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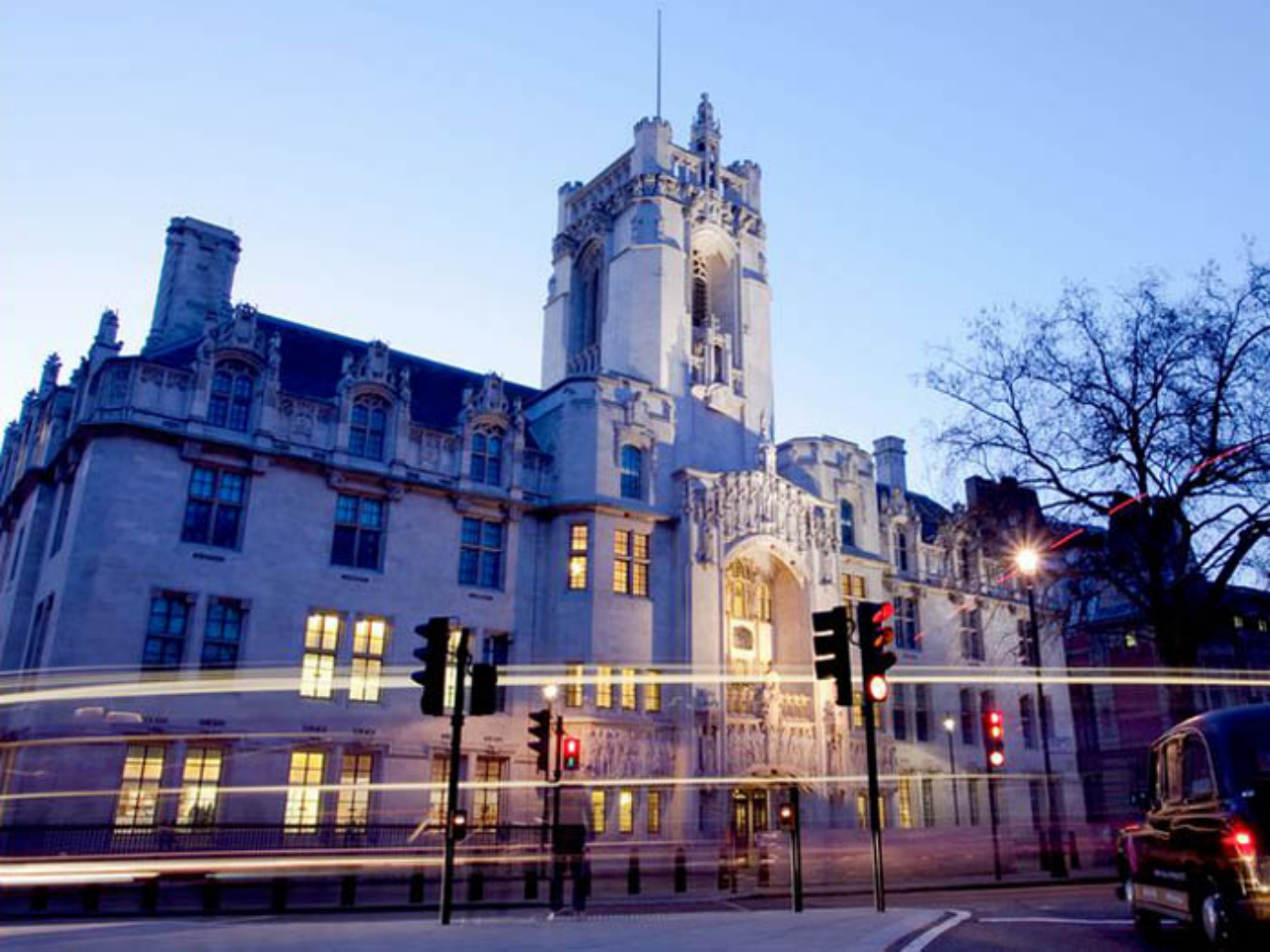
Human Rights and the United Kingdom Supreme Court

Brice Dickson



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Foreword

Professor Dickson is an eager student of the Supreme Court of the United Kingdom and is already the author of a number of articles and papers on its workings. In this book his attention is focused directly on the way in which the Court has dealt with various human rights issues and he has produced a work which is not only comprehensive and magisterial but also incisive and significant.

Many of the themes that have recently exercised the Court are painstakingly examined. The Court's attitude to the extra-territorial reach of the European Convention on Human Rights and Fundamental Freedoms, its decisions and those of its predecessor, the Appellate Committee of the House of Lords, on the limits of the retrospective effect of the Human Rights Act 1998, and the controversial subject of the 'mirror' or '*Ullah*' principle are all closely analysed.

Commendably, the author is not reticent in voicing criticism of the Court's approach to human rights in a number of important areas. He castigates its members for their conservatism on many issues. Happily, however, he is unstinting in his praise when he thinks that the Court may on occasions have got it right.

This book will be essential reading not only for those who are interested in the jurisprudence of the Supreme Court on many of the vital human rights questions that have arisen in the past four years but also for those who are concerned about the direction of travel of the final court of appeal in the United Kingdom on issues that affect the lives of so many of its citizens.

Lord Kerr of Tonaghmore
Justice of the Supreme Court

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Preface

This book is an attempt to provide an overview of where the United Kingdom's top court currently stands on a range of human rights issues, in particular those which fall to be considered under the Human Rights Act 1998. It is unusual in focusing on the output of a single court, albeit one which in 2009 was transformed from the Appellate Committee of the House of Lords into the United Kingdom Supreme Court. The justification for the focus is twofold. Firstly, that in courts of the United Kingdom it is the views of the Supreme Court – and of the House of Lords before it – that matter most. All other courts and law enforcers are bound to follow the decisions of the top national court in preference to any other more tempting authority. Secondly, that it is primarily the Supreme Court which 'converses' with the European Court of Human Rights on controversial human rights questions. The European Court looks to the Supreme Court for explanations concerning the state of UK law and the Supreme Court in turn communicates to the European Court whatever reservations it might have about the guidance available from the European Court. To a large extent, therefore, this book is a history of the interaction between the United Kingdom's top court and the European Court of Human Rights, particularly since the coming into force of the Human Rights Act 1998 in 2000. That interaction is often a hot topical issue for the media. The book is offered as a contribution to the debate about the extent to which the Supreme Court does, and should, conform to the judgments issued by the court in Strasbourg.

The book has had a long gestation period, during which a large number of people, whether knowingly or otherwise, have assisted in its development. I would particularly like to thank Gordon Anthony, Sir Louis Blom-Cooper, David Feldman, John Jackson, John Knowles, Philip Leach, James Lee, Andrew Le Sueur, Kate Malleson, Tom Obokata, Rory O'Connell, Aidan O'Neill, Alan Paterson, Jenny Rowe, Jenny Steele, Cheryl Thomas and David Wills. At Oxford University Press I have been very well served, as before, by all concerned, especially Natasha Flemming and Srikanth. It is the OUP who compared the Tables and Index. I am particularly grateful to Lord Kerr of Tonaghmore for agreeing to write a Foreword. Most of all I must thank my wife, Patricia Mallon, for her inexhaustible support. The book is dedicated to her.

I have endeavoured to state the relevant legal position as of early January 2013. On the day when this Preface was finalised the names of the next three Justices to be appointed to the Supreme Court were announced by Downing Street. Lord Justice Hughes is to fill the vacancy created by Lord Dyson's move in October 2012 to become Master of the Rolls, Lord Justice Toulson will replace Lord Walker, who retires next month, and Lord Hodge will become one of the two Scottish Justices when Lord Hope retires in June 2013. Lords Hughes and Toulson will take up office on 9 April 2013 and Lord Hodge will do so in October 2013. Before announcing who is to become the Deputy President of the Supreme Court on Lord Hope's retirement, expressions of interest are to be invited from existing Justices and the selection process will be supervised by the selection commission which made the recommendations for the three

new Justices. The names of the new Justices can now be inserted at the appropriate places on page 8 of this book. We wait with interest to see what contribution they will make over the next few years to the development of human rights law in the United Kingdom.

Brice Dickson, Queen's University Belfast
27 February 2013

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Introduction

This book presents an overview of the extent to which the UK Supreme Court is prepared to uphold human rights. Basing itself not just on the judgments of the Supreme Court itself, which was established as recently as October 2009, but also on the decisions of the court it replaced, the Appellate Committee of the House of Lords, the book focuses on the attitudes struck by the United Kingdom's most senior judges in relation to the rights set out in the Human Rights Act 1998. Those rights, called 'Convention rights' in the Act, are taken directly from the European Convention on Human Rights. Litigants in the United Kingdom who are unhappy with the way in which the top domestic court has protected their Convention rights can apply to have their complaint dealt with again by the European Court of Human Rights in Strasbourg. It is frequently possible, therefore, to measure the thinking of top UK judges against that of judges in the European Court. This book tries to conduct that measurement but also analyses the numerous human rights judgments of the House of Lords and Supreme Court which have not been reviewed in Strasbourg.

The study pays close attention to the views of individual judges in the domestic court and flags up the sharp differences of opinion which have often been expressed. It does so not just in relation to the substantive content of Convention rights but also in relation to how those rights have been vindicated through the Human Rights Act, looking at issues such as who is bound by the Act and the extent to which it permits judges to change the commonly accepted meaning of legislation. With a view to predicting how new issues might be dealt with, the book identifies trends to date and characterizes the attitudes of Supreme Court Justices as indicated in their judicial and extra-judicial pronouncements. It does not purport to be a detailed account of the current state of the whole of human rights law in the United Kingdom.

This opening chapter deals with relevant preliminary matters. It begins by explaining the origins of the Supreme Court and considering what difference its creation may have made to the way our top judges operate in the human rights field. It then looks at the jurisdiction of the Supreme Court, giving special attention to the controversies surrounding its role in relation to Scotland. There follow sections on the composition of the Court, the system for appointing new Justices, and the characteristics of those appointed. A further section looks at factors that can influence the processing of appeals to the Court, especially appeals concerning human rights. Finally the chapter sets out what will be covered in the book's subsequent chapters.

The new Supreme Court

The Supreme Court came into existence on 1 October 2009, replacing the Appellate Committee of the House of Lords as the top court within the United Kingdom.[1] The Appellate Committee had existed since 1876, but for centuries before then the House functioned on a non-statutory basis as the final court of appeal on most matters arising within the court systems of England and Wales, Scotland, and Ireland.[2] The decision to create the Supreme Court was an unexpected and controversial one when it was announced by Prime Minister Tony Blair in 2003, and was not unanimously welcomed by the judges who were then serving in the Appellate Committee as Lords of Appeal in Ordinary, or Law Lords as they were more usually called.[3] But the controversy was really over peripheral matters such as where the top court should be located, who its members should be, and what it would cost to run, not over the more substantive issues such as what the new Court's jurisdiction should be and whether its role within the unwritten constitution of the United Kingdom should be different from that played by the Appellate Committee. What seems to have mainly motivated the politicians who advocated the new Court was the doctrine of separation of powers: in the twenty-first century it looked very odd, especially in a country committed to the rule of law[4] and to the appearance, as well as the reality, of fairness and impartiality, that the top domestic court was physically located in the same building as the national Parliament and whose judges were *ex officio* members of one of the two chambers of that Parliament.[5] In any event, the man who more than anyone else ensured that the Supreme Court would become a reality is Lord Bingham of Cornhill, the Senior Law Lord from 2000 to 2008.[6]

There was some speculation that, despite protestations to the contrary, the new Court might seek to claim a greater importance than its predecessor, that the views of individual Justices might attract much greater publicity, and that the Court might

[1] It had been argued for by Lord Steyn, a serving Law Lord, as early as 2002: Steyn (2002). He reminds us that as far back as 1867 Walter Bagehot had written: 'The Supreme Court of the English people ought to be a great conspicuous tribunal … [and] … ought not to be hidden beneath the robes of a legislative assembly': Bagehot (1993), 149.

[2] Jones (2009); Keane (2009); Phillips (2008).

[3] Le Sueur (2009); Darbyshire (2011), Ch 15. Lords Nicholls, Hoffmann, Hope, Hutton, Millett, and Rodger all believed that 'on pragmatic grounds, the proposed change is unnecessary and will be harmful', while Lords Bingham, Steyn, Saville, and Walker saw 'the functional separation of the judiciary at all levels from the legislature and the executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law'; Lord Hobhouse was in favour of a Supreme Court in principle, but did not think the government's particular proposal was a good one. See 'The Law Lords' response to the Government's consultation paper on Constitutional reform: a Supreme Court for the United Kingdom' (CP 11/03 July 2003), available at <http://www.parliament.uk/documents/judicial-office/judicialscr071103.pdf> (last accessed 4 December 2012).

[4] The Constitutional Reform Act 2005, s 1(a), states that there is an 'existing constitutional principle of the rule of law'. For more on this Act, see Mance (2006).

[5] In *McGonnell v UK* (2000) 30 EHRR 289 the European Court of Human Rights held that Art 6 of the ECHR was breached by the fact that the Bailiff of Guernsey was both President of the island's Parliament and a judge in its Royal Court. The Lord Chancellor in the UK government was entitled to sit as a judge in the House of Lords, but that practice was abandoned in 2001 and there is no provision in the Constitutional Reform Act 2005 which allows the Lord Chancellor to sit in the Supreme Court.

[6] See the tribute by Hale (2009b), who says (at 209) that the Supreme Court may be Lord Bingham's 'most important and long-lasting legacy'. For his views on human rights, see Bingham (1993) and (2010).

change the working methods of the House of Lords so as to operate in a more modern and accessible way. In fact, apart from in that last respect, most of this speculation has proved wide of the mark, at any rate so far. The Supreme Court has adopted a forthright, but hardly surprising, Mission Statement:

> [T]o ensure that the President, Deputy President and Justices of the Court can deliver just and effective determination of appeals heard by the Court, in ways which also best develop the Rule of Law and the administration of justice.[7]

Bearing that statement in mind, any sober comparison of the 'product' of the Supreme Court with that of the House of Lords—in terms of judgments issued—is bound to conclude that it is very much a case of *plus ça change plus c'est la même chose*.[8] It is not easy to demonstrate that the Justices have in any way been more activist or outspoken than the Law Lords, even in the field of human rights, especially as the Law Lords themselves had a full nine years to acclimatize to the challenges thrown up by the Human Rights Act. The Justices do now compile and deliver their judgments slightly differently from the way their predecessors did,[9] with the first judgment no longer always being that of the most senior judge but rather that of the judge who has written the most detailed judgment explaining why the decision has gone a certain way; any dissenting judgments are usually placed after the judgments of all the judges in the majority. Moreover, Justices are increasingly issuing joint judgments, and the provision of summaries of Supreme Court decisions for the benefit of the media ensures that they are more accurately reported by the national press. In reality, the only *significant* change has been that the Supreme Court has much more frequently than the House of Lords convened a bench of more than five judges to hear appeals. In its first three 'legal' years, 2009–12, out of 164 separate sets of judgments issued by the Justices, no fewer than 35 involved seven Justices and a further 12 involved nine Justices.[10] Of the 35 cases, 14 concerned human rights issues, and of the 12 cases seven involved human rights issues. Altogether, 29 per cent of all the cases dealt with involved more than five Justices, and 45 per cent of the cases involving more than five Justices concerned human rights issues. In the last three years of the Appellate Committee of the House of Lords, by way of contrast, only two of the 180 cases involved more than five Law Lords (just over 1 per cent), each of which raised human rights issues.[11]

[7] This is at the front of each of the Court's Annual Reports. It is backed by eight strategic objectives, one of which is to 'promote knowledge of the importance of the Rule of Law'.

[8] Blom-Cooper et al (2011), xxvii. In the legal year 2009–10 there were 10 cases involving seven judges and three cases involving nine judges; in 2010–11 the figures were 12 and eight respectively; and in 2011–12 they were 13 and one. The Court's Annual Reports highlight all of these cases, with the 2011–12 Report stating that larger benches are 'a notable feature of the United Kingdom Supreme Court's brief history' (at 25). For an analysis of the new Court's output during its first year, see Blom-Cooper et al (2010); for the first two years see UCL (2011) and Phillips (2012). See too Malleson (2011); Lennan (2010).

[9] A fact noted by Lord Phillips in his Foreword to the Supreme Court Annual Report and Accounts 2011–12, HC 26, 6.

[10] These include two in which, because of Lord Rodger's illness, only eight Justices ultimately decided the appeal.

