she wrote to the Metropolitan Police requesting the destruction of her fingerprints, DNA and the supporting entry on the Police National Computer but this request was refused. The applicant subsequently secured new employment. The conditional discharge was again disclosed in an ECRC issued on 22 August 2012. The applicant did not suggest that the disclosure had any impact on her employment.

In May 2013, the law was changed to enable old and minor convictions, cautions, reprimands and warnings to be filtered so that they do not automatically appear on a criminal record certificate. The arrangements are set out in the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 (SI 2013/1200). Under the amended provisions, a conviction imposed on an adult will not be disclosed on an ECRC if the following conditions apply:

1. eleven years have elapsed since the date of conviction;
2. it is the person's only offence;
3. it did not result in a custodial sentence; and
4. it was not for a specified offence (mainly offences of violence, sexual offences and other offences relevant to safeguarding children and vulnerable persons).

As a consequence of the amendments, the applicant's conditional discharge was no longer subject to mandatory disclosure and did not appear on an ECRC issued in June 2015.

In the UK's written observations to the ECtHR, the Government accepted that the disclosure of the applicant's conditional discharge in August 2012 was pursuant to a regime that was not 'in accordance with the law' and was therefore in violation of Article 8. Having regard to its findings in *MM v UK* in respect of the relevant domestic law applicable at the time of the disclosure of the applicant's criminal record information, the ECtHR found that the provisions regulating disclosure of the applicant's data during this period were not in accordance with the law. There had therefore been a violation of Article 8 in this respect, but there was no evidence that the risk of disclosure, or disclosure itself, of the conditional discharge caused the applicant any real loss of opportunity, either in terms of her career in the social care sector or as regards volunteer positions for which she claimed she would otherwise have applied. Although she likely suffered some degree of distress as a result of the pre-29 May 2013 provisions, the ECtHR noted that the legislative changes implemented in 2013 meant that the conditional discharge was no longer subject to mandatory disclosure on an ECRC. It therefore concluded that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The ECtHR limited the award in respect of costs and expenses to the sum of €1,000 for the proceedings before the ECtHR.

With respect to the post-2013 disclosure regime the ECtHR found the claim to be inadmissible. DS complained of a lack of foreseeability under the post-2013 regime in relation to disclosure of soft intelligence on the basis that the applicant cannot know what soft intelligence will be disclosed on an ECRC before applying for it. No soft intelligence was disclosed for DS on an enhanced certificate issued to her in June 2015. Any future enhanced certificate would be provided to the applicant only, which would enable DS to apply to the independent monitor to challenge the inclusion of any soft intelligence before disclosing the certificate to an employer. In these circumstances, the ECtHR found that there was no evidence to suggest that the current disclosure regime failed to protect the applicant's Article 8 rights in this respect.

The just satisfaction award in the *DS* case is restricted to the circumstances of the case with no implications for the wider regime. As noted, the violation of Article 8 which the ECtHR found in this case was remedied by amendments made to the scheme of criminal records legislation in May 2013. No further changes to the legislation are considered necessary in light of this judgment.

4. VCL and AN (77587/12, 74603/12)

Chamber (Fourth Section) – violation of Articles 4 and 6

Final judgment on 5 July 2021

These joined cases concern two Vietnamese youths who were discovered working on cannabis farms in 2009 and were subsequently convicted of drug cultivation offences, to which they pleaded guilty.

The applicants challenged the Court of Appeal's decisions to dismiss their appeals against prosecution, which had been made on the basis that the Competent Authority had made a 'Conclusive Grounds Decision' in each case that it was more likely than not that the applicants were victims of human trafficking, and therefore that they should not have been prosecuted for offences that had a nexus with their trafficking; and that if they were prosecuted, the proceedings should have been stayed by order of the judge.

The ECtHR found in each case a violation of Article 4 (prohibition of slavery and forced labour) on account of: failure to take sufficient operational measures to protect minors prosecuted despite credible suspicion they were trafficking victims; failure to make sufficient initial and prompt assessment of trafficking status; and not having adequate reasons to continue prosecution despite a positive competent authority decision.

The ECtHR also found in each case a violation of Article 6 (right to a fair trial) on account of: failure to investigate potential trafficking affecting overall fairness of proceedings; evidence constituting a fundamental aspect of their defence not being secured; no waiver of guilty pleas that were not made with full awareness of the facts; and the defect not being remedied by subsequent reviews by domestic authorities relying on inadequate reasons.

The two cases pre-date relevant domestic legislation. The Modern Slavery Act 2015 includes (at section 45) a statutory defence against prosecution where an individual is compelled to commit a crime as a result of their exploitation, except in cases of specified serious offences set out in Schedule 4 to the Act. This is available in appropriate cases in addition to the general principle of the common law defence of duress where a person has been threatened, when considering whether to prosecute.

The Government is working closely with operational partners to consider the steps that will be required to implement the judgment.

Judgments already under supervision before August 2020

The reporting year began with 13 judgments under the supervision of the Committee of Ministers.

On 9 March 2021, the Committee of Ministers decided to close its supervision of three of the judgments in the *McKerr* group, considering that the question of individual measures was resolved, and recalling that the question of general measures continues to be examined within the other judgments in the group:

- *Jordan* (24746/94), final judgment on 4 August 2001
- *McShane* (43290/98), final judgment on 28 August 2002
- *Collette and Michael Hemsworth* (58559/09), final judgment on 16 October 2013.

On 14 April 2021, having considered the Action Report submitted by the Government, the Committee of Ministers was satisfied that all necessary measures had been taken and decided to close its supervision of the following judgment:

- *Hammerton* (6287/10), final judgment on 12 September 2016.