[11] These were *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356 and *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

The Court has published the criteria which it takes into account before deciding whether more than five judges should be selected to hear an appeal.[12] To some extent these could have been deduced from the previous practice of the House of Lords, but the fact that they have been made explicit is an indication that the Court wishes to be more transparent about the way it operates and that it envisages a larger bench being convened reasonably frequently. Decisions by larger benches have the potential to allow the Court to present a more powerful and united front to the outside world.[13]

The jurisdiction of the Supreme Court

The jurisdiction of the new court is almost the same as that of the Appellate Committee of the House of Lords. It can hear appeals in civil and criminal cases from all three jurisdictions in the United Kingdom (England and Wales, Scotland, and Northern Ireland), except that no criminal appeals can be heard from Scotland. The only change from previous practice is that responsibility for deciding 'devolution' cases, which were previously referred to the Judicial Committee of the Privy Council, has been transferred to the Supreme Court.[14] These can arise under the Scotland Act 1998,[15] the Northern Ireland Act 1998,[16] and the Government of Wales Act 2006.[17]

The routes by which appeals can be brought to the new court are virtually identical to those which applied when the Appellate Committee was in place,[18] with most appeals requiring permission from a panel of three Supreme Court Justices before they can be fully heard.[19] The main exception continues to be appeals from Scotland, where in civil cases no judicial leave is required, only the signature of two senior counsel.[20] In civil cases in England and Wales or Northern Ireland, permission to appeal can be granted either by the lower court or by a Supreme Court panel.[21] The prospective appellant in those jurisdictions therefore has two bites of the cherry, but does not have to take the first bite before taking the second (ie he or she can apply for permission from the

[12] They are whether it is a case (1) where the Court is being asked to depart, or may decide to depart, from a previous decision, (2) of high constitutional importance, (3) of great public importance, (4) where a conflict between decisions in the House of Lords, the Privy Council or the Supreme Court has to be reconciled, and (5) which raises an important point in relation to the European Convention on Human Rights. The criteria are available on the Court's website, under 'Court procedures' and then 'Panel numbers criteria'.

[13] See Cornes (2011) for comments about personal leadership within the Supreme Court. Malleson (2011), 754, suggests that 'because the judicial role which the new Supreme Court Justices have inherited has been a far more dynamic one than is generally acknowledged it is likely that the Supreme Court will evolve into a top court which more closely resembles the supreme courts or constitutional courts found in other parts of the world'.

[14] Constitutional Reform Act 2005, s 40(4)(b) and Sch 9.

[15] Scotland Act 1998, ss 33 and 98, and Sch 6.

[16] Northern Ireland Act ss 11 and 79, and Sch 10.

[17] Government of Wales Act 2006, ss 96, 99, 112 and 149, and Sch 9.

[18] Dickson (2007a).

[19] The Supreme Court's website <http://www.supremecourt.gov.uk> publishes monthly lists of the outcome of applications for permission to appeal but gives 'full case details' (including whether the appeal raises human rights) only at a later stage.

[20] The top court has often complained that an appeal brought to them under this system did not deserve their attention. See eg *G Hamilton (Tullochgribban Mains) Ltd v The Highland Council* [2012] UKSC 31.

[21] Administration of Justice (Appeals) Act 1934, s 1(1).

Supreme Court even though no such application has first been submitted to the lower court). It seems that, in practice, relatively few requests are made to lower courts for permission to appeal to the Supreme Court.

The Supreme Court, like the House of Lords before it, has no power to 'call in' issues for decision. At times, such as when the Court of Appeal in England and Wales grants permission to appeal in a civil matter, or when devolution issues are referred, the Supreme Court Justices have no choice but to deal with the questions presented to them, however undeserving of their attention they may deem them to be. The Justices can pick and choose which other appeals to hear, but the pool from which they can select consists only of those cases in which one or more of the litigating parties has lodged an application for permission to appeal, apart from the rare occasions on which the Court of Appeal, having considered a case referred to it by the Attorney General, refers it further to the Supreme Court.[22] Needless to say, the costs involved in pursuing an appeal or reference to the Supreme Court are often prohibitive and for that reason parties who believe that they still have a deserving case will often refuse to take the matter further. In criminal cases, moreover, the Courts of Appeal in England and Wales and in Northern Ireland have a veto over appeals being taken to the Supreme Court: appeals can proceed only if the lower court first certifies that there is a point of law of general public importance involved.

The Supreme Court and Scotland

In theory, no criminal appeals can go from Scotland to the Supreme Court, but the transfer to the Court of the Privy Council's jurisdiction to hear devolution issues arising in Scotland has meant that, in practice, the Supreme Court *can* hear criminal appeals from Scotland where the ground of appeal is that the defendant's human rights have been violated.[23] This has caused considerable consternation north of the border, particularly after the Supreme Court's decision in *Fraser v Her Majesty's Advocate*,[24] where the Court of Criminal Appeal in Edinburgh was ordered to quash a man's conviction for murdering his wife and to consider whether to authorize a new prosecution, the basis for the decision being that the Crown's failure to disclose certain evidence to the defence had made the original trial unfair, in violation of Article 6 of the

[22] Under the Criminal Justice Act 1972, s 36 (on a point of law following a person's acquittal in a criminal case) and the Criminal Justice Act 1988, s 36 (on whether a court's sentence has been unduly lenient).

[23] Cases on devolution issues in Scotland can currently reach the Supreme Court in three different ways: (1) by being referred to that Court by three or more judges of the Court of Session or two or more judges of the High Court of Justiciary, in which event no further permission is required; (2) by an appeal being lodged against the determination of a devolution issue by the Inner House of the Court of Session after a reference has been made to that court by a lower court, in which event, again, no further permission is required; or (3) by an appeal being lodged against the determination of a devolution issue by two or more judges of the High Court of Justiciary, or by three or more judges of the Court of Session in a case where there is otherwise no appeal to the Supreme Court, in which event the permission of the Scottish court concerned or, if that permission is not obtained, of the Supreme Court itself, is required. See Scotland Act 1998, s 98 and Sch 6, paras 7–13.

[24] [2011] UKSC 24. There had been an earlier Supreme Court decision of the same ilk: *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601. That led to corrective legislation in the Scottish Parliament—the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

European Convention on Human Rights. Within two weeks of the Supreme Court's edict, the First Minister of Scotland set up a group to review the future scope of Scottish appeals to the Supreme Court in criminal cases.

As Aileen McHarg has ably explained,[25] the final report produced by this review group was actually the third to be issued on the topic within two years. The first, the Walker Review published in January 2010, proposed that all Scottish appeals raising UK-wide legal issues (whether civil or criminal) should be capable of being heard by the Supreme Court but that all appeals raising only Scottish issues should not be appealable to London.[26] No further action was taken on this report but later that year the Advocate General[27] appointed a further group of experts to explore the more specific question whether devolution issues in criminal cases should continue to be heard by the Supreme Court. That group proposed, in November 2010, that rather than these issues being heard in London just because they concern the exercise of a function of the Lord Advocate (who is a member of the Scottish Government),[28] the Scotland Act 1998 should be amended so as to create a new free-standing right of appeal to the Supreme Court in criminal cases where an issue of compatibility with the European Convention on Human Rights or EU law arises.[29] The third report, published in its final version in September 2011,[30] agreed with the second report but suggested that appeals should be possible only if (a) the appeal court in Scotland were to verify that a point of law of general public importance is involved and (b) the Supreme Court were deprived of its power to make an ultimate ruling on the facts of the case and confined to deciding the specific question of law posed for it.

The matter has been resolved, for the time being at least,[31] by provisions in the Scotland Act 2012,[32] which insert additional sections into the Criminal Procedure (Scotland) Act 1995 and the Scotland Act 1998. The Advocate General for Scotland has been given the right to become a party to any criminal proceedings in Scotland, so far as they relate to a compatibility issue, that is, to whether a public authority has acted or is proposing to act in a way which is unlawful under section 6(1) of the Human Rights Act 1998 or inconsistent with EU law, or whether any provision of an Act of the Scottish Parliament is incompatible with a Convention right or with EU law.[33] Moreover, where

[25] McHarg (2011). See also Himsworth (2011); Reed and Murdoch (2011).

[26] See <http://scotland.gov.uk/Publications/2010/01/19154813/0> (last accessed 4 December 2012).

[27] The Advocate General is the head of the UK government's Scottish legal office. His or her job is to ensure that Scots law and the devolution settlement are taken into account in the development of UK government policy and legislation and that the UK government's interests are effectively represented in Scottish litigation. The Lord Advocate, also known as Her Majesty's Advocate, who is a minister in the Scottish government, is head of the prosecution service in Scotland: see the Scotland Act 1998, ss 44 and 48.

[28] Scotland Act 1998, s 98 and Sch 6, para 1(c).

[29] See <http://www.oag.gov.uk/oag/files/Expert%20Group%20report(1).doc> (last accessed 4 December 2012).

[30] See <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf> (last accessed 4 December 2012).

[31] The position has to be reviewed after three years, with further consideration being given at that time to, amongst other matters, whether an appeal to the Supreme Court on a compatibility issue should lie only if the High Court of Justiciary certifies that the issue raises a point of law of general public importance: Scotland Act 2012, s 38(3)(c).

[32] Sections 34–38. At the time of writing these were not yet in force.

[33] Criminal Procedure (Scotland) Act 1995, s 288ZA, inserted by the Scotland Act 2012, s 34.

a compatibility issue has arisen in criminal proceedings before a court, other than a court consisting of two or more judges of the High Court, the court may, instead of determining it, refer the issue to the High Court, and the Lord Advocate or Advocate General for Scotland, if a party to the criminal proceedings, may *require* the court to make such a reference.[34] The High Court, in turn, may either determine the issue referred to it or refer it further to the Supreme Court.[35] The Lord Advocate or Advocate General for Scotland, if a party to criminal proceedings before a court consisting of two or more judges of the High Court, may again *require* the court to refer to the Supreme Court any compatibility issue which has arisen in the proceedings otherwise than on a reference.[36] When an issue is referred to the Supreme Court, that court may exercise its powers only for the purpose of determining the compatibility issue and must then remit the proceedings to the High Court for determination.[37] These procedures apply to compatibility issues which would otherwise have been 'devolution issues'. In summary, the power of the Advocate General to require a reference to be made to the Supreme Court has been slightly expanded, but the jurisdiction of the Supreme Court to issue the final determination in a particular category of devolution case has been restricted. The suggestion that the Supreme Court should be permitted to deal with criminal cases raising Convention compatibility issues only if the appeal court in Scotland has certified that a point of law of general public importance is involved has not been implemented.[38] The number of such cases coming to the Supreme Court is therefore unlikely to decrease, but that Court will only be able to lay down the applicable legal rules, not to apply them to the facts of the cases before it.

The composition of the Supreme Court

When the Supreme Court was formed on 1 October 2009, 10 of the 12 Lords of Appeal in Ordinary who were members of the Appellate Committee of the House of Lords the previous day automatically became Justices of the Supreme Court.[39] They were, in order of seniority,[40] Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Saville of Newdigate, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lady Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Mapesbury, and Lord Kerr of Tonaghmore. With the establishment of the new Court, Lord Phillips and Lord Hope switched roles from Senior Lord of Appeal and Second Senior Lord of Appeal to President and Deputy President of the Supreme Court respectively.

Lord Scott of Foscote retired from the Appellate Committee of the House of Lords on 30 September 2009 and Lord Neuberger of Abbotsbury resigned on the same day

[34] Ibid, s 288ZB(1) and (2), inserted by the Scotland Act 2012, s 35.
[35] Ibid, s 288ZB(3) and (4).
[36] Ibid, s 288ZB(5).
[37] Ibid, s 288ZB(6)–(8).
[38] Scotland Act 1998, Sch 6, para 1, as amended by the Scotland Act 2012, s 36(4).
[39] Constitutional Reform Act 2005, s 24.
[40] The President and Deputy President rank as the most senior Justices; thereafter seniority depends on when the Justice was first appointed to the top court (whether the Appellate Committee of the House of Lords or the Supreme Court).

to take up the post of Master of the Rolls (head of the Civil Division of the Court of Appeal). On 1 October 2009 the outgoing Master of the Rolls, Sir Anthony Clarke, took up the seat which Lord Scott of Foscote would have occupied in the Supreme Court, and was given a peerage as Lord Clarke of Stone-cum-Ebony. The seat vacated by Lord Neuberger was not filled until April 2010, when Sir John Dyson was appointed as a Supreme Court Justice. He was given the courtesy title of Lord Dyson, but not a full peerage.[41] The same practice will be applied to all future appointees, unless they already happen to hold a peerage.

In September 2010 Lord Saville retired, being replaced in May 2011 by Lord Wilson of Culworth. Lord Collins retired in May 2011 and Lord Rodger died in June 2011; they were respectively replaced by Lord Sumption in January 2012 and Lord Reed in February 2012. Then Lord Brown retired in April 2012 and was replaced a month later by Lord Carnwath. Lord Phillips stood down as President of the Supreme Court on 30 September 2012 and was replaced by Lord Neuberger, just three years after he had chosen to serve as Master of the Rolls rather than move from the Appellate Committee of the House of Lords to the Supreme Court. There is some irony in this appointment as Lord Neuberger had been wary of the proposal to replace the Appellate Committee with the Supreme Court.[42] Lord Dyson followed Lord Neuberger's example by stepping down from the top court on 30 September 2012 to take over as Master of the Rolls; his replacement has not yet been announced. Lord Walker will retire in March 2013 and Lord Hope in June 2013, at which point a new Deputy President will need to be appointed.

As of 1 July 2013, therefore, barring unforeseen circumstances, we know that the Justices of the Supreme Court, in order of seniority, will include: Lord Neuberger (President), Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, and Lord Carnwath. Three people who are not currently on the Court will by then have been appointed. There may then be a lengthy period of stability before more changes are required, since the next scheduled retirement dates for Justices in post are not likely to fall due until April and May 2018, when Lords Mance and Clarke, respectively, will reach the age of 75. But of course one or more Justices may choose to retire before that time. The details of all these changes to the membership of the Supreme Court, as well as short biographies of the individuals currently in post, are set out in Appendices 1 and 2 at the end of this book. Appendix 1 also includes details of the Law Lords who served in the Appellate Committee of the House of Lords from the time of the enactment of the Human Rights Act 1998. In all there have been 32 individuals (not counting ad hoc judges) who have had the opportunity since that Act was passed to issue judgments in the United Kingdom's top court on Convention rights.

[41] Press release of the Supreme Court 13/2010, 13 December 2010.

[42] In an interview with Joshua Rozenberg broadcast by Radio 4 on 8 September 2009, Lord Neuberger said: 'The danger is that you muck around with a constitution like the British Constitution at your peril because you do not know what the consequences of any change will be' and he added that there was a real risk of 'judges arrogating to themselves greater power than they have at the moment'. He had not yet been appointed as a Law Lord when, in 2003, that group was asked for its opinion on the creation of a Supreme Court: see n 3 above. See Neuberger (2009a).

The appointment process

The Constitutional Reform Act 2005 provides for a maximum of 12 Supreme Court Justices to be in office at any one time,[43] the same number as that allowed for Lords of Appeal in Ordinary since 1994. To be eligible for appointment a person must have (a) held high judicial office for a period of at least two years, (b) satisfied the judicial-appointment eligibility condition on a 15-year basis, or (c) been a qualifying practitioner for at least 15 years.[44] The second of these criteria was inserted in 2008 to reflect more general changes that were made at that time to the judicial appointments system in England and Wales.[45] It means, for example, that a person who has been qualified as a barrister or solicitor in England and Wales for at least 15 years—and during that period has 'gained experience in law'—is eligible for appointment to the Supreme Court even though the experience has been gained other than through private legal practice.[46] It could be gained through engagement in other 'law-related activities' such as acting as an arbitrator or teaching law,[47] and such activities do not have to have been carried out on a full-time basis, for pay, or even within the United Kingdom.[48]

The Constitutional Reform Act 2005 requires that when a commission is making selections for the appointment of Justices it 'must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom'.[49] By constitutional convention two of the judges in the country's top court have to be experts in Scottish law. It is now also a tradition that one of the judges comes from Northern Ireland. In an internal review of the selection process conducted in 2011, the Court's Chief Executive recommended that the need to have judges with knowledge and experience of the law of each part of the United Kingdom should be made part of the definition of 'merit' when appointments are being made.[50] The logic of that proposal is that the need to have judges with knowledge and experience of all areas of law (commercial, criminal, public, family, etc) should also be made part of the definition of 'merit'.

The net effect of the eligibility criteria is that the people appointed to serve as Justices of the Supreme Court are extremely likely to be serving judges and to have been practising barristers for at least 15 years prior to first becoming a judge. Indeed, when the Supreme Court was first established, 10 of the 11 Justices in post from the first day fell into that category, the exception being Lord Collins of Mapesbury, who, when

[43] Section 23(2). The number can be increased but not decreased by an Order in Council laid before and approved by resolution of each House of Parliament: s 23(3) and (4).

[44] Ibid, s 25(1).

[45] Tribunals, Courts and Enforcement Act 2007, Pt 2 (ss 50–61) and (in particular) Sch 10, para 41, which took effect on 21 July 2008.

[46] The Tribunals, Courts and Enforcement Act 2007, s 51(1), allows the Lord Chancellor to specify other qualifications as making someone eligible for appointment to a judicial position, but no such specifying order has been made in relation to the UK Supreme Court.

[47] Ibid, s 52(2)–(4).

[48] Ibid, s 52(5).

[49] Constitutional Reform Act 2005, s 27(8).

[50] Supreme Court Annual Report and Accounts 2010–11, HC 976, 16.

he was appointed as a Lord of Appeal in Ordinary just six months before the demise of the Appellate Committee in 2009, was the first ever solicitor to achieve that status. The last Lord of Appeal in Ordinary to have been appointed from judicial ranks below the appellate level was Lord MacDermott in 1947,[51] and the last Lord of Appeal to have been appointed from outside the ranks of the judiciary altogether was Lord Radcliffe in 1949.[52] Today, more than three years after the commencement of the Supreme Court, the collective profile of the Justices does not differ greatly from that of the House of Lords at any time during the last 60 years of its history. The one solicitor judge retired in 2011, after just two years in the role, and was succeeded by a judge who had previously been a barrister, Lord Sumption. Lord Sumption, however, like Lord Radcliffe, had not previously served as a full-time judge in the United Kingdom, although he was appointed a Deputy High Court Judge in 1992, served as a Recorder from 1993 to 2001, and was a Judge of the Courts of Appeal of Jersey and Guernsey from 1995.[53]

Selection commissions for vacancies on the Supreme Court are provided for by Schedule 8 to the Constitutional Reform Act 2005.[54] For vacancies as Justices the selection commission comprises the President and Deputy President of the Supreme Court together with one member from each of the United Kingdom's three judicial appointment bodies—the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission. At least one of these three members must be non-legally qualified. An internal review of the selection process by the Court's Chief Executive in 2011 recommended that neither the President nor the Deputy President should sit on the panel appointing his or her successor, but in fact Lord Philips did sit on the panel which in 2012 appointed Lord Neuberger as his successor to the Presidency.[55]

The characteristics of Supreme Court Justices

The Supreme Court, just like the Appellate Committee of the House of Lords before it, cannot by any stretch of the imagination be described as a body which is representative

[51] At the time of his appointment he was a High Court judge in Northern Ireland.

[52] A leading QC at the time. See Duxbury (2011).

[53] Lord Sumption's appointment was criticized in some quarters, especially as there were rumours that he had effectively been promised the position after having withdrawn from an earlier competition due to alleged opposition from serving members of the Court of Appeal, who did not think it appropriate that Lords Justices should be 'leapfrogged' in this way. Jonathan Sumption was also criticized for delaying his take-up of the position until he had completed his involvement in lucrative civil proceedings between two Russian oligarchs, and for delivering the FA Mann lecture on judicial activism (Sumption, 2011) just before he assumed office. The lecture led to a stinging rejoinder from Sir Stephen Sedley, a recently retired Lord Justice of Appeal: Sedley (2012). See too <http://ukscblog.com/twelfth-justice-further-revelations> (last accessed 4 December 2012); <http://www.guardian.co.uk/law/2011/nov/09/sumption-shows-certain-naivety> (last accessed 4 December 2012) (Joshua Rozenberg); and <http://business.timesonline.co.uk/tol/business/law/article7013960.ece> (last accessed 4 December 2012) (Frances Gibb).

[54] Given effect by s 27(6) and further regulated by ss 27–31.

[55] Lord Neuberger seems to have been preferred to Lord Mance and Lady Hale: see Joshua Rozenberg at <http://www.guardian.co.uk/law/2012/jul/12/lord-neuberger-announced-supreme-court-president> (last accessed 4 December 2012). Rozenberg adds, in relation to Lady Hale: 'Shaking the place up a bit, as she is wont to do, may go down well with the *Guardian* and its readers but it hardly endears a judge to her colleagues.'

of the society it serves. The persons appointed to it are overwhelmingly elderly, white, Christian, males. No person of colour has ever been appointed to one of the United Kingdom's top judicial posts, although several have come to the United Kingdom from other countries in their youth and some have even retained a non-British nationality. Several persons from a Jewish background have been appointed, but no-one who is an openly practising Muslim, Hindu, or Buddhist. As far as is known, none has been openly homosexual, and none has had a notable disability. Perhaps most remarkable of all is the fact that only one woman has ever been appointed, Lady Hale. There are at least two schools of thought on this phenomenon. Putting it bluntly, the first believes that the gender of a judge is irrelevant: if intellectual ability in the application of the law is the main criterion for appointing our top judges, they can all be relied upon to be gender-blind when they are considering appeals and issuing judgments. The second school believes that being gender-blind is not always appropriate and that to properly understand the particular perspective of a woman it is necessary to be a woman oneself. Lady Hale, it would seem, strongly adheres to the second school. It is certainly clear from both her judicial and her extra-judicial pronouncements[56] that she believes female judges see many legal issues in a different light, especially when they arise in the areas of family law, child law, or social care law. The publication of *Feminist Judgments* in 2010[57] demonstrates that there clearly *are* alternative feminist perspectives on standard legal problems, and Lady Hale, writing in the Foreword to that book, states:

> Reading this book ought to be a chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world . . . If lawyers and judges like me have so much to learn from reading this book, then surely other, more sceptical, lawyers and judges have even more to learn . . .

In the human rights context there is also a feminist approach which potentially affects the outcome of cases.[58] Most notably, many women would disagree with where the dividing line is traditionally drawn between public law and private law, arguing that what goes on within families, for example, should be reclassified as public and therefore more comprehensively regulated.[59] They have in mind, in particular, the phenomenon of domestic violence. In addition, a significant number of theorists now hold that women have human rights which men do not have (eg to reproductive health care) and that these ought to be reflected in national and international legal documents.[60] In the nine years that Lady Hale has already been a member of the United Kingdom's top court she has certainly tried to influence her brethren to adopt a more feminist point of view on human rights but, as is made apparent later in this book,[61] she has had mixed success.

Many would argue that the most obvious trait of those who are appointed to the top UK court is their long immersion in traditional legal thought processes. The people

[56] Hale (2007) and (2001a). More generally, see Sumption (2012b); Rackley (2006).

[57] Hunter et al (2010). Of the 23 feminist judgments supplied for that book to supplement those issued in real cases, eight related to decisions of the House of Lords, six of which were human rights cases.

[58] For how feminists might view the European Convention on Human Rights, see Dembour (2006), Ch 7.

[59] Pateman (1987).

[60] eg MacKinnon (2007) and (2006); Brems (1997); Charlesworth et al (1991).

[61] See Ch 11 below, at 327.

appointed come to their appellate task as individuals who have already been socialized into acting in predictable ways when faced with arguments about what the law should be. They will bring to the job a mindset which, for instance, believes very much in the importance of the doctrine of precedent and the concept of Parliamentary sovereignty. They will have a shared view as to what qualifies as an authoritative argument in an appeal, what kind of empirical evidence is deserving of consideration, and how they should word their judgments so as to influence the future path of the law. They will, in short, be familiar with 'judicial discourse'.[62] Whether they will be prepared to look at how foreign courts have dealt with the kind of problem before them, or at what academic commentators have written about the matter, will also be determined by their previous experience as judges or lawyers who have focused on legal practice within the United Kingdom. If they have served some time as a legal academic they will have imbibed similar values, although mixed with these might be a more sceptical approach to tradition and a greater openness to change.

None of this is to deny that Justices will all be individuals with lives outside of the law.[63] They will be exposed to the plurality of influences that assail everyone from a variety of media outlets—even if their listening and viewing may be focused on Radio 4 and BBC 2, and their reading to *The Times*. But when sitting to hear appeals, when discussing with their colleagues what the result of appeals should be, and when composing their judgments, they are bound to be 'limited' by what is expected of them as holders of the office in question. They will not want to gain a reputation for being non-collegiate, nor for being someone who writes judgments incautiously. They will be conscious of their legacy and of the fact that what they write will be exposed to close scrutiny, if not by journalists then at least by practising lawyers (some of whom will be their former colleagues) and legal academics.[64] On some occasions what they say will be scrutinized by an international court too. Unlike their counterparts on the US Supreme Court, who are appointed for life, they know how long they may potentially serve on the country's highest court and can look forward in due course to a relaxing retirement. Just as importantly, unlike their American counterparts, they do not have clerks to assist them in the drafting of their judgments.

Life experience is particularly likely to influence Justices when they are confronted with human rights arguments, because those arguments will relate to what it is that every human being is entitled to expect from the state. The fact that all of the Justices will be of a certain age when appointed (the average age at appointment of those currently in post was 63) means that their approach to such arguments will be affected by long personal experience. Today's Justices will have begun attending primary school in the 1950s and will not have experienced military service, as many of their predecessors would have done, nor the pre-welfare state era. As adolescents, they will have lived through the sexual revolution of the 1960s and 1970s and will have benefited from free university education (even if prior to university they

[62] On which see Burton and Carlen (1979), Ch 5.

[63] A point well demonstrated on several occasions by Darbyshire (2011).

[64] However, Posner argues that academic critiques of judges have little impact on their behaviour: Posner (2008), Ch 8. For the view of Lord Bingham on judicial activism, see Bingham (2010).

attended private schools).[65] As lawyers they will have built up considerable financial security and numerous esteem indicators. They will have acquired significant legal experience, including perhaps as a lower level judge, before the Human Rights Act was enacted in 1998. Until then they will not have had the opportunity to plead, or adjudicate on, Convention rights. By the time they get to the Supreme Court their confidence should be riding high. They will most likely have endured a sharp drop in salary when first taking up a judicial appointment, but will have gained entitlement to a generous state-funded pension. The relative relaxation they enjoy at the appellate level through no longer having to sit through tedious evidence-gathering sessions in order to decide questions of fact will no doubt be much appreciated by most of them. They will be thinking that now is their chance to display their intellect on paper and to make a significant contribution to the development of the relatively new field of human rights law.

Influences on the processing of appeals

Human rights issues can arise in both civil cases and criminal cases, but no appeal can be heard in the Supreme Court unless express permission has first been granted. In civil cases, whether it is a lower court or the Supreme Court which is considering whether to grant permission to appeal, and with the exception of Scotland as already noted, the test applied is whether the case involves an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time. This is not a test laid down by Parliament: it is a creation of the Law Lords. It was not expressly set out in the Standing Orders or Civil Practice Directions of the House of Lords, but it is now included in the Practice Directions of the Supreme Court.[66] In criminal cases in England and Wales or Northern Ireland a similar system applies, with the difference being that before either court can consider whether permission to appeal should be granted the lower court must have issued a certificate stating that the case involves a point of law of general public importance.[67]

These idiosyncrasies of the system for seeking permission to appeal would not matter too much if there was greater clarity as to what is meant by 'an arguable point of law of general public importance'. But the Supreme Court, like the House of Lords before it, has refused to provide any kind of definition of the phrase. Contrary to its position regarding the use of benches of more than five Justices to hear appeals,[68] the Supreme

[65] Lord Neuberger notes that there may have been a change in judicial temperament concerning issues of social policy because 'yesterday's judges were children of the conventional and respectful 40s and 50s, whereas today's judges are children of the questioning and sceptical 60s and 70s': Neuberger (2011a), para 62.

[66] Practice Direction 3.3.3: 'Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal.'

[67] Criminal Appeal Act 1968, s 33(2).

[68] See n 12 above.

Court has not published any criteria indicating the sorts of considerations it will bear in mind when deciding if the test for granting permission has been satisfied. Usually the decisions are taken on the basis of documents only, in private deliberation by panels of three Justices. Very occasionally the Justices will call the parties to an oral hearing.[69] The Justices' decisions on applications for permission to appeal are announced without any reasons being given for them other than a statement that the test in the Practice Direction has or has not been met. The whole process remains one of the most opaque aspects of the Supreme Court's work and even seems to contradict the Court's own Practice Direction. This concludes by saying that '[t]he Appeal Panel gives brief reasons for refusing permission to appeal',[70] which surely implies that something beyond the earlier wording of the same Practice Direction will be supplied.

Notwithstanding this lack of transparency, it is hard to argue that it has had any negative impact on the readiness of the Supreme Court (or the House of Lords before it) to hear appeals concerning the protection of human rights. The proportion of all applications for permission to appeal which is granted each year is quite high, although it appears to be diminishing, being 47 per cent in 2009–10, 36 per cent in 2010–11, and 28 per cent in 2011–12.[71] Given the number of successful applications which involve human rights issues (almost one-third), there is very little evidence that novel human rights arguments are not getting an airing in the Supreme Court on account of a restrictive attitude on the part of permission to appeal panels.[72] There are some instances where permission to appeal to the House of Lords or the Supreme Court from decisions on human rights issues taken by a lower court has been refused, but very few of these stand out as examples of the law being left in a unacceptable state of uncertainty.[73]

[69] UKSC Annual Reports reveal that from October 2009 to March 2010 there were just two oral hearings; from April 2010 to March 2011 there were three and from April 2011 to March 2012 there were again two. That makes a total of seven oral hearings out of 612 applications received in a 30-month period (1.1%).

[70] See n 66 above. Some very recent Panel decisions have been slightly more informative.

[71] UKSC Annual Reports show that from October 2009 to March 2010 44 applications for permission to appeal were granted and 50 were refused; from April 2010 to March 2011 67 were granted, 117 were refused, and four had some other result; and from April 2011 to March 2012 64 were granted, 156 were refused, and five had some other result. For figures for the House of Lords between 2001 and 2005, see Dickson (2006a), 331. See too Shah and Poole (2009), and also Poole and Shah (2011), which examines the period 1994 to 2007, and the project by Stirton and Arvind (2011).

[72] UKSC Annual Reports do not classify appeals in accordance with the subject-matter they deal with, but 18 of the 57 cases decided by the Supreme Court in the legal year 2009–10 can be labelled as ones which involved human rights issues to some significant extent (taking that category to include cases on discrimination and entitlement to asylum). The figures for 2010–11 are 18 cases out of 60, and for 2011–12 they are 19 cases out of 58. Thus, 31% of all the cases decided by the Supreme Court in its short life to date have been human rights cases. The President of the Court estimates that human rights issues arise in about one quarter of the cases dealt with: Phillips (2012), 11. In its Annual Reports the Supreme Court summarizes a handful of cases which are 'particularly high profile'; of the 20 such cases summarized in the three reports so far, at least 14 could be classified as human rights cases.

[73] For an example of a pre-Human Rights Act decision by the Court of Appeal from which the Law Lords refused permission to appeal but which went to the European Court and resulted in a finding that a Convention right had been violated, see *R v Ministry of Defence, ex p Smith* [1996] QB 517, which led to *Smith and Grady v UK* (2000) 29 EHRR 548. For a post-Human Rights Act example, see *Smith v Buckland* [2007] EWCA 1318, [2008] 1 WLR 661, which led to *Buckland v UK* App No 40060/08, judgment of 18 September 2012.

Even after conceding the adventitiousness of the appeals process, we have to realize that the content of judgments issued by Supreme Court Justices, whether in human rights cases or in any other kind of case, is very largely determined by the arguments put before the Justices by counsel for each of the parties. In most instances the judgments will be structured around those arguments, with answers being given to the specific points raised by counsel. During the oral hearing of the appeal, Justices are free to raise arguments which counsel seem to have neglected, but they cannot suggest different grounds of appeal than those presented in the parties' lodged documents. Nor, of course, do the Justices hear in person from witnesses, even expert witnesses: they may occasionally appoint a barrister as *amicus curiae* to help guide them on the state of the current law, and they may allow expert or concerned parties to intervene both in writing and orally. If, in their judgments, the Justices rely on an argument which was neither thoroughly debated during the course of the oral hearing nor set out clearly in the written documents lodged for the appeal, there may be grounds for re-opening the appeal.[74] In the vast majority of cases the outcome will be determined by principles derived from 'binding' precedents, and the Supreme Court has made it clear that it will adopt the same position as the House of Lords regarding the need to follow previous decisions of the country's highest court unless there are exceptional reasons not to do so.[75] Justices may voice misgivings about the acceptability of the outcome they are adopting but nevertheless view themselves as constrained so to decide the case. In particular, they may see it as much more appropriate for elected politicians in Parliament to reform the law, not judges. Throughout this book we will encounter numerous instances of such judicial restraint.

Subsequent chapters

This introductory chapter has tried to show that the UK Supreme Court has wide-ranging opportunities to protect human rights because its jurisdiction is very broad. The top judges have been noticeably willing to grant permission for appeals to be heard on human rights issues and in many such appeals have chosen to sit as a bench of seven or even nine judges. The judges have displayed a strong desire to adopt an agreed approach, but dissents are still common. The men and women who reach these elevated judicial positions tend to be cut from the same cloth in that they have had similar experience of legal practice and are attuned to a form of legal reasoning which makes it difficult for them to be truly creative in their judgments.