Details of this judgment can be found in last year's report.[21]

The following judgments remain open:

- *McKerr group* of five judgments (28883/95 etc.), first final judgments on 4 August 2001
- *S and Marper* (30562/04 and 30566/04), final judgment on 4 December 2008
- *Catt* (43514/15), final judgment on 24 April 2019
- *JD and A* (32949/17 and 34614/17), final judgment on 24 February 2020
- *Gaughran* (45245/15), final judgment on 13 June 2020.

Details of the measures being taken to implement these judgments are set out below.

[21] https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020

1. McKerr group (28883/95 etc.)

Chamber judgments – violation of Article 2

First final judgments on 4 August 2001

These cases concern investigations into the deaths of the applicants' next-of-kin in Northern Ireland in the 1980s and 1990s, either during security force operations or in circumstances giving rise to suspicion of collusion with those forces. The ECtHR was concerned with the obligations under Article 2 that require that there be an effective official investigation when individuals have been killed as a result of the use of force.

In the *McKerr* group of cases, the problems identified by the ECtHR as impacting on the effectiveness of the investigations related to issues identified with the police investigations which included, notably, a lack of independence of police officers investigating the incidents, defects in the police investigations and a lack of public scrutiny and information to the victims' families. Furthermore, the ECtHR identified a number of shortcomings in the inquest proceedings including the failure to comply with the requirement of promptness and expedition and the absence of legal aid for the victims' families. The *McShane* case also concerned a failure by the State to comply with its obligations under Article 34.

In *McCaughey and Others* and *Hemsworth* the ECtHR found that there had been excessive delay in the inquest proceedings which had concluded in 2012 and 2011 respectively (procedural violations of Article 2), caused variously by periods of inactivity; the quality and timeliness of the disclosure of material; and legal procedures necessary to clarify coronial law and practice. Under Article 46, the ECtHR indicated that the authorities had to take, as a matter of priority, all necessary and appropriate measures to ensure, in similar cases of killings by the security forces in Northern Ireland where inquests were pending, that the procedural requirements of Article 2 would be complied with expeditiously.

Steps taken by the UK Government and previous decisions of the Committee

General measures

Following the judgments in these cases, general measures to respond to the issues raised by the ECtHR were placed under ten measures. These measures are summarised as follows:

- Lack of independence of the investigating police officers from security forces or police officers implicated in the incidents
- Lack of public scrutiny of and information to the victims' families concerning the reasons for decisions not to prosecute
- Defects in the police investigations

- The inquest procedure did not allow for any verdict or findings which could play an effective role in securing prosecution in respect of any criminal offence which might have been disclosed.
- The soldiers or police officers who shot the deceased could not be required to attend the inquest as witnesses.
- Absence of legal aid for the representation of the victim's family
- 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.
- The scope of the inquest procedure excluded the concerns of collusion by security force personnel in the killing.
- The public interest immunity certificate in *McKerr* had the effect of preventing the inquest examining matters which were relevant to the outstanding issues in the case.
- The inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

Supervision of nine of these measures was closed by the Committee of Ministers in a series of decisions and interim resolutions between 2005 and 2009 which are not repeated in detail here. The outstanding issue concerns the lack of independence of the investigating police officers from the security forces or police officers implicated in the incidents.

As set out in the previous update, the UK Government has taken a number of steps to address the lack of independence in those cases.

UK Government Command Paper

As noted in last year's update, the UK Government has reiterated its commitment to reforming the current approach to addressing the legacy of Northern Ireland's past.

The UK Government has committed to introducing legislation in this parliamentary session that will address the issues of the past in Northern Ireland.

At a meeting of the British-Irish Intergovernmental Conference (BIIGC) on 24 June 2021 the UK and Irish Governments agreed there was a need for a 'process of intensive engagement' with the Northern Ireland parties and others on legacy issues. This would build on previous discussions, take account of the views of all participants and include new proposals which the UK Government intended to bring forward.

To inform this engagement the UK Government published a Command Paper on 14 July 2021 which sets out the UK Government's proposals to address the legacy of the Troubles. In the statement which accompanied the paper, the UK Government was clear that the objective of the paper was to deal with legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights

obligations, and responds to the needs of individual victims and survivors, as well as society as a whole.

The proposals set out in the Command Paper follow on from the principles set out in the Stormont House Agreement, while attempting to address the implementation problems within that agreement. The UK Government is clear that any system for dealing with the legacy of the past must be fair, proportionate, focused on reconciliation and deliver for all those affected by the Troubles. The Command Paper therefore sets out a number of proposals which are designed to help support reconciliation and provide families with the information which they seek.

Ongoing litigation relating to the Troubles often fails to deliver for victims and their families. The higher bar of proof in a criminal case means that few cases reach a prosecution and even fewer result in a successful conviction. We think the best way to help Northern Ireland move towards reconciliation is through information recovery rather than an adversarial court process. The proposed establishment of a new independent body to focus on the recovery and provision of information about Troubles-related deaths and most serious injuries would help families to find out the truth of what happened to their loved ones. The body would be independent of Government. Importantly, this process would be guided by families and victims, allowing them to participate but respecting the wishes of those who do not want more information. It is envisaged that the body would have full powers to seek access to information and find out what happened to enable it to deliver. This would be a more efficient and focused method than judicial processes and would not require families to go through an adversarial court system to get the answers they seek.

It is proposed that a statute of limitations will apply equally to all Troubles-related incidents. This is a challenging step but one which would allow resources to be focused on delivering information rather than putting families through a trial which is unlikely to end in a successful conviction. The recent decision by the Public Prosecution Service in Northern Ireland to end the prosecution of two former soldiers highlights how challenging it is to successfully prosecute so long after the event.

There are many conflicting and overlapping narratives surrounding events during the Troubles. The UK Government has recognised the importance of oral history and memorialisation in supporting the transformation of a number of post-conflict societies. In line with provisions outlined in the earlier Stormont House Agreement we propose that an oral history initiative would create opportunities for voices to be shared and heard. This would allow people from a variety of backgrounds to share their experience of the Troubles, highlighting voices that have not been heard before and allowing an opportunity for people to learn about others and their experiences. In order to make this process meaningful it is acknowledged that this must be handled in a manner that is sensitive and balanced.