[74] Following the Supreme Court's decision in the challenge by Julian Assange, of Wikileaks, to a request for his extradition (*Assange v Swedish Prosecution Authority* [2012] UKHL 22, [2012] 2 AC 471, his counsel complained that the decision was significantly influenced by the Court's reliance on the Vienna Convention on the Law of Treaties 1969, which she suggested had not been fully discussed during the appeal. Following further consideration of her arguments on this point, the Supreme Court unanimously refused to allow a further hearing and confirmed its original decision: see *Assange v Swedish Prosecution Authority (No 2)* [2012] 3 WLR 1. On the *Assange* case see Kerr (2012b).

[75] *Austin v Southwark London Borough Council* [2010] UKSC 28, [2011] 1 AC 355, [25] (per Lord Hope). See, more generally, Lee (2012).

Chapter 2 considers the way in which Supreme Court Justices conceptualize human rights, paying particular attention to the top court's reluctance to develop a category known as 'constitutional rights'. The approach of the common law to human rights is also critiqued, as is the Supreme Court's adherence to the *Ullah* (or 'mirror') principle concerning judicial activism and to the *Shabina Begum* (or 'outcome not process') approach concerning judicial assessments of public authorities' decisions affecting human rights. The chapter closes with a suggestion that the most appropriate way in which Justices could develop their conception of human rights is by focusing on the role that an apex court needs to play in a democracy founded on the rule of law.

The issues examined in Chapter 3 are the degree to which the Supreme Court is prepared to allow the Human Rights Act to operate retrospectively, the respect it accords to decisions of the European Court of Human Rights, the Court's preferred definition of 'public authority', the way in which Justices make use of their duty to interpret legislation as compatible with Convention rights if it is possible to do so, the occasions on which the top judges have issued declarations stating that legislation is incompatible with Convention rights, the extent to which the Court will allow public authorities to use the so-called 'primary legislation defence', the willingness of the Court to apply the Human Rights Act within private law, the remedies it is prepared to issue, and the approach of the Justices to applying the Act to actions taken abroad. It will be argued that on all of these issues, even bearing in mind the constraints imposed upon the top judges by the country's constitution, precedents, and traditional practices, they have shown themselves to be cautious and rather unimaginative.

Chapters 4 to 12 consider in detail the pronouncements by the House of Lords and Supreme Court on specific Convention rights, attempting to evaluate how supportive they are of arguments in favour of human rights, especially when compared with the views of judges in the European Court of Human Rights. Chapter 13 briefly draws some threads together to present an overall picture of where the UK Supreme Court currently stands in relation to international human rights standards, especially those contained in the European Convention.

2

The Supreme Court's Conception of Human Rights

Unless the sole source of the protection of individual rights is a democratically validated Bill of Rights, then we may be compelled to inhabit a Tower of Babel of conflicting rights theories.

(Lord Irvine of Lairg QC, 1996).[1]

Introduction

This chapter considers how the concept of human rights has developed in English law. It explains how the common law traditionally valued liberties or freedoms, framing these as basic consequences of the rule of law rather than as entitlements based on a concept of human rights. A close analysis is made of the extent to which, in modern times, judges have agreed to accord some rights the special status of 'constitutional rights', the conclusion being that the top court has conspicuously refused to adopt that categorization, despite the repeated urgings to do so from senior judges such as Sir John Laws and Lord Steyn. The impact of the Human Rights Act 1998 is then addressed. This legislation has revolutionized the way the country's top judges conceptualize human rights and has had the effect of internationalizing rather than constitutionalising the concept in UK law. But it is also arguable that the enactment of the Human Rights Act has corralled the Supreme Court Justices into thinking about human rights in a particular way, at once liberating them but at the same time stultifying them. Recognition is then given to the fact that the common law has long embraced what we now call human rights principles and that there is other legislation besides the Human Rights Act which deserves to be labelled as human rights legislation. Attention is also drawn to the potential impact of the EU's Charter of Fundamental Rights. Two key features of the way in which the top court has chosen to protect Convention rights in the United Kingdom are then critiqued, before an attempt is made to locate the Supreme Court's current approach to human rights within the wider debate on the meaning of the rule of law. The chapter suggests that the Supreme Court could go further in protecting human rights than it does at present and that the Justices need to be more assertive in stating what they believe the basis for human rights to be and what value those rights should be given in a modern democratic society.

Liberties, not rights

Lawyers throughout the United Kingdom are now so used to thinking about human rights claims that it is easy to forget that until comparatively recently the phrase was

[1] Irvine (2003b), Chs 1, 6. He was responding to Sir John Laws' Mishcon Lecture: Laws (1996).

not part of the common law's vocabulary at all. When the common law first blossomed, it was a system which based itself on the identification of wrongs which deserved to be remedied. So much so that, in the United States at least, some now argue that in the common law there is a 'fundamental right' to a remedy in relation to all the wrongs that are recognized by the law.[2] But the types of wrongs that were recognized in the common law—from the twelfth century onwards in England—were ones which occurred through the interaction of individuals in property or commercial transactions. In so far as the 'state' was an acknowledged player in people's lives at all, it was in the form of a keeper of the peace: the King's courts determined whether punishment should be imposed on people who had allegedly violated that peace by committing what in today's terms would be called criminal offences. The two principles underlying these manifestations of 'private' and 'public' law were, on the one hand, commutative justice (ie restoring protagonists to the position they were in before the wrong was committed) and, on the other, public order (ie ensuring that people could safely go about their lives without fear of attack). The former concept can be traced back to Aristotle and features prominently in the work of later philosophers such as Aquinas, Hobbes, and Rawls. The latter concept has even deeper roots, starting with the Babylonian Code of Hammurabi in about 1700 BC.

The history of the development of the concept of human rights on a worldwide level has been explored on many occasions by philosophers and legal historians. Micheline Ishay, for example, stresses the early influence of Greek and Far Eastern theologies. She does not go into details as to when and how the concept was articulated in the English legal system, preferring instead to explain how and why 'a universal ethics of rights' developed in the West rather than in the civilizations of India, China, or the Middle East.[3] During the period of the Enlightenment, she argues, three particular rights became embedded in Western political philosophy—the right to freedom of religion and opinion, the right to life, and the right to property.[4] As regards England, she highlights (but not to the extent that many English historians do) the significance of Magna Carta in 1215, citing it as the basis for the idea that no-one should be arrested, detained, outlawed, or banished 'unless by the lawful judgment of his peers and by the law of the land'.[5] That document is important not because it laid down a catalogue of what we would today call human rights but because its whole purpose was to impose limitations on the otherwise sovereign power—at that time vested in the monarch. Magna Carta did not give 'rights' to anyone, not even to the Barons with whom the Charter was agreed, but rather guaranteed some 'liberties' to freemen by requiring the King not to act arbitrarily. The document is therefore much more a foundation stone of 'the rule of law' than it is of 'human rights',[6] and even in that regard it harks back to previous documents whereby English monarchs had agreed to limit their powers—most notably the so-called Charter of Liberties which King Henry I drew up with the Barons

[2] Poole (2004).
[3] Ishay (2008), 66–75. The quote is from 67.
[4] Ibid, 75–99.
[5] Ibid, 85 and n 51. The quote is from clause 39 of Magna Carta.
[6] Irvine (2003a), reprinted in Irvine (2003b), Ch 15; also Irvine (2012) and Sales (2012). See too Laws LJ in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, [36].

in 1100. Nevertheless, Magna Carta has been accorded such a totemic role in the minds of common law lawyers that, whether it is historically accurate to regard it as such or not, the document must be viewed as a primary source of inspiration for human rights lawyers even today. This is partly because at the heart of the modern concept of human rights is the notion that the governments of nations cannot treat the people they govern in whatever manner they like: there are limits to those powers based on the principle that each individual has certain rights which must not be interfered with—unless there are clearly justifiable reasons for doing so.

England developed without writing down its 'constitution' in one comprehensive document. The nearest it came to doing so was in the seventeenth century when, in the aftermath of the two civil wars in 1642–46 and 1685–88, several crucial Acts were passed by Parliament, the ultimate victor in those wars. Amongst these were the Habeas Corpus Act 1679, the Bill of Rights 1689, and the Act of Settlement 1700. The 1679 Act re-enforced clause 39 of Magna Carta by insisting that, if someone was detained, the authorities responsible for the detention could be required to come before a court to explain the legal justification for the detention. This had already been confirmed by Parliament in an earlier Act,[7] and was in any event part of the common law, which of its own motion had developed the writ of *habeas corpus ad subjiciendum* many centuries earlier.[8] The remedy is clearly a means of protecting what we now call the right to liberty, but at that time, and for the next two-and-a-half centuries, it was not conceptualized as a human right by English judges, Parliamentarians, or legal writers. Clause 39 of Magna Carta is also seen as the progenitor of the right to trial by jury and has been extremely influential in securing a central place for that means of trial in both English and, even more so, American common law.[9] 'Liberty', the leading civil liberties organization in England and Wales, identifies the Assize of Clarendon of 1166 as 'the earliest ancestor of human rights protection',[10] because it paved the way for the abolition of trial by combat or by ordeal and their replacement with trial by jury.

The Bill of Rights 1689 is also not a human rights document in the modern sense, since again it focuses on restrictions placed on the Crown vis-à-vis Parliament.[11] Only indirectly does it protect ordinary individuals. It does so by preventing the Crown from exercising arbitrary power without parliamentary approval and by guaranteeing that no-one can be punished for petitioning the King. The closest it comes to guaranteeing what today would qualify as a human right is in Article 10, which states that 'excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted', a provision which was later inserted, almost verbatim, into the US Constitution.[12] In addition, Article 7 permits subjects of the Crown—so long as they

[7] Habeas Corpus Act 1640.

[8] Halliday (2010); Sharpe et al (2008); Jenks (1902). The Latin means 'you have the body to submit'.

[9] The Sixth and Seventh Amendments to the US Constitution (1791) guarantee jury trial in criminal and civil cases respectively.

[10] 'The History of Human Rights' available at <http://www.liberty-human-rights.org.uk/human-rights/human-rights/history-of-human-rights/index.php> (last accessed 4 December 2012).

[11] Lock (1989); Maer and Gay (2009). For Scotland, a separate Claim of Right Act was passed by the Parliament in Edinburgh in 1689. The Bill of Rights was never expressly extended to Ireland.

[12] Through the Eighth Amendment, which reads: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.

are Protestants—to keep weapons for their defence 'suitable to their condition, and as allowed by law', another provision which found its way, this time in a slightly amended form, into the US Constitution,[13] where it continues to be staunchly defended by the US Supreme Court today.[14] The Bill of Rights 1689 also lives on through Article 9, which provides that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[15] This had to be considered by the UK Supreme Court as recently as 2010, when three MPs who were charged with falsely claiming parliamentary expenses tried to argue that no court could look at that issue. A bench of nine Justices gave them short shrift, observing that Article 9 was limited to the protection of freedom of speech during parliamentary proceedings.[16]

So, what characterized the protection of what we now call human rights during the seventeenth and eighteenth centuries in England was principally the notion that the powers of rulers needed to be curtailed. Rather than concede that rulers, especially monarchs, had absolute control over everyone in their country, philosophers built on the idea that individuals had to be left with the freedom, or liberty, to do as they pleased. John Locke (1632–1704) is credited with developing the concept of 'the self', and its potential. In *An Essay Concerning Human Understanding* (1690), while not using the phrase 'human rights', Locke clearly laid the foundation stones for an approach to the study of society which maintained that granting people the opportunity to develop their own potential as individuals was the surest way of achieving a stable and peaceful society. Locke's political philosophy was very influential on John Stuart Mill (1806–73), who famously summed up his position by asserting that everyone should be free to act as they wished except to the extent that what they did harmed others.[17] He too did not express this view in terms of individuals having rights against the state, but he did claim that governments should not interfere unduly in the lives of individuals.

Does the Supreme Court recognize constitutional rights?

The absence of one single document encapsulating the constitution of the United Kingdom inevitably invites attempts to list those Acts of Parliament which do nevertheless have a constitutional status. Such a status means, at its simplest, that these are the Acts which make provision for some of the basic building blocks of how the United Kingdom is run. But that alone would not mean very much in practice. The whole point of a constitution is that it has a higher role to play than other laws, in the sense that it is deserving of greater respect. A possible, but not essential, corollary to that respect is

[13] Through the Second Amendment, which reads: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'.

[14] *District of Columbia v Heller* 554 US 570 (2008); *McDonald v Chicago* 561 US 3025 (2010). In the United Kingdom, very extensive laws have been enacted to curtail people's right to keep weapons, but Art 7 of the Bill of Rights has not been repealed: Maer and Gay (2009), 5.

[15] Modern spellings have been substituted here.

[16] *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684. The compatibility of Art 9 with the European Convention on Human Rights was affirmed by the European Court in *A v UK* (2003) 36 EHRR 51.

[17] He develops this 'harm principle' in Ch 1 of *On Liberty* (1859). For a judicial tribute to Mill, see Arden (2009).

the principle that a constitutional document should be more difficult to change than other laws.

In recent years a few English judges have yielded to the temptation to attribute to some Acts of Parliament a constitutional status in the sense just mentioned. Thus, in 2002, when giving judgment in a case about whether Unit of Measurement Regulations issued in 1994 under an authority conferred by the European Communities Act 1972 could amend the Weights and Measures Act 1985, Laws LJ explained that the 1972 Act should be viewed as a 'constitutional Act'.[18] He categorized a constitutional Act as one which either:

> (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.[19]

He added that it was difficult to think of an instance of (a) that was not also an instance of (b) and as examples of constitutional Acts he gave Magna Carta, the Bill of Rights 1689, and several later Acts.[20] The feature which distinguished a constitutional Act from an ordinary Act, he maintained, was that it could not be subject to the doctrine of 'implied repeal', according to which a later Act which seems to be inconsistent with an earlier Act must be taken to have repealed or amended the earlier Act to the extent of the inconsistency:

> For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual—not imputed, constructive or presumed—intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.[21]

During his time as Lord Chief Justice of England and Wales (2000–05), Lord Woolf of Barnes also described Magna Carta as the first statute which has 'a special constitutional status'[22] and he listed the others as the Petition of Right 1628,[23] the Habeas

[18] *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin, [2003] QB 151, [62]. Laws LJ also expounded his theory of constitutional rights in several articles: Laws (2008), (2003), and (1996).

[19] Ibid.

[20] The Act of Union (it is not clear whether he meant the 1707 Act which united England and Wales with Scotland, or the 1800 Act which united those nations with Ireland), the Reform Acts (presumably those of 1832, 1867, and 1884, all of which considerably enlarged the franchise—but why not then mention the Representation of the People Act 1918 and the Representation of the People (Equal Franchise) Act 1928, both of which extended the franchise to women?), the Human Rights Act 1998, the Scotland Act 1998, and the Government of Wales Act 1998 (but why omit the Northern Ireland Act 1998?).

[21] *Thoburn*, n 18 above, [63].

[22] Woolf (2005). In 1770, the then Prime Minister, William Pitt the Elder, referred to Magna Carta, the Petition of Right and the Bill of Rights as forming 'the bible of the English Constitution' (speech in the House of Commons, 22 January 1770).

[23] This was a resolution by both Houses of Parliament, eventually signed by King Charles I, which set out certain liberties of the subject that the king was prohibited from infringing without parliamentary approval. These included the liberties not to be taxed, not to have to provide accommodation for soldiers, and not to be imprisoned without cause. The document also restricted the use of martial law. It is still on the statute book. See Reeve (1986).

Corpus Act 1679, the Bill of Rights 1689, and the Act of Settlement 1700. However, even before Laws LJ and Lord Woolf attempted to systematize constitutional Acts, several other English judges had used the expression 'constitutional rights'. Laws LJ himself cited five such cases in the *Thoburn* case. These will now be examined to see if they truly support the proposition that the common law recognizes a category of constitutional rights. Three of them were decisions of the House of Lords.

Pre-Thoburn authorities

The first in time of these 'authorities' is *Derbyshire County Council v Times Newspapers Ltd*,[24] decided in 1993, but in fact Lord Keith, who gave the only judgment for the House of Lords in that case, did not go as far as Laws LJ suggests. Lord Keith merely agreed with the dictum of Lord Goff in *Attorney General v Guardian Newspapers Ltd (No 2)* (one of the Spycatcher cases)[25] that 'in the field of freedom of speech there is no difference in principle between English law on the subject and Article 10 of the [European Convention on Human Rights]'.[26] In the *Derbyshire* case the Lords held not only that 'there is no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to public interest that they should have it',[27] an important conclusion but not one which substantiates the intimation by Laws LJ that the Lords considered the right of newspapers to freedom of expression as a 'constitutional right'.