The engagement process which underpins the Command Paper involves not just the UK and Irish Governments and the Northern Ireland parties, but also those directly affected by the Troubles.

Dealing with the legacy of the past in Northern Ireland is complex and challenging. Annex B of the Command Paper sets out the previous attempts which have been made since 1998. The UK Government believes that now is the time for a bold step forward to address these issues and end the cycle, to promote reconciliation and deliver strong and stable relationships between communities ultimately building a better Northern Ireland for all.

Individual measures

Recent developments regarding the individual cases and measures are set out below. On 9 March 2021, the Committee of Ministers decided to close its supervision of three of the judgments in the *McKerr* group, with the Committee considering that the question of individual measures was resolved, and recalling that the question of general measures continues to be examined within the other judgments in the group.

The cases which were closed are:

- *Jordan* (24746/94), final judgment on 4 August 2001
- *McShane* (43290/98), final judgment on 28 August 2002
- *Collette and Michael Hemsworth* (58559/09), final judgment on 16 October 2013.

Legacy inquest reform

On 28 February 2019, the Northern Ireland Department of Justice announced funding for an initiative to support a significant expansion of capacity to clear outstanding legacy inquests, as proposed by the Lord Chief Justice of Northern Ireland in 2016. These proposals were developed in consultation with the international human rights community, including the Council of Europe Commissioner for Human Rights and the United Nations' Special Rapporteur, about the principles that should underpin an Article 2 compliant model for dealing with legacy cases.

The intention was to conclude the current caseload within a five-year period following an initial set-up phase lasting for one year (2019–20). The Legacy Inquest Project is proceeding and is currently in the first year of hearing cases.

As of May 2021, of the 46 cases within the Legacy Inquest Project, six have been completed. A further three inquests have been completed and findings are awaited, and one further inquest is at hearing.

In June 2021, the Presiding Coroner, Mr Justice McFarland, issued a statement following a review of legacy-related inquests. Mr Justice McFarland noted that Covid-19 had caused significant delay and changes in the way that inquests have been progressed. The Courts

in Northern Ireland closed for a period at the height of the pandemic and this has obviously affected the progression of cases. Moreover, the limitations on working arrangements and social distancing for organisations providing information to the Coroner's service means that in some instances the disclosure process has been challenging, as staff are unable to be in the same room to work through items.

As a result of the challenging working environment created by the Covid-19 pandemic, a number of the inquests which were set down for hearing this year (Year One) were delayed and work on them is continuing. Mr Justice McFarland has identified eight further cases which will be suitable for hearing in Year Two of the plan.

Finucane

On 27 February 2019, the UK Supreme Court gave its judgment in the matter of an application by Mrs Geraldine Finucane for Judicial Review (Northern Ireland).

In its submission of 21 June 2019 to the Committee of Ministers, the UK Government summarised the *Finucane* case and the Supreme Court judgment. In respect of the issues regarding Article 2 and the application of the HRA, the Supreme Court found as follows:

> 'there has not been an article 2 compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of [the previous reviews and inquiries] to meet the procedural requirement of article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.' (para. 153)

On 30 November 2020, the Secretary of State for Northern Ireland set out in a statement to Parliament the next steps in this matter. The Secretary of State indicated that he was not minded to establish a public inquiry into the murder of Mr Finucane at this time and went on to confirm that he would continue to keep open the option of a public inquiry in future – including pending the outcome of relevant review processes by the Police Service of Northern Ireland and the Police Ombudsman. The UK Government also published further details – not previously in the public domain – relating to the conduct of previous investigations into the *Finucane* case.[22]

The Committee adopted a fourth interim resolution against the UK at its December 2020 meeting and have reopened their consideration of the individual measures in the case of *Finucane*.

The *McKerr* group remains under the supervision of the Committee of Ministers.

[22] https://www.gov.uk/government/news/uk-government-response-to-judgment-of-the-supreme-court-of-the-united-kingdom-in-the-matter-of-an-application-by-geraldine-finucane-for-judicial-revie

2. S and Marper (30562/04 and 30566/04)

Grand Chamber – violation of Article 8

Final judgment on 4 December 2008

The applicants, both of whom had been arrested for but not convicted of criminal offences, sought to have their DNA samples, profiles and fingerprints removed from police records. The refusal of the police to delete this information was upheld by all domestic courts up to the House of Lords. However, on 4 December 2008 the Grand Chamber ruled the blanket policy of retaining this information from all those arrested or charged but not convicted of an offence was disproportionate and therefore unjustifiable under Article 8.

The Government brought forward legislative proposals to address the issue in England and Wales, and across the UK in respect of material collected under counter-terrorism powers, in the Protection of Freedoms Act 2012 (PoFA) which received Royal Assent on 1 May 2012. The legislation adopted the protections of the Scottish model for the retention of DNA and fingerprints.

The Government has confirmed that in England and Wales, DNA profiles and fingerprints which can no longer be retained under the provisions of PoFA have been removed from the national databases. This was completed by 31 October 2013, the date on which PoFA was brought into force.

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

The DoJ has consulted on a series of proposed changes to the retention framework originally set out in CJA, which it hopes to legislate for by the end of 2023. The draft legislation will repeal CJA and replace it with a new biometric framework that will comply with the *S and Marper* and *Gaughran* judgments.

As the provisions of both PoFA and the new biometric retention framework will require the destruction of a large volume of existing DNA and fingerprints, there is a risk that future investigations into Troubles-related deaths in Northern Ireland would be undermined should such material be destroyed.

The UK Government proposed to mitigate this risk by introducing statutory provision to allow for the retention of a copy of material solely for the purposes of such investigations. It is the intention of the UK Government that the retention of this data will be strictly time-

limited for the period any such investigations are taking place. The UK Government's current aim is to include provisions to this effect in forthcoming legacy legislation which it hopes to introduce by the end of autumn.