Three months later the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Leech* did use the phrase 'constitutional right'.[28] The case turned on the validity of a Prison Rule[29] which permitted a prison governor to read and stop any letter between a prisoner and his or her legal adviser if it was objectionable or of inordinate length, provided no legal proceedings involving the prisoner were pending at the time. Steyn LJ, as he then was, giving the judgment of the court, held that the validity of the Prison Rule depended on whether the authority to make it was necessarily implied by the parent Act, which in turn depended on how fundamental the right was that was interfered with by the Prison Rule and how drastic the interference was. Here there had been interference with the citizen's 'civil rights in respect of correspondence', especially the right to have confidential communication with a solicitor.[30] These were 'vested common law rights' and there was a presumption that legislation did not interfere with them.[31] Of even greater importance, continued Steyn LJ, was the principle that every citizen had 'a right of unimpeded access to a court'.[32] Lord Wilberforce, in

[24] [1993] AC 534.
[25] [1990] 1 AC 109, 283–4. See Ch 10 below, at 283.
[26] [1993] AC 534, 551G.
[27] Ibid, 549B.
[28] [1994] QB 198.
[29] Prison Rules 1964, r 33(3), made under the Prison Act 1952, s 47(1), which authorized the making of rules for, amongst other things, 'the regulation and management of prisons…and control of persons required to be detained therein'.
[30] [1994] QB 198, 209D.
[31] Ibid, 209H.
[32] Ibid, 210A.

an earlier case, had described this as a 'basic right',[33] but Steyn LJ thought it was more significant than that: 'Even in our unwritten constitution it must rank as a constitutional right'.[34] Moreover, in support of the idea that an inseparable part of the right of access to a court is a prisoner's unimpeded right of access to a solicitor to seek advice about possible civil proceedings, the judge cited the first decision ever issued by the European Court of Human Rights in which the United Kingdom was held to have violated the European Convention, *Golder v UK*.[35] Likewise, in holding the Prison Rule to be *ultra vires*, the Court of Appeal noted that the recent decision of the European Court in *Campbell v UK*,[36] which concerned a prisoner's correspondence rights under Scottish law, 'reinforces the conclusion arrived at in the *Leech* case on the basis of domestic jurisprudence'.[37]

The Court of Appeal's decision in *Leech* was applied by the Divisional Court in *R v Lord Chancellor, ex parte Witham*,[38] where almost the same issue arose. The Lord Chancellor had made subordinate legislation which, the applicant argued, deprived him of his constitutional right of access to the courts because it required him to pay a fee of £500 if he wished to claim damages for defamation of more than £10,000: being unemployed, with no savings, Mr Witham could not afford to start proceedings to protect his reputation. Laws J, who was himself a member of the Court of Appeal on this occasion, endorsed the decision in *Leech*, asserted that 'the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg',[39] and declared that the right of access to justice was an even higher right than that to freedom of expression: 'the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage'.[40] Earlier the judge had explained the concept of a constitutional right in much the same way as he was to do five years later in *Thoburn*, and he added:

> [A]ny such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.[41]

The fourth of the cases cited by Laws LJ in *Thoburn* to support the theory of constitutional rights—and the second to be decided by the House of Lords—was *Pierson v Secretary of State for the Home Department*,[42] where a challenge had been made to the power of the Home Secretary to increase the tariff period for a life-sentenced prisoner which had already been set by a previous Home Secretary. By three to two the Law Lords decided that such a power could not lawfully exist because in exercising what was essentially a sentencing function the Home Secretary was bound by the same common law constraints as are imposed on judges. One of those constraints is the principle of

[33] In *Raymond v Honey* [1983] 1 AC 1, 13A.
[34] [1994] QB 198, 210A.
[35] (1975) 1 EHRR 524.
[36] (1993) 15 EHRR 137.
[37] [1994] QB 198, 217F.
[38] [1998] QB 575.
[39] Ibid, 585D. [40] Ibid, 585F. [41] Ibid, 581E. [42] [1998] AC 539.

substantive fairness, which means that once a sentence has been pronounced it cannot be increased.[43] The three Law Lords in the majority differed slightly in their reasoning. For Lord Goff the unfairness lay in the fact that the Home Secretary's new policy was being applied retrospectively. For Lord Hope the unfairness lay in the fact that a person was being punished twice for the same offence. It was Lord Steyn who stated the broadest of justifications for the decision—the principle of legality.[44] He took that phrase from *Halsbury's Laws*,[45] but noted that Dicey himself had referred to Parliamentary sovereignty needing to be exercised 'in a spirit of legality'.[46] Lord Steyn cited two recent cases as examples of where the House of Lords had held that the Home Secretary, when fixing a prisoner's tariff, had to observe the procedural safeguards provided by the common law,[47] and he then cited two further cases where the House of Lords had held that the Home Secretary in one case[48] and the Court of Appeal in the other[49] had to apply Acts of Parliament in ways that protected 'substantive basic or fundamental rights'.[50] In the first of these cases the right in question was again a prisoner's right to have unimpeded access to a court and in the second it was the right of a convicted person to appeal against a sentence on the basis that the court passing the sentence had no power to do so.

The decision in *Pierson* is a reassuring one from a human rights point of view, even if the reasons given by the majority judges were all slightly different. But the fact that two Law Lords dissented gives pause for thought. Lord Browne-Wilkinson's dissent was based on his conclusion that there was no general common law principle that once a punishment has been imposed it must not be subsequently increased.[51] His Lordship admitted that 'the law leans against any increase in penalty once imposed' but he could find no authority for a general principle that such an increase was contrary to law.[52] Lord Lloyd agreed with Lord Browne-Wilkinson on this point[53] and added that, even if such a general principle of law did exist, it did not apply in this case because what the Home Secretary was doing was not fulfilling a sentencing function but merely giving a provisional indication of the earliest date for referring a prisoner's case to the Parole Board.[54] If two senior Law Lords did not believe that a principle favoured by their three colleagues even existed, it does somewhat undermine any suggestion by those colleagues that the principle was basic, fundamental, or constitutional. Moreover, in the court below, where the judgment was delivered by Sir Thomas Bingham MR, there was complete unanimity that the Home Secretary had not acted unlawfully.

[43] This had been a principle of the common law but was given statutory recognition by the Courts Act 1971, s 11(2), a provision which was replaced by the Supreme Court Act 1981, s 47(2) and then by the Powers of Criminal Courts (Sentencing) Act 2000, s 155(1).

[44] Lord Hope did advert to this principle, but only fleetingly (618h). See too Lakin (2008).

[45] 4th edn reissue, vol 8(2), para 6.

[46] *Introduction to the Study of the Law of the Constitution* (10th edn, 1978), 414.

[47] *R v Secretary of State for the Home Dept, ex parte Doody* [1994] 1 AC 531; *R v Secretary of State for the Home Dept, ex parte Venables* [1998] AC 407.

[48] *Raymond v Honey* [1983] AC 1.

[49] *R v Cain* [1985] AC 46.

[50] [1998] AC 539, 589B.

[51] Ibid, 573F.

[52] Ibid, 576D.

[53] Ibid, 578D–579B.

[54] Ibid, 579F–582E.

In the last of Laws LJ's five 'authorities', *R v Secretary of State for the Home Department, ex parte Simms*,[55] Lord Steyn was again able to apply his favoured principle of legality when holding that the Home Secretary's blanket ban on prisoners giving oral interviews to journalists which could then be published was unlawful. He did not think that the relevant Prison Service Standing Orders were *ultra vires*,[56] but the way in which the Home Secretary was applying them ran counter to 'a fundamental and basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner'.[57] In a passage which has been cited by judges in the top court on several later occasions,[58] Lord Hoffmann endorsed the use of the principle of legality in this context:

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words [of Parliament] were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[59]

Lord Hoffmann went on to point out that the Human Rights Act 1998 will supplement 'the principles of fundamental human rights which exist at common law'[60] and he stressed that the significance of the House's decision in *Simms* was that the principle of legality applies to subordinate legislation as much as to Acts of Parliament.[61] Lords Hobhouse and Millett, traditionally more conservative in their approach to the law, also found the Home Office's policy to be unlawful because it was not only 'unreasonable and disproportionate'[62] but also 'indiscriminate'.[63] Lord Browne-Wilkinson, who had dissented in *Pierson*, this time concurred with Lord Steyn.

There are several other cases where judges referred to particular rights as constitutional rights but to which Laws LJ made no reference in *Thoburn*. As early as 1981, in an arbitration case, Lord Diplock said that 'every citizen has a constitutional right of access [to courts of justice] in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant'.[64] In two other House of Lords' cases Lord Steyn referred to the right to free speech as a constitutional right,[65] yet in a later case Simon Brown LJ, as

[55] [2000] 2 AC 115.
[56] Ibid, 130G.
[57] Ibid, 130E.
[58] See eg *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534, discussed in Ch 3 below, at 71.
[59] [2000] 2 AC 115, 131F–G.
[60] Ibid, 131G.
[61] Ibid, 132B.
[62] Ibid, 142G (per Lord Hobhouse).
[63] Ibid, 146E (per Lord Millett).
[64] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn* [1981] AC 909, 977, citing Lord Kilbrandon in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1133A–B.
[65] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 207G; *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 297F. Lord Steyn said that '[b]y categorising this basic and fundamental right as a constitutional right, its higher normative force is emphasised'.

he then was, commented that it is one thing to say that the media's right to free speech is 'of a higher order' than the right of an individual to his or her good reputation, but another thing 'to rank it higher than other basic rights'.[66]

Having reviewed the authorities prior to *Thoburn*, it is clear that the category of 'constitutional rights' so favoured by Laws LJ is not one that is well supported by precedent at the highest level. *Leech* and *Witham*, where the concept was most warmly endorsed, are decisions of the Court of Appeal and Divisional Court respectively. In *Pierson*, Lord Steyn, as he had by then become, promoted 'the principle of legality' but talked of 'substantive basic or fundamental rights' rather than of 'constitutional rights', and two of the other Law Lords disagreed even with that conclusion. In *Simms*, both Lord Steyn and Lord Hoffmann reaffirmed the principle of legality but again talked only of 'basic' or 'fundamental' rights.

Post-Thoburn authorities

Could it be, however, that even though Laws LJ's concept had little or no support at the highest judicial level at the time he decided *Thoburn*, it has nevertheless gained a foothold in subsequent years? Is there any post-*Thoburn* authority to suggest that the House of Lords, and hence the Supreme Court, has recognized the concept of 'constitutional rights' within the common law? The answer to these questions is no.

Laws LJ himself did try to entrench his notion. Just a month after giving judgment in *Thoburn* he adopted a similar stance in *R (ProLife Alliance) v BBC*,[67] where the applicant was challenging the BBC's refusal to include certain vivid images of aborted foetuses in an election broadcast. In upholding the challenge, Laws LJ asserted that the courts' special responsibility to the public as the constitutional guardian of freedom of political debate had its origins in the fact that 'the courts are ultimately the trustees of our democracy's framework'[68] and he added: 'this view is consonant with the common law's general recognition, apparent in recent years, of a category of fundamental or constitutional rights', amongst which he numbered the right to freedom of expression.[69] When the *ProLife* case went to the Lords, however, the decision of the Court of Appeal was overturned on the basis that it was no part of the court's function to conduct its own balancing exercise regarding the taste, decency, and offensiveness of a party election broadcast.[70] There was no ringing endorsement of Laws LJ's high-sounding principle, partly because ProLife Alliance conceded that the restriction on offensive material was not in itself an infringement of its right to freedom of expression under Article 10 of the European Convention, the only issue then being whether the BBC had applied the right standard when applying that restriction.[71] On that issue Lord Nicholls stressed

[66] *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] Ch 650, [54]. The decision of the Court of Appeal was reversed by the House of Lords: [2004] UKHL 44, [2005] 1 AC 253. In *Kiam v Neil (No 2)* [1996] EMLR 493, 507–8, Beldam LJ said that there is a constitutional right to jury trial in a claim for defamation. This too was not cited by Laws LJ in *Thoburn*.

[67] [2002] EWCA Civ 297, [2004] 1 AC 185, 191.

[68] Ibid, [36].

[69] Ibid.

[70] [2003] UKHL 23, [2004] 1 AC 185. See Ch 10 below, at 300.

[71] Ibid, [10] (per Lord Nicholls), [91] (per Lord Hoffmann), and [131] (per Lord Walker).

that it was not legitimate for the Court of Appeal to carry out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. Parliament had already decided where that balance should be struck.[72] Lord Hoffmann agreed with Lord Nicholls, and cited three paragraphs from an academic's article to support his position.[73] Lord Walker, likewise, was persuaded that the broadcaster's decision in this case had to be respected, although he admitted to having fluctuated on the matter.[74]

What lies at the bottom of this difference of opinion between Sir John Laws on the one hand and the majority of Law Lords on the other is a clash of views over the centrality of the concept of human rights in English law. For Sir John it is at the heart of the common law and must indirectly affect even Parliament's sovereignty; for Lords Nicholls, Hoffmann, and Walker it is very much secondary to the power of Parliament to impose standards of taste and decency. Nevertheless, it is possible to agree with Sir John Laws' stance while still not approving of the concept of 'constitutional rights'. To this author the dissenting judgment of Lord Scott in *ProLife Alliance* has much to commend it: he found that the broadcaster's decision to reject the party election broadcast was unreasonable within the post-Human Rights Act version of the *Wednesbury* test, because the conclusion reached was not one to which, 'paying due regard to the Alliance's right to impart information about abortions to the electorate subject only to what was necessary in a democratic society to protect the rights of others', a reasonable decision-maker could have come.[75]

In *R (McCann) v Crown Court at Manchester*[76] there was a throw-away reference by Lord Steyn to the constitutional right to a fair trial in an appeal dealing with whether an application for an anti-social behaviour order was a criminal or a civil proceeding and what standard of proof should be applied in such an application. A week later the same judge referred to the newspapers' right of free speech as a constitutional right under both domestic law and the European Convention on Human Rights.[77] A further opportunity to endorse and develop the notion arose in an appeal from the Court of Appeal in Northern Ireland, *Cullen v Chief Constable of the Royal Ulster Constabulary*.[78] Their Lordships had to decide whether a detainee's right of access to a solicitor was such that, if violated, a claim for damages should be allowed. By three to two they held that it was not, with Lords Bingham and Steyn issuing a joint dissenting opinion, a very rare phenomenon in the history of the House of Lords. In the course of their opinion they noted that there were cases in the United States, Ireland, and Canada in which damages had been obtained for the breach of this right. In the Court of Appeal in Northern Ireland, Carswell LCJ (who was soon to become a Law Lord himself) had distinguished those decisions on the basis that they dealt with constitutional provisions,

[72] Ibid, [16].
[73] Ibid, [50], citing Geddis (2002), 621.
[74] Ibid, [141]. Lord Millett, who at [82] simply concurred with Lord Nicholls, also admitted to having been for a long time of the contrary view.
[75] Ibid, [94]–[95].
[76] [2002] UKHL 39, [2003] 1 AC 787, [29].
[77] *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024, [38].
[78] [2003] UKHL 39, [2003] 1 WLR 1763.

but Lords Bingham and Steyn, citing Lord Wilberforce's description of the right of access to justice as 'a basic right',[79] said that Lord Carswell's distinction was 'fragile'.[80] They were certainly prepared to categorize the right of access to a solicitor as 'a fundamental right'.[81] Their three colleagues, on the other hand—Lords Hutton, Millett, and Rodger—were not persuaded, although Lord Millett did categorize the right as 'a quasi-constitutional right of fundamental importance in a free society'.[82] Lord Rodger doubted whether it could be a constitutional right because Parliament had chosen to confer different rights of access to a solicitor on persons detained in Scotland from those conferred on persons detained in England, Wales, or Northern Ireland.[83] The decision of the majority was therefore another body blow to the efforts being made to confer full common law status on 'constitutional rights'.