The UK Government has made provision through a transitional order to enable authorities in Northern Ireland to retain biometric data collected under counter-terrorism powers in Northern Ireland before 31 October 2013 on a temporary basis, pending the proposed statutory provision. The UK Government has taken steps to renew this transitional order so that such material can continue to be held until October 2022 and primary legislation is put in place.

Once such statutory provision has been made, the DoJ will work to bring the collective provisions of the new biometric retention framework into force. The Police Service of Northern Ireland will enter into a retention regime that meets the requirements of the *S and Marper* and *Gaughran* rulings. As such, the legislation to allow the taking and use of biometric data for legacy purposes will need to be sequenced with the commencement of the new biometric retention framework.

3. Catt (43514/15)

Chamber (First Section) – violation of Article 8

Final judgment on 24 April 2019

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

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

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

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

The ECtHR considered that the continued retention of data in the applicant's case had been disproportionate because it revealed political opinions requiring enhanced protection, it had been accepted he did not pose a threat (taking account of his age) and there had been a lack of procedural safeguards, the only safeguard provided by the Management of Police Information Code of Practice being that data would be held for a minimum of six years and then reviewed. The ECtHR did not consider that this was applied in a meaningful way as the decision to retain did not take account of the heightened level of protection it attracted as data revealing a political opinion. The ECtHR rejected the argument that it would be too burdensome to review and delete all entries on the database relating to the applicant; also, if this were accepted as a valid reason for non-compliance, that would create a route to allow violations of Article 8.

The police unit (National Domestic Extremism and Disorder Intelligence Unit) which held the standalone database containing the applicant's six data entries which were the subject of the judgment, has ceased to exist. The information held by this unit was transferred to the National Counter Terrorism Policing Operations Centre within the Metropolitan Police Service (MPS). A new national database (the National Common Intelligence Application (NCIA)) supports the work of this Centre. Other police forces migrated their respective standalone databases to the NCIA. Searches were then conducted by the Compliance & Protective Monitoring Unit across the migrated databases for any references to the applicant. Any remaining references to the applicant that were identified were deleted by 4 October 2019.

The NCIA is administered centrally by the National Counter Terrorism Police Headquarters within the MPS. As this data is now on one database and is under the control of one police force, this ensures a consistent approach to the review, retention and disposal of this information. A team of assessors determine whether a record is relevant and necessary and whether it is proportionate for the record to be added to the database, and their decisions are recorded. The NCIA database schedules a review for all records at either 6, 7 or 10 years depending on the category of the data. A user may also trigger a record for review at another date in time if considered necessary.

The police have set up a national level 'Records Management Working Group' led by the Metropolitan Police Service, the College of Policing and the National Police Chiefs Council (NPCC) and including a member from the Information Commissioner's Office, whose role is to uphold information rights in the public interest.

The Records Management Working Group is working on producing a revised Management of Police Information Code of Practice. This is a statutory Code which sets out procedures to be applied in respect of the collection and retention of information and to which the police must have regard when obtaining, managing and using information to carry out their duties. The College of Policing has concluded a public consultation and hopes to publish the updated Code later this year. In the meantime, in November 2020, the College published an updated Authorised Professional Practice (part of wider guidance for police forces) in relation to the management of police information: retention, review and disposal. The College has released a new version of the National Retention Schedule, providing a definitive list of the retention periods for all police information.

4. JD and A (32949/17, 34614/17)

Chamber (First Section) – violation of Article 14 with Article 1 of Protocol 1

Final judgment on 24 February 2020

The applications of JD and A were joined by the Court. No violation was found in respect of JD.

A lives in a three-bedroom house in the social rented sector with her son. Her son was conceived as a result of a violent sexual assault by a man known as X. In 2012, ten years after the assault, X contacted A and she was referred by the police to a 'Sanctuary Scheme'. The scheme adapted the applicant's home to include a 'panic room' where she and her son can retreat in the event of an attempted attack by X.

A receives Housing Benefit to cover the rent for her home. Following the introduction of Regulation B13 of Housing Benefit Regulations 2006 (SI 2006/2013) in 2012, the applicant's Housing Benefit was reduced by 14%, because she is considered to be under-occupying her home. Since the reduction, the applicant's Housing Benefit no longer meets the cost of her rent.

In making its decision the ECtHR determined that there would have to be very weighty reasons to justify sex discrimination under Article 14. This is contrary to the decision of the UK Supreme Court on this issue which has previously decided that the correct justification test in an Article 14 discrimination case in relation to measures of economic or social strategy is 'manifestly without reasonable foundation'.

The ECtHR found that in respect of A there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 because the aim of Regulation B13 (the removal of the spare room subsidy) was to encourage people to move and this conflicted with the aim of the Sanctuary Scheme to allow victims of gender-based violence to remain in their homes. The Government did not provide any weighty reasons to justify the prioritisation of the aim of the removal of the spare room subsidy scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely and therefore the measure was not justified.

The ECtHR awarded €10,000 in respect of non-pecuniary damages to A, which has been paid.

The Government has now amended legislation to introduce a sanctuary scheme exemption from the removal of the spare room subsidy. The exemption applies to qualifying claimants of either Housing Benefit or the housing element of Universal Credit, which is replacing Housing Benefit.

A claimant will qualify for the exemption if their home has been adapted under a sanctuary scheme as a result of them (or a member of their household) being a victim of domestic violence or abuse, provided that the perpetrator is not resident.

This exemption removes the conflict between the aims of sanctuary schemes and the removal of the spare room subsidy found by the Court.

The exemption was implemented via the Domestic Abuse Support (Relevant Accommodation and Housing Benefit and Universal Credit Sanctuary Schemes) (Amendment) Regulations 2021 (SI 2021/991) which were laid on 9 September 2021 and came into force on 1 October 2021.

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

5. Gaughran (45245/15)

Chamber (First Section) – violation of Article 8

Final judgment on 13 June 2020

Mr Gaughran pleaded guilty in November 2008 to the offence of driving with excess alcohol at Newry Magistrates Court. He was thus a convicted person. His DNA profile, fingerprints and photograph ('biometrics') were taken. The regime in Northern Ireland relating to police powers allows these biometrics to be retained indefinitely. Mr Gaughran argued that the Police Service of Northern Ireland's (PSNI) indefinite retention of his biometrics contravened his Article 8 rights. In 2015 the Supreme Court rejected his argument. He subsequently applied to the ECtHR, which heard the case in 2018.

The ECtHR unanimously found that the scheme allowing for the indefinite retention of the biometrics DNA profile, fingerprints and photograph of a person convicted of an offence was disproportionate and in violation of Article 8. In reaching this conclusion the ECtHR pointed to the lack of reference within the scheme to the seriousness of the offence or sufficient safeguards, including the absence of any real possibility of review of the retention.

The retention regime for DNA and fingerprints in England and Wales is very similar to that in Northern Ireland; the rules are set out in Part V of the Police and Criminal Evidence Act 1984 as amended by the Protections of Freedoms Act 2012. The regime allows (subject to limited exceptions) DNA and fingerprints of convicted persons to be retained indefinitely.

However, the Data Protection Act 2018 (DPA), which came into force in May 2018, requires periodic reviews of the retention of personal data, including biometrics, for law enforcement purposes (DPA 2018, Part 3, Chapter 2, Section 39). The DPA also provides for oversight by the Information Commissioner. The DPA applies to all parts of the UK. The *Gaughran* case was brought before the Courts prior to the DPA coming into force, so the DPA was not factored into the judgment.

Therefore, our view is that no change to legislation is required to implement the judgment, as although indefinite retention of biometrics without the possibility of review violated Article 8, that has now been addressed UK-wide by the Data Protection Act 2018. Notwithstanding this, the Northern Ireland authorities are considering whether to amend provisions within the Police and Criminal Evidence Act (Northern Ireland) Order 1989. This would be via legislation that could be introduced no earlier than summer 2022.

UK public authorities (which includes law enforcement agencies) must ensure that their practices on data retention are consistent with data protection obligations and the ECHR. The Home Office will continue to work with the police to promote consistent compliance with the DPA and enable more efficient review of the retention of biometric data.

Recent declarations of incompatibility

The domestic courts made one declaration of incompatibility under section 4 of the HRA during the period August 2020 – July 2021. This is the 44th declaration made since the HRA came into force on 2 October 2000.

44. In the matter of an application by 'JR111' for judicial review (ruling on remedy)
Queen's Bench Division (NI); substantive judgment [2021] NIQB 48 on 13 May 2021; ruling on remedy 21 May 2021.

The case was brought in the High Court of Northern Ireland and concerns the Gender Recognition Act 2004 (the GRA). The GRA provides that an applicant for a Gender Recognition Certificate (GRC) must provide certain evidence before a GRC can be granted, including a medical report confirming that they have a diagnosis of gender dysphoria. Gender dysphoria is defined at section 25 of the GRA as '... the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism'. Since the Act was passed in 2004, how gender dysphoria is described has changed, and it is no longer regarded or classified as a mental disorder.

The applicant claimed that it was a breach of her human rights to require her to produce such a report in order to obtain a GRC, and that requiring a diagnosis of gender dysphoria, described as a disorder, was stigmatising and a breach of her Article 8 and Article 14 rights. The Court held that the requirement for a medical diagnosis and medical report could be viewed as part of the proper checks and balances which the State was entitled to adopt, and was Convention compliant. However, the requirement that the diagnosis was one which was specifically and expressly defined as a 'disorder' was not: it was unnecessary, unjustified and 'an affront to the dignity' of those applying for a GRC.

The Court made a declaration that 'sections 2(1)(a) and 25(1) of the Gender Recognition Act 2004 are incompatible with the applicant's Convention rights under Article 8 ECHR insofar as they impose a requirement that she prove herself to be suffering or to have suffered from a *"disorder"* in order to secure a gender recognition certificate.'

The time limit for the applicant to appeal the decision which went against her was reached on 9 September. The Government is considering its response to the declaration of incompatibility.

Updates on earlier declarations of incompatibility

There is further information to report on the following declarations of incompatibility:

- 23. *Smith v Scott*
- 30. *Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya*
- 40. *K (A Child) v Secretary of State for the Home Department*
- 41. *Siobhan McLaughlin, Re Judicial Review (Northern Ireland)*
- 42. *R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*
- 43. *Jackson and Others v Secretary of State for Work and Pensions*

23. Smith v Scott
Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007

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

The Court ruled that as part of the Court of Session for the purposes of section 4 of the HRA it had the power to make a declaration of incompatibility under that section. It held that the Scottish Parliament was a legislature for the purposes of section 3 of the Representation of the People Act 1983 and, therefore, declared that section 3 was incompatible with Article 3 of Protocol 1 on the grounds that it imposed a blanket ban on convicted prisoners voting in the Scottish Parliament elections. This declaration was substantially similar to the judgment of the ECtHR in the earlier case of *Hirst v UK (no. 2)* (74025/01; 6 October 2005).

On 16 October 2013, the UK Supreme Court handed down its judgment on a further legal challenge relating to prisoner voting rights in *Chester & McGeoch.*[23] The Court applied the principles in *Hirst (no. 2)* and *Scoppola v Italy (no. 3)* regarding the blanket ban on voting, but declined to make any further declaration of incompatibility. The Supreme Court took the view that the incompatibility of the blanket ban on prisoner voting in the UK with the ECHR was already the subject of a declaration of incompatibility made by the Registration Appeal Court in *Smith v Scott* and was under review by the UK Parliament and that, in those circumstances, there was no point in making a further declaration of incompatibility.