In *D v Home Office*[84] the Court of Appeal confirmed that asylum-seekers detained by immigration officers under the Immigration Act 1971[85] still had the right to access a court in order to seek protection for their right to liberty. Brooke LJ, with whom the other two judges concurred, ended his detailed judgment by saying that 'the philosophy of human rights law, and the common law's emphatic reassertion in recent years of the importance of constitutional rights' drove inexorably to the conclusion the court had reached.[86] Despite this rhetorical support for the concept, the coffin lid on constitutional rights was well and truly screwed down three years later in the key case of *Watkins v Secretary of State for the Home Department*,[87] where the significance of labelling a right as 'a constitutional right' was squarely before the House of Lords. The case again involved a scenario where a prisoner's correspondence with his legal advisers had been opened and read by prison staff. The prisoner claimed damages under the tort of misfeasance in public office. The Court of Appeal (including Laws LJ) allowed the claim, ruling that if a constitutional right had been violated then damages could be awarded under this tort even though the claimant could not prove that he had suffered any actual loss.[88] It granted him nominal damages (£5 against each of the three prison officers involved) and remitted the case to the county court for a decision on whether exemplary damages should be awarded. But the House of Lords overturned the Court of Appeal's decision. The Law Lords were not prepared to create an exception to the established rules governing this tort so as to accord some special status to constitutional rights. They said that to do so would lead to boundary disputes over which rights should qualify as constitutional rights and, in any event, since the enactment of the Human Rights Act 1998, it was reasonable to infer that Parliament had

[79] In *Raymond v Honey* [1983] 1 AC 1, 13A. They also cited the *Leech* case (n 28 above).
[80] [2003] 1 WLR 1763, [18]. See too Lord Steyn's Brian Dickson lecture in Ottawa: Steyn (2004).
[81] Ibid.
[82] Ibid, [67] and [71].
[83] Ibid, [87]. The Scottish law was later held to violate Art 6 of the ECHR: *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601, which led to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.
[84] [2005] EWCA Civ 538, [2006] 1 All ER 183.
[85] Schedule 2.
[86] [2006] 1 All ER 183, [130].
[87] [2006] UKHL 17, [2006] 2 AC 395.
[88] [2004] EWCA Civ 966, [2004] 4 All ER 1158. The main judgment was given by Brooke LJ.

intended constitutional rights to be protected in the ways laid out in that Act rather than through the development of parallel remedies.[89] It was Lord Rodger who most directly addressed the constitutional rights theory of Laws LJ. Having explained that it does not really matter whether the adjective 'basic', 'fundamental', or 'constitutional' is used, since what counts is the importance of the right in question, he continued:

> The term 'constitutional right' works well enough, alongside equivalent terms, in the field of statutory interpretation. But, even if it were otherwise suitable, it is not sufficiently precise to define a class of rights whose abuse should give rise to a right of action in tort without proof of damage. Moreover, any expansion to cover abuse of rights under 'constitutional statutes', as defined by Laws LJ in *Thoburn v Sunderland City Council*, would carry with it similar problems of deciding which statutes fell within the definition. Even supposing that these could be resolved, it is by no means clear that the abuse of 'constitutional rights' or rights under 'constitutional statutes' should necessarily attract a remedy which would be denied for the abuse of other important rights… Most of the references to 'constitutional rights' are to be found in cases dealing with situations before the 1998 Act brought Convention rights into our law. In using the language of 'constitutional rights', the judges were, more or less explicitly, looking for a means of incorporation avant la lettre, of having the common law supply the benefits of incorporation without incorporation. Now that the Human Rights Act is in place, such heroic efforts are unnecessary: the Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights, albeit not one tailor-made for this country.[90]

Watkins, decided in 2006, should have marked the end of attempts to develop a concept of constitutional rights. The House of Lords found the category to be both impracticable and unnecessary.

Nevertheless, the concept has persistently re-emerged from time to time. In *Seal v Chief Constable of South Wales*[91] Baroness Hale (dissenting, alongside Lord Woolf) referred to the right of access to the courts as 'a fundamental constitutional right' and, when arguing his client's case in the Court of Appeal in *A v HM Treasury*, Rabinder Singh QC, as he then was, asserted that, because the right of access to a court was a constitutional right, it could not be taken away save by express words in a statute.[92] Likewise, in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*[93] Sir Sydney Kentridge QC argued on the basis of Magna Carta[94] that the right of abode of the Chagos Islanders was a fundamental constitutional right, a position which Laws LJ had himself predictably asserted at an earlier stage in the same litigation.[95] Lord Hoffmann, however, thought that the very fact that Magna Carta acknowledged that

[89] Lord Bingham, at [2006] 2 AC 395, [26], added that it would be inappropriate for the judges to declare a solution to a problem which was already being investigated by the Law Commission.

[90] Ibid, [62] and [64]. Lord Walker agreed.

[91] [2007] UKHL 31, [2007] 1 WLR 1910, [38].

[92] [2008] EWCA Civ 1187, [2010] 2 AC 534, 545, [114].

[93] [2008] UKHL 61, [2009] 1 AC 453. See Elliott and Perreau-Saussine (2009).

[94] Chapter 29, which reads (in part): 'No freeman shall be taken, or imprisoned… or exiled, or any otherwise destroyed… but by the lawful judgment of his peers, or by the law of the land.'

[95] [2001] QB 1067 (DC), [39]. See too Lunn (2012).

the right not to be exiled could be qualified 'by the law of the land'[96] meant that a citizen's common law right to enter and remain in the United Kingdom whenever and for as long as he or she pleased[97] did *not* qualify for constitutional status: 'The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right'.[98] That is clearly taking the phrase to mean something more than what Laws LJ takes it to mean, for Laws LJ has always admitted that constitutional rights *can* be abrogated by express words of Parliament.[99] In *Bancoult* Lords Rodger and Carswell reached the same ultimate conclusion as Lord Hoffmann (namely, that denying the Islanders their right of abode was not unlawful) and they did not see the right as constitutional. Lord Carswell conceded that '[t]he desire to be able to remain in one's homeland is so deeply ingrained in the human psyche that the right not to be exiled could readily be regarded as fundamental', but he added that it was not 'an inalienable constitutional right'.[100] Lords Bingham and Mance dissented in this case, but only the latter said that the Crown's subjects in the United Kingdom had a fundamental constitutional right of abode in the United Kingdom[101] and that people who became subjects of the Crown in other parts of the world acquired the like constitutional right of abode in that territory.[102] That presumably remains a minority view amongst the current Supreme Court Justices. Few academic commentators persist in using the phrase 'constitutional rights' in relation to the United Kingdom,[103] but there is still a lively debate as to the extent to which UK public law should be viewed as resting on a bed of 'constitutionalism', a term which embraces human rights but much else besides.[104]

The impact of the Human Rights Act 1998

Bancoult was the last opportunity granted to the House of Lords to fully endorse the concept of constitutional rights, but it did not grasp it. Nor has the Supreme Court done so in the intervening years. What instead has dominated the way in which judges in those courts conceive of human rights is the Human Rights Act 1998. There are two main reasons for this.

[96] [2009] 1 AC 453, [43].

[97] Citing *R v Bhagwan* [1972] AC 60.

[98] [2009] 1 AC 453, [45]. A subsequent application to Strasbourg was declared inadmissible: *Chagos Islanders v UK* App No 35622/04, decision of 20 December 2012.

[99] In *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, [92], Lord Scott seems to have preferred Laws LJ's definition: 'There are not, under English domestic law, any fundamental constitutional rights that are immune from legislative change'.

[100] [2009] 1 AC 453, [123] et seq.

[101] Ibid, [151].

[102] Ibid, [155].

[103] eg Knight (2011); Möller (2009), though even he refers mostly to US and German court decisions.

[104] Hickman (2010) and (2005a), where he argues for the Human Rights Act to be interpreted on the basis of an approach which favours a 'strong form of constitutional dialogue'; this is basically a Diceyan approach, falling somewhere between 'rights absolutism' and 'principle-proposing dialogue'. See too Kavanagh (2011), (2009a) and (2009b); Murkens (2009), who argues that the thinking about constitutionalism has to date been woolly and that the concept could be dispensed with altogether; Dickson (2006b); Juss (2006); Poole (2004); Waldron (1993).

The first reason is that, because the Act enshrines in the law of all parts of the United Kingdom many of the rights set out in the European Convention on Human Rights, it encapsulates an approach to human rights which goes beyond the common law's approach. At one bound the Act moves the United Kingdom from a situation where there was great uncertainty over the number and extent of the rights which could be claimed against the state to one where considerable precision was given not just to the rights themselves but also to the categories of claimants who can assert them, the categories of authorities against which they can be claimed, and, most importantly of all perhaps, the conditions that must be satisfied if the rights are to be lawfully restricted. By buying into a treaty-based catalogue of rights aimed at avoiding the kind of mistreatment of citizens which contributed so markedly to the outbreak of the Second World War, the United Kingdom internationalized rather than constitutionalized its system for protecting fundamental rights and, for the first time, labelled all of those rights as 'human rights'.[105] While there is no express reference in the Human Rights Act to the Preamble to the European Convention, which makes it clear that the motivation for the Convention was the Council of Europe's desire to enforce certain of the rights in the Universal Declaration of Human Rights of 1948, section 2 of the Act requires a court in the United Kingdom, when determining a question which has arisen in connection with a Convention right, to 'take into account' the views expressed in the decisions of the European Commission and Court of Human Rights. Article 31 of the Vienna Convention on the Law of Treaties 1969 also requires a treaty to be interpreted 'in the light of its object and purpose' and the context is defined as including the preamble to the treaty.[106] Given the background to the European Convention, and the absence of a written constitution for the country, it is simply unnecessary, and possibly disadvantageous, for the United Kingdom to develop a parallel category of constitutional rights.

The second reason for the 1998 Act's current dominance is that, far from merely stating that the Convention rights are to be part of UK law, the Act is quite specific as regards the powers and duties it bestows. Apart from the duty imposed by section 2, mentioned above, section 3(1) provides that:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

It is important to note that this duty is imposed not just on courts. It is binding on anyone who has to interpret, apply, or enforce legislation. The duty is supplemented by a power conferred by section 4(2), which is specifically conferred on courts at the High Court level or above:

> If the court is satisfied that [a provision of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.

Section 4(4) confers a similar power in relation to a provision of subordinate legislation if it has been made in the exercise of a power conferred by primary legislation

[105] Bates (2012) argues that, over time, British sovereignty has been conceded to the European Court of Human Rights. For a constitutional perspective, see Allan (2006b).

[106] Article 31(1) and (2).

which itself prevents removal of the incompatibility.[107] By section 4(6), neither kind of declaration affects the validity, continuing operation or enforcement of the provision in question, nor is it binding on the parties to the proceedings in which the declaration was made.

Much of the literature on the Human Rights Act in the years since its enactment has focused on the way in which sections 3 and 4 have been applied.[108] But the Act contains many other important provisions which affect the way in which human rights are protected in the United Kingdom. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right and section 7(1) allows a person who is or would be a victim of that unlawful act to bring proceedings against the authority or to rely on the Convention right in any other proceedings. By section 8(1) a court which finds an act of a public authority to be unlawful 'may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. Section 10(2) allows a government minister (with Parliament's approval) to remedy a declared incompatibility[109] by making an order amending the legislation in question. Section 12(4) requires a court to have particular regard to the importance of the Convention right to freedom of expression when it is asked to grant any relief which might affect the exercise of that right, and section 13(1) provides the same in relation to the right to freedom of thought, conscience, and religion when a court is determining any question which might affect the exercise of that right by a religious organization.

It is clear that a whole new regime for the protection of human rights was put in place by the 1998 Act.[110] The next chapter of this book looks in detail at how the country's top court has applied that regime. The architects of the Act, as the quotation from Lord Irvine at the start of this chapter illustrates, seemed to view the Act as providing the sole source and rationale for human rights protection in the United Kingdom. In fact, it is incorrect to think that there are no other regimes for protecting human rights under UK law. For a start, section 11 of the Act explicitly states that a person's reliance on a Convention right does not restrict his or her other rights or freedoms conferred 'by or under any law having effect in any part of the United Kingdom', or the right to make any claim which could be made apart from under sections 7 to 9 of the Act. For that matter, the European Convention itself recognizes that states are free to guarantee other human rights and fundamental freedoms under their national laws or through

[107] This must presumably be read in a way which is consistent with s 6(2) of the Act, which provides a defence to a public authority accused of acting incompatibly with a Convention right if it was acting as a result of provisions made under primary legislation which itself cannot be read or given effect in a way which is compatible with Convention rights. See too Ch 3 below, at 83.

[108] eg Leyland (2012) 223–40; Brady (2012), noting a divergence between UK and Irish practice; Kavanagh (2009a), (2009b), (2006), (2005), (2004); Arden (2009), where a 'dynamic' as opposed to an 'agency' model of interpretation is advocated, and (2004); King (2008), who believes that judicial restraint is a necessary corollary to the doctrine of proportionality; Hickman (2005a); Ekins (2003), arguing that judges should not have the final say in human rights adjudication because of the many moral and political choices that have to be made.

[109] This includes not just declarations made under s 4 but also findings of incompatibility made by the European Court of Human Rights: s 10(1)(a) and (b).

[110] Gearty (2010) admits to changing his initial view that the Human Rights Act was not a good idea. He greatly admires the judges' performance (at 584). For dissenters, see Ewing (2004) and Ewing and Tham (2008).

other treaties.[111] It follows that any attempt to set out the attitude of the UK Supreme Court to human rights law must embrace sources other than the Human Rights Act. Those sources include the common law, but also other legislative sources. It is useful at this juncture to cast a glance at how those areas of law have developed their approach to human rights.

Human rights under the common law

The common law does not recognize a catalogue of human rights, or of constitutional rights, *as such*. But this does not mean that it does not recognize and protect rights, or concepts, which *in substance* are human rights.[112] In the field of criminal law, for example, the concepts of 'abuse of process', 'want of prosecution', and 'natural justice' have often been used by the courts in ways which shield individuals from unfairness, or worse.[113] In the law of torts many causes of action are based on the idea that people have a right to have their bodily integrity, their freedom of movement and their possessions protected against interference. Moreover, before the enactment of the Human Rights Act, students of law in the United Kingdom were taught about civil and political rights when studying constitutional law. The rights were usually referred to as civil liberties and the coverage was often confined to the rights to liberty, freedom of speech, and freedom of assembly. The commentators' analysis was rarely informed by 'modern' principles such as that certain rights are non-derogable in times of emergency, that rights have to be guaranteed 'in accordance with law', or that interferences with rights must be for a legitimate aim, necessary in a democratic society and proportionate. There was little or no reference to the observations of any international body dealing with human rights disputes. Yet the core notion that all people had basic entitlements as human beings was still prevalent, if rarely articulated.

While the judges may have been reluctant to develop a body of human rights law, they were certainly active in developing rules and principles which regulated the relationship between individuals and the state from a different perspective, namely that of good administration. In a series of seminal cases in the 1960s[114] the House of Lords, inspired by Lord Reid, laid out the ground rules for what was to become, over the course of the next 50 years, a hugely important body of law aimed not so much at addressing the merits of decisions taken by public authorities but at ensuring that the procedures used to reach those decisions complied with basic requirements.[115] As the legal standards regarding administrative procedure became ever more demanding, administrative law became almost a surrogate human rights law, even though the term 'human

[111] Article 53 states: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'.

[112] Cooke (2004) 276–82; Fordham (2011). However, Mildenberger (2009) doubts the robustness of the common law in this field. See too Mullender (2003a); Wright (2001) Beatson (1997).

[113] See eg Sharpe (1998), Ch 2. Hughes (2012) regrets that the Supreme Court did not consider the principles of common law in the civil case of *Tariq v Home Office* [2011] UKSC 35, [2011] 3 WLR 322.

[114] *Ridge v Baldwin* [1964] AC 40; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

[115] Craig (2009). Not everyone was content with this judicial activism: see Griffith (1993) and (1997).

rights' was not itself employed. Indeed, the House of Lords does not seem to have used that expression until Lord Reid referred to the Universal Declaration of Human Rights and the European Convention on Human Rights in 1974.[116] When the Human Rights Act was eventually enacted, a process of mutual enrichment ensued: administrative law gained a defined set of criteria against which to assess the decision-making procedures of public authorities, while human rights law gained an entrée at all levels of the country's administrative machinery, thereby ensuring that good human rights practice could proliferate throughout all public authorities. Prior to the Human Rights Act, UK judges, like Molière's Monsieur Jourdain and his prose, may not have realized that they were talking the language of human rights. After the Act they were able to do so quite consciously, and they have taken full advantage of the opportunity. Other countries have enjoyed similar epiphanies and there is now growing evidence of 'a common law of human rights' in common law countries.[117]

Throughout this book we will encounter many examples of the common law being relied upon to protect human rights. The regrettable reality is that this has not occurred more frequently: one of the unintended consequences of the enactment of the Human Rights Act has been a growing reluctance on the part of our top judges to use the common law to achieve the same goals as the Act. But the common law still has the potential to complement the Act in important ways. This became apparent in *AXA General Insurance Ltd v Lord Advocate*,[118] where an insurance company alleged that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was outside the competence of the Scottish Parliament because it was unreasonable and arbitrary (as well as in breach of the claimant's right to property under Article 1 of Protocol No 1 to the European Convention on Human Rights). The Supreme Court found no lack of competence on the facts, but it did confirm that the ultimate controlling factor over the Scottish Parliament's powers must be 'the rule of law', a thinly veiled disguise for the body of rules and principles developed by the common law over centuries which are designed to ensure that everyone in society is treated fairly and justly.

Human rights under legislation besides the Human Rights Act

The courts take account of Strasbourg's thinking on human rights because they have been directed by Parliament to do so. Parliament has likewise transposed other international human rights standards into UK law and the courts are obliged to apply them too. The only difference is that for these other standards there is no international court the decisions of which the UK Parliament can direct UK courts to take into account. At best these other standards are overseen by treaty-monitoring bodies which are not courts, or by national courts in other countries which have transposed the standards into their domestic law. Parliament has chosen not to direct UK courts to take account of what those treaty-monitoring bodies or national courts may have said about the

[116] In *Waddington v Miah* [1974] 1 WLR 683, 693–4. See too Feldman (2009c), 541–5.

[117] Cram (2009); McCrudden (2000); Slaughter (1994). For the view of a serving Supreme Court Justice on when foreign sources should be referred to, see Reed (2008).