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

The UK Government considered this declaration alongside the ECtHR's decision in *Hirst* and its pilot judgment in *Greens and MT v UK*. In 2018, the UK Government adopted a package of administrative measures in England and Wales to respond to the conclusions in *Hirst* and *Greens and MT*. This package of measures was mirrored in Northern Ireland by the Northern Ireland Department of Justice. In December 2018, the Secretariat concluded that they constituted 'an adequate response' to the *Hirst* (and subsequent) judgments, and the Committee of Ministers, having satisfied itself that all necessary measures had been adopted, decided to close its supervision of the judgments. Such measures, where introduced, ensure that the UK is fully compliant with its obligations under international law in respect of these judgments.

Following the passage of the Scotland Act 2016 and the Wales Act 2017, which devolved responsibilities for the franchise to the local and devolved governments, the Scottish and Welsh Governments are responsible for the franchise as it relates to local government elections and to the devolved legislatures in Scotland and Wales respectively.

The Scottish Elections (Franchise and Representation) Act received Royal Assent in April 2020. It has extended the right to vote in Scottish Parliament and local government elections for convicted prisoners sentenced to 12 months or less who would otherwise be resident in Scotland. The decision to enfranchise some prisoners was a domestic policy choice of the Scottish Government, and not a requirement of the Council of Europe given the agreement between the Committee of Ministers and the UK Government.

30. Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya
Court of Appeal; [2015] EWCA Civ 33; 5 February 2015

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

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

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

On 23 February 2021, the Government announced its intention to address the incompatibility by Remedial Order.[24]

40. K (A Child) v Secretary of State for the Home Department
Administrative Court; [2018] EWHC 1834 (Admin); 18 July 2018

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

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

The Court was clear that the legislation could only be interpreted to mean that the husband of the mother (where the mother was married) must be the child's father for nationality purposes. The Court accepted that the aims of that section were legitimate social policy goals: that each child should be limited to two parents for nationality purposes, and that there should be reasonable legal certainty as to who shall be treated as parents. It also accepted that it is reasonable to presume that a child born within marriage is a child of that marriage, and that to displace that presumption it is reasonable to require an application process. However, it went on to make a declaration that the definition of father under section 50(9A) of the British Nationality Act 1981 was incompatible with Article 14 (read with Article 8) in circumstances where the mother of the child was married to someone other than the biological father at the time of the child's birth. This was on the basis that whilst there was a route to registration for such children (section 3(1) of the 1981 Act), this was a discretionary provision and not an entitlement. Such children did not therefore have an adequate remedy against the discrimination which they faced.

The Nationality and Borders Bill was introduced in Parliament on 6 July 2021. Clause 6 of the Bill ('Citizenship where mother married to someone other than natural father') will give an entitlement to children in K's position to register as a British citizen. This will be achieved by removing the requirement (at section 4E of the British Nationality Act 1981) for children of unmarried fathers to have been born before 1 July 2006 in order to have an entitlement to register. The change will enable people born after that date to register as a

[24] https://questions-statements.parliament.uk/written-statements/detail/2021-02-23/hcws788

British citizen, if they would have become British had their parents been married at the time of their birth.

People in this group can already apply free of charge and be granted citizenship (under the discretionary route). The new provision will continue that.

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

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

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

On 28 July 2020, the Government announced its intention to take forward a Remedial Order to remove this incompatibility and the incompatibility identified in *Jackson* (no. 43, below). The proposal for a draft Remedial Order was laid on 15 July 2021. The draft Order would extend eligibility for WPA and the higher rate of Bereavement Support Payment (BSP) to surviving cohabitees with dependent children. It is proposed that once the Order comes into force it would be effective from 30 August 2018, the date of the *McLaughlin* judgment. There will be no minimum period of cohabitation required to make a claim, eligible claimants will only need to have lived with the deceased on the date of death.

42. R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department
Administrative Court; [2019] EWHC 452 (Admin); 1 March 2019
Court of Appeal; [2020] EWCA 542 (Civ); 21 April 2020

The case concerned the Right to Rent Scheme (the Scheme) which requires landlords and agents and homeowners to check the immigration status of tenants and other occupiers to, before entering into a tenancy agreement. These checks apply equally to everyone

seeking to rent property and there are penalties for landlords who fail to complete them and who are later found to have rented to someone without a right to be in the UK.

The challenge was brought on the basis that the Scheme allegedly causes landlords to commit nationality and/or race discrimination against those who are entitled to rent with the unintended effect that non-white British citizens are less likely to be able to find homes.

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

The Court of Appeal, overturning the decision of the High Court, determined that the Scheme is lawful and does not breach human rights law. The legislation was found to have a legitimate policy purpose, with the Court stating that it is in the public interest that a coherent immigration policy should set out the criteria on which leave to enter and remain is granted, and also discourage unlawful entry or the continued presence of those who have no right to enter or be here.

The Joint Council for the Welfare of Immigrants sought permission from the Supreme Court to appeal the ruling. On 31 May 2021 the Supreme Court refused permission to appeal because the application does not raise an arguable point of law.

43. Jackson and Others v Secretary of State for Work and Pensions

Administrative Court; [2020] EWHC 183 (Admin); 7 February 2020

Bereavement Support Payment (BSP), which was introduced in April 2017, can be paid when a person’s spouse or civil partner dies. It consists of a lump sum and 18 monthly instalments with higher amounts paid for those with children. Mr Jackson had been living with his partner for 14 years when she died in 2018; they had three children together.

The High Court declared that the primary legislation governing BSP was incompatible with Article 14 read with Article 8 in that BSP could only be paid at the higher rate in respect of parents who were spouses or civil partners of the deceased. Drawing a parallel with the *McLaughlin* case the Court took the view that the higher rate was for children and that limiting eligibility for BSP in this way is unfair discrimination against children on the grounds of their parents’ status. The Government did not appeal this case.

On 28 July 2020, the Government announced its intention to remove this incompatibility by Remedial Order. See *McLaughlin* (no. 41, above) for further details.

Annex A: All declarations of incompatibility

As there is no official database of declarations of incompatibility, this annex lists all the cases in which a declaration has been made.

Since the HRA came into force on 2 October 2000 until the end of July 2021, 44 declarations of incompatibility have been made. Of these:

- 10 have been overturned on appeal (and there is no scope for further appeal);
- 5 related to provisions that had already been amended by primary legislation at the time of the declaration;
- 8 have been addressed by Remedial Order;
- 15 have been addressed by primary or secondary legislation (other than by Remedial Order);
- 1 has been addressed by various measures;
- 3 the Government has proposed to address by Remedial Order;
- 1 the Government has proposed to address by primary legislation;
- 1 (the most recent) is under consideration as to how to address it.

The cases in each category are listed in the table below. They are numbered in chronological order of the initial making of a declaration of incompatibility (rather than any appeals). Full details of cases 1–42 can be found in the 2019 report, with updates on cases 33, 34, 38 and 39 in the 2020 report, and further updates in the body of this report.[25]

Overturned on appeal

1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions
   Administrative Court; [2001] HRLR 2; 13 December 2000

3. Wilson v First County Trust Ltd (no.2)
   Court of Appeal; [2001] EWCA Civ 633; 2 May 2001

6. Matthews v Ministry of Defence
   Queen's Bench Division; [2002] EWHC 13 (QB); 22 January 2002

10. R (on the application of Uttley) v Secretary of State for the Home Department
    Administrative Court; [2003] EWHC 950 (Admin); 8 April 2003

[25] https://www.gov.uk/government/collections/human-rights-the-governments-response-to-human-rights-judgments

15. R (on the application of MH) v Secretary of State for Health
Court of Appeal; [2004] EWCA Civ 1609; 3 December 2004

20. Re MB
Administrative Court; [2006] EWHC 1000 (Admin); 12 April 2006

24. Nasseri v Secretary of State for the Home Department
Administrative Court; [2007] EWHC 1548 (Admin); 2 July 2007

25. R (on the application of Wayne Thomas Black) v Secretary of State for Justice
Court of Appeal; [2008] EWCA Civ 359; 15 April 2008

31. Northern Ireland Human Rights Commission, Re Judicial Review
Queen's Bench Division (NI); [2015] NIQB 102; 16 December 2015

42. R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department
Administrative Court; [2019] EWHC 452 (Admin); 1 March 2019

Provisions already amended by primary legislation

13. R (on the application of Wilkinson) v Inland Revenue Commissioners
Court of Appeal; [2003] EWCA Civ 814; 18 June 2003

14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions
Court of Appeal; [2003] EWCA Civ 875; 18 June 2003

21. R (on the application of (1) June Wright; (2) Khemraj Jummun; (3) Mary Quinn; (4) Barbara Gambier) v (1) Secretary of State for Health; (2) Secretary of State for Education & Skills
Administrative Court; [2006] EWHC 2886 (Admin); 16 November 2006

22. R (on the application of Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another
House of Lords; [2006] UKHL 54; 13 December 2006

32. David Miranda v Secretary of State for the Home Department
Court of Appeal; [2016] EWCA Civ 6; 19 January 2016

Addressed by Remedial Order

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

19. R (on the application of Baiai and others) v Secretary of State for the Home Department and another
Administrative Court; [2006] EWHC 823 (Admin); 10 April 2006

26. R (on the application of (1) F; (2) Angus Aubrey Thompson) v Secretary of State for the Home Department
Administrative Court; [2008] EWHC 3170 (Admin); 19 December 2008

29. R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions
Administrative Court; [2014] EWHC 2182; 4 July 2014

35. Z (A Child) (no.2)
Family Court; [2016] EWHC 1191 (Fam); 20 May 2016

36. R (on the application of Johnson) v Secretary of State for the Home Department
Supreme Court; [2016] UKSC 56; 19 October 2016

37. Consent Order in R (on the application of David Fenton Bangs) v Secretary of State for the Home Department
Administrative Court; 4 July 2017

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

Addressed by other primary or secondary legislation

4. McR's Application for Judicial Review
Queen's Bench Division (NI); [2002] NIQB 58; 15 January 2002

5. International Transport Roth GmbH v Secretary of State for the Home Department
Court of Appeal; [2002] EWCA Civ 158; 22 February 2002

7. R (on the application of Anderson) v Secretary of State for the Home Department
House of Lords; [2002] UKHL 46; 25 November 2002

8. R (on the application of D) v Secretary of State for the Home Department
Administrative Court; [2002] EWHC 2805 (Admin); 19 December 2002

9. Blood and Tarbuck v Secretary of State for Health
Unreported; 28 February 2003

11. Bellinger v Bellinger
House of Lords; [2003] UKHL 21; 10 April 2003

12. R (on the application of M) v Secretary of State for Health
Administrative Court; [2003] EWHC 1094 (Admin);16 April 2003

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 and First Secretary of State (no.3)
Court of Appeal; [2005] EWCA Civ 1184; 14 October 2005

18. R (on the application of Gabaj) v First Secretary of State
Administrative Court; unreported; 28 March 2006

27. R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department
Administrative Court; [2010] EWHC 2761; 10 November 2010

28. R (on the application of T, JB and AW) v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice
Court of Appeal; [2013] EWCA Civ 25; 29 January 2013

33. R (on the application of P and A) v Secretary of State for the Home Department and Others
Administrative Court; [2016] EWHC 89 (Admin); 22 January 2016

34. R (on the application of G) v Constable of Surrey Police & Others
Administrative Court; [2016] EWHC 295 (Admin); 19 February 2016