[118] [2011] UKSC 46, [2012] 1 AC 868.

standards, although Article 32 of the Vienna Convention on the Law of Treaties 1969 does say that in the interpretation of treaties 'recourse may be had to supplementary means of interpretation' when, after applying the approach to interpretation set out in Article 31,[119] the meaning is still 'ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable'. The House of Lords often looked at these other sources of its own motion, especially when interpreting treaties the effectiveness of which depended on the same interpretation being adopted by all States Parties to the treaty (eg treaties on international transport).[120]

Human rights standards agreed under the auspices of the United Nations which have subsequently been transposed into UK law by Acts other than the Human Rights Act include the following:[121]

- the right to asylum if one is in fear of persecution in one's home country, which is protected by the Convention on the Status of Refugees 1950, the provisions of which UK immigration officials are obliged to adhere to by virtue of the Immigration Rules issued under the Immigration Act 1971;[122]
- the right to be compensated for a miscarriage of justice, protected by Article 14 of the International Covenant on Civil and Political Rights, which was incorporated into UK law by the Criminal Justice Act 1988;[123]
- the right not to be tortured, which is protected by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; its requirement that torture be made a criminal offence in each State Party was implemented in the United Kingdom by the Criminal Justice Act 1988[124] and, as we shall see in Chapter 5 below, it was this provision which proved so crucial in the seminal *Pinochet* litigation in 1999–2000.[125]

In addition, important human rights standards agreed within EU law have had to be transposed into UK law.[126] These mostly relate to the right not to be discriminated against. The Westminster Parliament had already begun to grant protection against discrimination on the basis of race, gender, or disability by the time the EU began issuing Directives in those fields; later it found itself catching up with what the EU was requiring as regards discrimination on the basis of religious belief, sexual orientation, or age.

[119] See text at n 106 above.

[120] eg Warsaw Convention on Carriage by Air 1929, on which see eg *Abnett (known as Sykes) v British Airways plc* [1997] AC 430; *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] AC 534; *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, [2002] 2 AC 628.

[121] See too Lester et al (2009), Ch 9. Freeman (2010) argues for the incorporation of the UN Convention on the Rights of the Child into UK law, something Wales has come close to achieving through the Rights of Children and Young Persons (Wales) Measure 2011. See too Fortin (2006).

[122] Rule 328 states: 'All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention'. For a recent example of the Supreme Court's engagement with the Geneva Convention, see *Al-Sirri v Secretary of State for the Home Dept* [2012] UKSC 54, [2012] 3 WLR 1263.

[123] Section 133. See eg *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2011] 2 WLR 1180.

[124] Section 134. [125] See 134–6.

[126] For an account of the influence of EU law on UK human rights law, see Dickson (2011a), 343–50. More generally on human rights within EU law, see De Burca and De Witte (2005), Chs 7–11, O'Neill (2002), and Alston (1999).

It took decisions of what is now called the Court of Justice of the European Union (CJEU) to ensure that discrimination against transsexuals was outlawed in the United Kingdom[127] and, later, discrimination against carers.[128] A Directive of the EU was also the prompt for comprehensive data protection laws in the United Kingdom,[129] an earlier Act having been based on a Council of Europe Convention.[130] The EU has, in addition, been the driver behind better protection of the rights of workers, not just in the realm of discrimination but also in realms such as health and safety, working time, and redundancy.[131] It also looks set to have a much more general influence on the protection of human rights in EU states through the Charter of Fundamental Rights.

Various pieces of domestic legislation also protect a range of social and economic rights which in effect implement some of the obligations the United Kingdom has agreed to comply with through ratifying treaties such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter.[132] Courts at all levels are called upon from time to time to interpret this legislation, but they usually do so without reference to the government's international obligations. It would be helpful to the cause of human rights if such obligations could be incorporated into an updated Human Rights Act for the United Kingdom, perhaps through a Bill of Rights Act, but such is the antipathy of many of our politicians, as well as of our mainstream media, to the expansion of a 'human rights agenda' that a development of this nature is highly unlikely. The report of the Commission on a Bill of Rights, published in December 2012, was a great disappointment in that regard.[133]

The EU Charter of Fundamental Rights

When the EU's Treaty of Lisbon came into effect on 1 December 2010, the Charter of Fundamental Rights appended to it became part of the law of all EU Member States. Although the United Kingdom (and Poland) negotiated what some have called an 'opt-out' from the Charter's provisions, in fact the Charter still applies in this country to a considerable extent. Its provisions, from a substantive point of view, are extremely wide-ranging, embracing not just the so-called first generation civil and political rights but also the second generation economic and social rights. It is perhaps the most comprehensive human rights treaty in the world. But its applicability is limited to those subject areas which are within the EU's competence. While those areas have expanded greatly over the course of the last 50 years, they still leave large areas within the exclusive

[127] *P v S and Cornwall County Council* Case C-13/94, [1996] ICR 795.

[128] *Coleman v Attridge Law* (Case) C-303/06, [2008] ICR 1128.

[129] Data Protection Act 1998, implementing Directive 95/46/EC. Following a review, the European Commission announced in 2012 that it was proposing a comprehensive reform of the 1995 Directive in order to strengthen online privacy rights: see COM(2012) 12 final.

[130] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981, which led to the United Kingdom's Data Protection Act 1984.

[131] eg Framework Directive on Health and Safety 89/391/EEC; Directive on Collective Redundancies 98/59/EC; Directive on Working Time 2003/88/EC.

[132] Dickson (2009b).

[133] *A UK Bill of Rights? The Choice Before Us*, available at <http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>. See too Amos (2009); Sedley (2005).

competence of each Member State. Housing, health care, and primary and secondary education, for example, are all matters on which EU law-making barely trespasses. Criminal justice is also a largely domestic matter, even if in recent years the EU has begun to infiltrate there too, through providing for procedures such as European Arrest Warrants[134] and making proposals for better protection of the rights of persons accused of criminal offences.[135]

The exact status of the Charter of Fundamental Rights in UK law depends on how Protocol No 30 to the Treaty of Lisbon is interpreted by the UK courts and by the CJEU. The Protocol begins by emphasizing that the Charter reaffirms and makes more visible the rights, freedoms, and principles already recognized in the EU and that it does not create new rights or principles. It then states that the Protocol clarifies the application of the Charter in relation to the laws and administrative action of the United Kingdom and its justiciability there. The clarification is set out in two articles:

> Article 1
> (1) The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of . . . the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of . . . the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
> (2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter[136] creates justiciable rights applicable to . . . the United Kingdom except in so far as . . . the United Kingdom has provided for such rights in its national law.
>
> Article 2
> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to . . . the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of . . . the United Kingdom.

The import of Protocol No 30 has been clarified to some extent by the decision of the Grand Chamber of the CJEU in 2011 in *NS v Secretary of State for the Home Department*.[137] Mr Saeedi was an Afghani national who entered Greece illegally and sought asylum there. The Greek authorities rejected his claim and deported him to Turkey, where he was detained in very bad conditions for two months. He escaped from detention and made his way illegally to the United Kingdom, where again he sought asylum. The Home Secretary ordered his transfer to Greece (as the country of first entrance into the EU) in accordance with the EU's so-called 'Dublin Regulation' of 2003.[138] The Home Secretary said that Mr Saeedi's complaint that his transfer to

[134] These derive from the EU Framework Decision 2002/584/JHA of 13 June 2002.

[135] eg the Directive on the Right to Interpretation and Translation in Criminal Proceedings 2010/64/EU.

[136] Title IV of the Charter deals with 'Solidarity' and protects workers' right to information and consultation within the undertaking, the right of collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, and consumer protection.

[137] Joined Cases C-441/10 and C-493/10, [2012] 2 CMLR 9. Several other cases from Ireland were considered alongside Mr Saeedi's.

[138] Regulation No 343/2003, made under Art 63 of the then EC Treaty. This replaced the so-called Dublin Convention, signed in 1990 but coming into force only in 1997 (OJ 1997 C 254).

Greece would violate his rights under the European Convention was clearly unfounded, because Greece was a 'safe country' for the purposes of domestic legislation made pursuant to another EU Directive.[139] The High Court rejected Mr Saeedi's application for judicial review of his transfer,[140] but on appeal the Court of Appeal referred to the CJEU questions about the applicability of the EU Charter of Fundamental Rights to these facts.[141] The CJEU held, firstly, that, when the Home Secretary examines an asylum application which is not the United Kingdom's responsibility according to the Dublin Regulation, he or she is 'implementing EU law' and so must comply with the EU Charter of Fundamental Rights.[142] Secondly, the CJEU agreed with a ruling by the Grand Chamber of the European Court of Human Rights[143] that at the relevant time there was a systemic deficiency in the asylum procedures in Greece, resulting in inhuman and degrading treatment within the meaning of Article 4 of the Charter,[144] and that a transfer of Mr Saeedi to Greece would therefore be incompatible with that provision. Thirdly, in so far as UK law automatically deemed some countries to be 'safe countries' for the purposes of returning asylum seekers to those countries, or conclusively presumed that other Member States always respected fundamental rights, those provisions too were incompatible with EU law. The net result of the *Saeedi* case is that Article 1(1) of Protocol No 30, quoted above, 'does not . . . exempt . . . the United Kingdom from the obligation to comply with the provisions of the Charter or . . . prevent a court [of the United Kingdom] from ensuring compliance with those provisions'.[145] However, the CJEU did not throw any light on the meaning of Article 1(2) of Protocol No 30, since 'solidarity' rights were not relevant to the case.

The UK Supreme Court has so far had only one opportunity to interpret the EU Charter,[146] but it is safe to predict that in years to come the Charter will feature prominently in the Supreme Court's case law. The implication of *Saeedi* is that, so long as a state body in the United Kingdom is 'implementing EU law', all of the rights in the Charter—with the possible exception of the solidarity rights in Title IV—will have to be complied with by that body and such compliance will be justiciable in UK courts. As regards the Charter articles which go beyond what is protected by the European Convention, the Supreme Court will be obliged to follow any guidance which is forthcoming from the CJEU or to refer questions to that court for a preliminary ruling.

[139] Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 3, Pt 2, made pursuant to Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status.

[140] [2010] EWHC 705 (Admin). Cranston J relied upon the House of Lords' decision in *R (Nasseri) v Secretary of State for the Home Dept* [2009] UKHL 23, [2010] 1 AC 1.

[141] [2010] EWCA Civ 990.

[142] See Art 51(1) of the Charter, which begins: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.

[143] In *MSS v Belgium and Greece* (2011) 53 EHRR 2.

[144] The wording of Art 4 of the EU Charter is identical to that of Art 3 of the European Convention on Human Rights.

[145] Joined Cases C-441/10 and C-493/10.

[146] This was in *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55, [2012] 1 WLR 3333, where the Court held that granting a *Norwich Pharmacal* order, which required a company to disclose the identities of people who were buying and selling tickets online for rugby matches at Twickenham (see too Ch 10 below, at 294), would not infringe Art 8 of the Charter, which guarantees to every person the right to protection of his or her personal data.

The EU's imminent accession to the European Convention on Human Rights may have no direct effect on how the Charter is interpreted by the CJEU, but it is likely that the two international courts will want to stay more or less in step with each other in their application and development of human rights standards. The United Kingdom's Supreme Court will need to follow suit and will retain freedom of action only on those matters which fall outside EU law and on which the common law or other domestic legislation has set out relevant human rights standards going beyond those in the European Convention.

The *Ullah* or 'mirror' principle

When applying the Human Rights Act the Supreme Court adheres to two principles which have become prominent features of the way in which our top judges conceive of human rights.[147] The first is the 'mirror' principle, which was originally enunciated in 2004 by Lord Bingham in *R (Ullah) v Special Adjudicator*, although he himself did not give it that name.[148] The question at issue in that case was whether the risk of Convention rights being violated abroad, other than the right not to be tortured or ill-treated, could prevent the deportation of an unsuccessful applicant for asylum in the United Kingdom. The Law Lords unanimously held that it could, but on the facts of the two appeals before them they found there to be no such risk. It was when Lord Bingham expatiated on the kinds of breaches which *would* prevent a deportation that he suggested the Lords should take their lead from the approach adopted by the European Court of Human Rights:

> It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[149]

Lord Steyn, Lord Walker, Baroness Hale, and Lord Carswell all appeared to agree with this statement, or at any rate did not disassociate themselves from it.[150]

On one reading this principle could be taken to mean that a UK court should always protect Convention rights to the same degree as the European Court would do, never to a higher or lower degree. But on another reading it merely means that in 'foreign' cases, that is, when a UK court is considering whether someone should be deported or extradited to another country, the UK court should disallow the expulsion only

[147] Unfortunately these two principles were firmly enunciated only after Conor Gearty had already published his eulogistic appraisal of the first three years of judicial interpretation of the Human Rights Act: Gearty (2004). For an excellent critique, see Young (2005).

[148] [2004] UKHL 26, [2004] 2 AC 323. The term 'mirror principle' appears to have been coined by Lewis (2007a), 720.

[149] Ibid, [20].

[150] Ibid, [51] (per Lord Steyn), [52] (per Lord Walker), [53] (per Baroness Hale), and [67] (per Lord Carswell).

in circumstances where the European Court would consider it to be in violation of a Convention right. Unfortunately, perhaps because of the respect which is usually accorded to Lord Bingham's pronouncements, most judges have preferred the first of these two readings, thereby extending the principle's reach beyond the 'foreign' cases for which Lord Bingham originally devised it. Indeed in *R (Al-Skeini) v Secretary of State for Defence*[151] Lord Brown took Lord Bingham's principle one step further when he said that Lord Bingham could just as well have ended his principle with 'no less, but certainly no more'. He explained himself thus:

> There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the Member State cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.[152]

But other judges have shied away from according *Ullah* undue influence in the protection of human rights. In *R (Smith) v Oxfordshire Assistant Deputy Coroner* Lord Mance did not endorse the views of Lord Brown in *Al-Skeini*, preferring to state the position thus:

> [I]t is our duty to give effect to the domestically enacted Convention rights, while taking account of the Strasbourg jurisprudence, although caution is particularly apposite where Strasbourg has decided a case directly in point or, perhaps, where there are mixed messages in the existing Strasbourg case law and, as a result, a real judicial choice to be made about the scope or application of the Convention.[153]

Likewise, in *In re G (Adoption: Unmarried Couple)*[154] Lord Hoffmann expressed the view that in *Ullah* Lord Bingham was talking about situations where a state had no margin of appreciation regarding the right in question. In cases where there was such a margin, Lord Hoffmann felt that a national court could make its own determination of what was appropriate domestically.[155] He therefore had no compunction about declaring it to be a violation of the right not to be discriminated against in the enjoyment of the right to a family life when a couple in Northern Ireland were barred from jointly applying to adopt a child because they were not married to each other—even though the European Court had not yet ruled that the Convention conferred such a right on unmarried couples. While this decision is undoubtedly to be welcomed, a better justification for not being constrained by the European Court's position, with respect, would have been that it was a purely domestic case, with no foreign element. What Lord Hoffmann was really doing was expanding UK human rights law through the common law.

Writing extra-judicially, Baroness Hale, Lord Kerr, and Arden LJ have all tried to distance themselves from a broad application of *Ullah*. Baroness Hale rehearses a number

[151] [2007] UKHL 26, [2008] 1 AC 153.
[152] Ibid, [107]. Baroness Hale appeared to endorse Lord Brown's view: ibid, [90].
[153] [2010] UKSC 29, [2011] 1 AC 1, [199].
[154] [2008] UKHL 38, [2009] 1 AC 173.
[155] Ibid, [31]. On the margin of appreciation, see Letsas (2006).

of reasons for not adhering too closely to it and, besides *In re G*, she cites a 'foreign' case, *EM (Lebanon) v Secretary of State for the Home Department*,[156] as one where the *Ullah* principle was given scant regard.[157] In that case the Lords granted asylum to a mother because if she was returned to Lebanon she would lose custody of her seven-year-old child; this was held to be a violation of the right of the mother and child to a family life, under Article 8 of the European Convention, even though the European Court had not yet recognized this kind of violation as serious enough to prevent someone being deported. Lord Kerr has argued that there is 'a role for the Human Rights Act to play in the development of a body of UK human rights law, which is not necessarily umbilically tied to the European Court of Human Rights view of Convention rights'.[158] More particularly, he thinks the *Ullah* principle should not be applied in cases where Strasbourg has not yet spoken on the topic in question,[159] and he himself practised what he preached when he delivered his judgment in *Ambrose v Harris*,[160] where, disagreeing with his Supreme Court colleagues, he ruled that, even though the European Court had not yet gone this far, it would be a violation of Article 6 of the European Convention to admit in evidence the answers given by a detainee to questions put to him by the police before he was detained in a police station and given access to a solicitor. Lord Kerr deprecated '*Ullah*-type reticence'.[161] By way of contrast, in the same case Lord Hope expressed the clear view that:

> Parliament did not intend to give the courts of this country the power to give a more generous scope to [Convention] rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.[162]

Arden LJ has stated that the *Ullah* principle 'does not acknowledge that the Strasbourg court is only laying down minimum guarantees' and thinks it 'sits uneasily' with the duty imposed on UK courts by section 2 of the Human Rights Act 1998 to 'take account of' (not 'follow') Strasbourg jurisprudence.[163] The British judge who in 2011–12 was the President of the European Court of Human Rights, Sir Nicolas Bratza, has also asserted that it is 'right and positive for the protection of human rights that the national

[156] [2008] UKHL 64, [2009] 1 AC 1198; Palmer (2009a). Baroness Hale also cited *R (Limbuela) v Secretary of State for the Home Dept* [2006] UKHL 66, [2006] 1 AC 396 (Sweeney, 2008) but that was a case on Art 3 of the ECHR, with which the *Ullah* principle, arguably, was not at all concerned. But see too Bratza (2011), 512. On *Limbuela*, see Mackenzie (2006); on *EM (Lebanon)*, see Pickup and Gask (2009).