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

Addressed by various measures

23. Smith v Scott
Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007

Proposed to address by Remedial Order

30. Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya
Court of Appeal; [2015] EWCA Civ 33; 5 February 2015

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

43. Jackson and Simpson v Secretary of State for Work and Pensions
High Court; 7 February 2020

Proposed to address by primary legislation

40. K (A Child) v Secretary of State for the Home Department
Administrative Court; [2018] EWHC 1834 (Admin); 18 July 2018

Under consideration

44. In the matter of an application by 'JR111' for judicial review (ruling on remedy)
Queen's Bench Division (NI); substantive judgment [2021] NIQB 48 on 13 May 2021; ruling on remedy 21 May 2021

Annex B: Statistical information on implementation of ECtHR judgments

Data in tables 1 and 2 are taken from the Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (http://www.coe.int/en/web/execution/annual-reports). The source table is indicated in brackets. 'Case' in these statistics refers to a judgment or decision of the ECtHR (including strike-out decisions following a friendly settlement).

Table 1: Statistics on UK cases

New cases under supervision (B.3)	**2018**	**2019**	**2020**
All cases	2	7	4
of which leading cases	0	4	2
Cases closed by final resolution (D.3)	**2018**	**2019**	**2020**
All cases	8	3	5
of which leading cases	2	1	2
Pending cases at year end (C.3)	**2018**	**2019**	**2020**
All cases	12	16	15
of which leading cases	5	8[26]	8
Leading cases by time pending (F.1)	**2018**	**2019**	**2020**
Pending <2 years	0	3	4
Pending 2–5 years	1	1	1
Pending >5 years	4	3	3
Payment of just satisfaction (G.2)	**2018**	**2019**	**2020**
Paid within deadline	2	4	3
Paid late	1	0	1
Awaiting confirmation of payment	1	2	1
Just satisfaction (G.1)	**2018**	**2019**	**2020**
Total awarded (€)	6,120	74,883	102,104

[26] This is greater than the sum of the three figures below as it includes one case which was closed shortly before the end of 2019.

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

Ranking by 2020 pending cases	State	All pending cases			of which leading cases		
		2018	2019	2020	2018	2019	2020
1	Russian Federation	1,585	1,663	**1,789**	215	219	217
2	Turkey	1,237	689	**624**	166	155	149
3	Ukraine	923	591	**567**	127	119	107
4	Romania	309	284	**347**	64	76	89
5	Hungary	252	266	**276**	51	48	54
6	Azerbaijan	186	189	**235**	55	34	45
7	Italy	245	198	**184**	57	56	57
8	Bulgaria	208	170	**166**	90	79	83
9	Republic of Moldova	173	173	**154**	55	53	49
10	Greece	238	195	**120**	49	43	39
11	Poland	100	98	**89**	32	30	33
12	Croatia	91	84	**73**	46	37	23
13	Georgia	41	47	**53**	17	19	23
14	Armenia	36	38	**42**	15	19	19
15	North Macedonia	52	35	**40**	20	14	15
16	France	32	36	**35**	17	19	26
17=	Bosnia and Herzegovina	24	39	**34**	10	10	11
	Lithuania	41	42	**34**	21	21	21
	Portugal	34	33	**34**	17	17	21
20=	Malta	23	31	**33**	14	13	11
	Serbia	60	57	**33**	13	13	12
22=	Belgium	21	30	**31**	14	18	18
	Finland	29	29	**31**	9	9	11
	Slovak Republic	36	32	**31**	8	12	14
25	Spain	20	24	**30**	14	16	18
26	Albania	37	36	**29**	9	11	13
27	United Kingdom	12	16	**15**	5	8	8
28	Austria	19	17	**13**	10	6	5
29=	Germany	18	20	**12**	16	14	10
	Iceland	3	6	**12**	3	3	3

Ranking by 2020 pending cases	State	All pending cases			of which leading cases		
		2018	2019	2020	2018	2019	2020
31	Cyprus	9	8	**10**	8	7	7
32=	Latvia	7	8	**8**	5	6	8
	Switzerland	8	8	**8**	8	7	8
34=	Montenegro	4	4	**7**	3	3	5
	Slovenia	13	13	**7**	11	12	7
36	Norway	1	2	**6**	1	2	2
37	Netherlands	7	6	**5**	4	5	5
38	Czech Republic	7	3	**4**	4	2	2
39=	Ireland	3	2	**3**	3	2	2
	Sweden	3	3	**3**	3	3	3
41=	Estonia	1	2	**2**	1	2	2
	Liechtenstein	2	2	**2**	1	1	1
43=	Denmark	0	1	**1**	0	1	1
	San Marino	0	0	**1**	0	0	1
45=	Andorra	0	0	**0**	0	0	0
	Luxembourg	1	1	**0**	1	1	0
	Monaco	0	0	**0**	0	0	0
	Total	**6,151**	**5,231**	**5,233**	**1,292**	**1,245**	**1,258**

Table 3: Judgments finding a violation against the UK under the supervision of the Committee of Ministers at the end of July 2021

Case name	Application	Final judgment
Enhanced Procedure		
McKerr group		
McKerr	28883/95	4/8/2001
Kelly and Others	30054/96	4/8/2001
Shanaghan	37715/97	4/8/2001
Finucane	29178/95	1/10/2003
McCaughey and Others	43098/09	16/10/2013
Gaughran	45245/15	13/6/2020
Standard Procedure		
S and Marper	30562/04 and 30566/04	4/12/2008
Catt	43514/15	24/4/2019
JD and A	32949/17 and 34614/17	24/2/2020
Unuane	80343/17	24/2/2021
Big Brother Watch and Others	58170/13 etc.	25/5/2021
DS	70988/12	30/6/2021
VCL and AN (enhanced from 16/9/2021)	77587/12 and 74603/12	5/7/2021

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