[157] Hale (2012), 68–77.

[158] Kerr (2012c), 1. See too Kerr (2009); Klug and Wildbore (2010).

[159] Ibid, 5–6.

[160] [2011] UKSC 43, [2011] 1 WLR 2435.

[161] Ibid, [126].

[162] Ibid, [19]. Lord Brown, too, said he would give 'full weight' to the *Ullah* principle: ibid, [86]. Lord Dyson did not go that far but adopted the approach advocated by Lord Mance in *Smith*, which led him to conclude that caution was 'particularly apposite' here, partly because 'there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention': ibid, [105]. Lord Matthew Clarke, sitting as an ad hoc judge, did not mention *Ullah* but did agree that in this case the Supreme Court should go no further than the European Court had gone so far: ibid, [116].

[163] Arden (2008), 498–9.

courts…should sometimes consciously leap ahead of Strasbourg',[164] and he cited the same three cases used by Baroness Hale to support his argument.

Various practising and academic commentators have likewise been adversely critical of the broad interpretation of *Ullah*. Clayton and Tomlinson, for example, observe:

> It seems unfortunate for the English courts to have sought democratic legitimacy by means of a self-denying ordinance which has the effect of severely restricting their ability to be an 'international standard-bearer of liberty and justice' as envisaged by Lord Bingham in 1993.[165]

Andenas and Bjorge consider Lord Kerr's approach to be more enlightened than that of Lord Hope,[166] and do not see it as inconsistent with Lord Bingham's own views as later expressed in *Secretary of State for the Home Department v JJ*.[167] Lewis thoroughly analyses the case law supporting the *Ullah* approach but still remains sceptical of its utility.[168] Singh, too, believes that UK courts should not feel themselves limited by the European Court's jurisprudence on rights.[169] On the other hand, there are well-intentioned observers who argue that any kind of adjudication about human rights claims, whether at the national or international level, is fraught with uncertainty because human rights systems lack a sufficient normative basis,[170] that in general judicial deliberations lack transparency,[171] that human rights law should focus on protecting people against suffering rather on increasing people's sufferance of others,[172] that protecting human rights through institutions is not at all as important as protecting the victims of human rights violations on the ground,[173] and that judicially enforced human rights are not likely to confer democratic legitimacy on the judges[174] or remove the disenchantment with national politics.[175]

McHarg observes that the Strasbourg Court has failed to develop a coherent set of tests for determining when rights must be allowed to prevail over 'the public interest', which leads her to come close to agreeing with Simmonds that the project of judicially-

[164] Bratza (2011), 512. See too Martens (1998).

[165] Clayton and Tomlinson (2009b), 65. The reference to what Lord Bingham had earlier envisaged is to Bingham (1993), 400.

[166] Andenas and Bjorge (2012), 323.

[167] [2007] UKHL 45, [2008] 1 AC 385, [19]. Lord Bingham said there that, as the Strasbourg court had not ruled on any case closely comparable with the one before him, it would be inappropriate to seek to align it with the least dissimilar of the Strasbourg cases. He added: 'The task of the English courts is to seek to give fair effect, on the facts of this case, to the principles which the Strasbourg court has laid down'.

[168] Lewis (2007a).

[169] Singh (2008). Rabinder Singh is now a judge of the High Court of England and Wales.

[170] Beck (2008); Gearty (2006), Ch 2; Ekins (2003). Verschraegen (2002), applying a sociological perspective and systems theory, maintains that human rights are but a social institution whereby a modern society protects itself against self-destructive tendencies; Bamforth (1999) admits that whether it is right for the state to provide mechanisms allowing individuals to sue for breaches of their human rights depends on one's preferred theories of justice and political morality.

[171] Lasser (2004) and review by Komárek (2009); Huls et al (2009).

[172] Williams (2007); Harris (2004).

[173] Douzinas (2000) and review by Stauffer (2001).

[174] Heydon (2006); Ewing (2001).

[175] Cooper (1998) and review by Malik (2000). But see too Mullender (2003b), who argues for an approach to human rights law which allows both individuals' rights and the cultures in which they are applied to be protected.

protected human rights should be abandoned as inherently flawed.[176] She concludes, eloquently:

> [A] human rights court needs to be able to point to a firmer theoretical foundation for its claim to legitimacy than simply the reasonableness of individual decisions, since these are judgments with which observers may or may not agree. If it is to be durable, the system itself must be able to attract loyalty irrespective of the particular decisions it produces. Ultimately, the inconsistency and unpredictability which result from fudging the conceptual issue represent a greater threat to judicial legitimacy than opting unequivocally for one or other methodological approach. In the absence of a definitive theoretical solution to the problem of reconciling conflicting rights and public interests, one must settle for greater procedural certainty and doctrinal clarity as the best available foundation for judicial legitimacy in this context.[177]

This effectively amounts to an argument for not utilizing the common law at all in order to supplement the way human rights are protected by the UK Supreme Court, but it bears repeating that the absence of any grand overall theory of human rights has not prevented the common law from developing what we now call human rights law. It does not particularly help to label this an aspect of 'common law constitutionalism', because not all human rights can reasonably be called constitutional rights. As we have seen already in this chapter, the Supreme Court has set its face firmly against that categorization, and both the Human Rights Act and the European Convention explicitly accept that, if it is the national will, UK law can not only protect Convention rights to a much greater extent than the European Court does, but also develop other human rights.[178] A good example of judicial creativity in non-Convention human rights law is the decision of the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department*,[179] where the Justices held that gay men who would risk persecution if they were returned to their home country and did not conceal their sexuality were entitled to be considered for asylum in the United Kingdom.[180]

It is submitted that the *Ullah* principle deserves either to be eliminated altogether from the Supreme Court's toolkit for the protection of human rights or else re-designed so as to provide much greater freedom to the United Kingdom's top judges to add value to what the European Court has already said to protect human rights. There have been numerous occasions on which the common law has proved itself to be stronger in protecting human rights than the European Convention.[181] Such supplementary protection should not be lightly cast aside.

The *Shabina Begum* or 'outcome not process' principle

The second basic principle adhered to by the Supreme Court when ensuring that public authorities comply with Convention rights derives from the House of Lords' decision

[176] McHarg (1999), 695; Simmonds (1998).
[177] Ibid, 696.
[178] See the text at n 111 above.
[179] [2010] UKSC 31, [2011] 1 AC 596.
[180] See too Ch 8, below, at 324. See too Buxton (2011).
[181] For some examples mentioned elsewhere in this book, see below, at 71–2, 118, 123–4, 136–42, 187 and 212.

in *R (SB) v Governors of Denbigh High School*, in 2006.[182] Again it can be argued that the principle was issued as an *obiter dictum*, but it has nevertheless gained considerable purchase in subsequent decisions by the Law Lords and Supreme Court Justices. The principle holds that, when assessing whether a public authority has acted compatibly with Convention rights, what matters is whether the decision or action ultimately taken by that authority is respectful of those rights, not how that decision or action has come about: the process used is unimportant so long as the outcome is Convention-compliant.

There is some irony in the fact that the *Shabina Begum* case is the main authority for this principle because in that case the Law Lords went out of their way to commend the head teacher and governors of the school in question for the process they had followed before finalizing the school's policy on uniforms. Only after consulting widely did the school decide that it would allow Muslim girls to wear a shalwar kameeze but not a jilbab, that is, a garment partly covering their bodies but not one which covered them completely. Reversing the Court of Appeal,[183] the Law Lords upheld the school's exclusion of a girl who wanted to wear a jilbab, not because of defects in the consultation process but because being denied the chance to wear the jilbab was not itself a violation of Article 9 of the European Convention (the right to freedom of religion), nor indeed of Article 2 of Protocol No 1 (the right to education).[184] Lord Hoffmann criticized Brooke LJ in the Court of Appeal for suggesting that the school should have set itself what Lord Hoffmann called an examination paper before taking its decision (an examination paper which Lord Hoffmann said the Court of Appeal itself would have failed).[185] He added:

> In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But Article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under Article 9(2)… Head teachers and governors cannot be expected to make such decisions with textbooks on human rights at their elbows.[186]

With respect, this paragraph greatly overstates the contrast between a process-driven and an outcome-driven approach to the protection of human rights. It is perfectly possible to favour the former without requiring decision-makers to refer to human rights textbooks. Decision-makers are perfectly aware that everyone, including a child at school, has human rights and they should be required to address their minds in some way—as they clearly did in this particular case—to the protection of those rights.

[182] [2006] UKHL 15, [2007] 1 AC 100. The name of the young female applicant was Shabina Begum. See too Ch 9 below, at 267; Ch 11 below, at 331; and Ch 12 below, at 370.

[183] [2005] EWCA Civ 199, [2005] 1 WLR 3372.

[184] Three of the Law Lords (Lords Bingham, Hoffmann, and Scott) thought there was no interference at all with Art 9 (nor with Art 2 of Protocol No 1), and two (Lord Nicholls and Baroness Hale) thought that there was an interference with Art 9 but that it was objectively justified, and they did not mention Art 2 of Protocol No 1.

[185] [2007] 1 AC 100, [66]–[67].

[186] Ibid, [68]. Lord Bingham and Lord Scott agreed with Lord Hoffmann's reasoning: [40] and [91].

Unfortunately Lord Hoffmann's approach was confirmed both by himself and his four colleagues just a year later in *Belfast City Council v Miss Behavin' Ltd*,[187] where a shop owner, relying on his rights to freedom of expression and peaceful enjoyment of his possessions, challenged a city council's decision to refuse him a licence to operate a sex shop. Reversing the Court of Appeal in Northern Ireland,[188] the Law Lords rejected the challenge. They said it did not matter that the council could not show that it had fully considered the applicant's human rights before making its decision: it was enough that the decision which it ultimately took did not violate those rights. Lord Hoffmann was just as forthright as in *Shabina Begum*:

> Either the refusal infringed the applicant's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of Article 10 or the First Protocol.[189]

While Lord Rodger agreed with this approach,[190] the opinions of Baroness Hale, Lord Mance, and Lord Neuberger were not quite so supportive. Rather than imply that it did not matter at all what process was adopted by the decision-maker, they pointed out that, if the decision-maker has not addressed the human rights question then the court is bound to give less weight to the decision-maker's position when, as it must, it strikes the human rights balance for itself.[191] Nevertheless, even this group of judges seemed to accept that in judicial review applications a court need not focus so much on procedural aspects of the decision being challenged as on the decision itself. In Baroness Hale's words:

> The role of the court in human rights adjudications is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.[192]

In 2009 the House of Lords again confirmed its preference for the 'outcome not process' approach in *R (Nasseri) v Secretary of State for the Home Dept*,[193] an immigration case.[194] But, as the section on the EU Charter of Fundamental Rights above has already explained, the Court of Justice of the European Union, in *NS v Secretary of State for the Home Dept*, subsequently disapproved of the outcome reached in *Nasseri* and favoured a more individualized form of justice. In his analysis of *Nasseri* and the preceding decisions, Mead argues convincingly that they betoken a 'judicially exclusive'

[187] [2007] UKHL 19, [2007] 1 WLR 1420.
[188] [2005] NICA 35, [2006] NI 181.
[189] [2007] 1 WLR 1420, [13].
[190] Ibid, [23].
[191] Ibid, [37] (per Baroness Hale), [47] (per Lord Mance), and [90] (per Lord Neuberger).
[192] Ibid, [31].
[193] [2009] UKHL 23, [2010] 1 AC 1.
[194] See too Ch 3 below, at 79 and Ch 5 below, at 146.

and 'juricentric' attitude, one which avoids 'a more rounded, more plural, less reactive, less individualistic mechanism for protecting human rights domestically'.[195]

The *Shabina Begum* principle is nefarious because it strikes at the heart of the mission of the Human Rights Act, which is to inculcate an appreciation of human rights in all public authorities. Section 3(1) actually imposes a legal duty on *everyone* to read and give effect to *all* legislation in a way which is compatible with Convention rights. This implies, at the very least, that Convention compliance must be deliberately, not accidentally, achieved. It also seems excessive that, even when a human rights issue arises during the course of judicial review proceedings, as in *Shabina Begum* and *Miss Behavin'*, the usual process-driven approach is somehow trumped by an outcome-based approach, a situation which takes away with one hand what has been given by the other, and which is not at all compelled by the wording of the Human Rights Act itself. Perhaps what really lurked behind the House's rulings in these two cases was the fear that if reviewing bodies, including courts, could not look at the merits of challenged decisions, far too many challenges based purely on procedural grounds would result in decisions being remitted to the original decision-maker, with all the delay, expense, and frustration that that would entail. There is something to be said for that position, but it sits uneasily with the general duty imposed by section 3 of the Human Rights Act[196] and with the European Court's insistence that the Convention should be applied dynamically and effectively. When discussing the right to respect for a home, in Chapter 8 below,[197] we will see that in recent cases the Supreme Court has conceded the importance of administrative bodies and lower courts being able to demonstrate that they have taken full account of the right in question,[198] but it is not yet clear whether the Justices will be prepared to extend that concession into other fields.

On one view the position is exacerbated by the fact that in a decision taken by the Lords just a month prior to *Miss Behavin'* they emphasized that, when an appellate authority is assessing whether a decision taken by a lower authority is compliant with human rights standards, the former must make its own separate assessment and not simply look at the process used by the lower authority. This was in *Huang v Secretary of State for the Home Department*,[199] an immigration case. All five Law Lords, once again reversing the Court of Appeal,[200] held that the task of an immigration adjudicator or appellant authority is not a secondary, reviewing, function aimed at establishing whether the original decision-maker misdirected him- or herself, acted irrationally, or failed to behave with procedural propriety. The adjudicating or appellant authority must decide for itself whether the impugned decision is lawful. Some might argue that this decision was dictated by the specific wording of the relevant legislation,[201] but that would be to beg the very question at issue, which is what does it mean to say that a lower

[195] Mead (2012), 63.
[196] See Ch 3 below, at 63.
[197] At 242–56.
[198] See eg *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[199] [2007] UKHL 11, [2007] 2 AC 167.
[200] [2005] EWCA Civ 105, [2006] QB 1.
[201] Immigration and Asylum Act 1999, s 65(5): 'If the adjudicator, or the tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground'.

authority 'acted in breach of the appellant's human rights'? Others might welcome the Lords' decision on the basis that it rejects the Secretary of State's view that adjudicating and appellant authorities should simply inquire whether the Secretary of State's original decision was within the range of reasonable assessments of what is proportionate, but that in turn is unduly dismissive of the importance of due process when decisions on human rights are being taken. The real motivation behind the Lords' approach is more likely to have been their desire to clarify how much deference adjudicating and appellant authorities should have to pay to the expertise of original decision-makers.

There is a large literature on 'deference',[202] the essential question being, where should the line be drawn between executive functions and judicial functions? In other words, at what point should adjudicators bow out of a dispute over the preferred solution to a problem by recognizing that the final say over whether to adopt position A or position B should be allocated not to judges but to democratically elected politicians and the administrators who do their bidding? Given the internationalization of human rights standards, most human rights campaigners at the national level are now in favour of expanding the reach of judicial involvement and of reducing the deference which should be paid to the executive branches. The Law Lords in *Huang*, although not as clearly as they might have done,[203] tried to cut through the controversy by explaining that what might appear as deference on the part of adjudicators is in fact:

> performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.[204]

This validates, in Amos's words, 'the opinion of those who have argued that deference should be rooted in institutional competence rather than respect for democratic credentials'.[205] The Law Lords themselves observed that, in the context of immigration, the Immigration Rules and the Home Office's supplementary instructions are not 'the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented'.[206] One might add that, even when matters have been thoroughly debated in Parliament, the wording of resulting legislation may not be crystal clear and other factors may since have come to light which call into question the appropriateness of Parliament's stance.

The decision in *Huang* is affirmation of the approach long adopted by Lord Hoffmann, both extra-judicially and in his judgments. In *R (ProLife Alliance) v BBC*, he took the opportunity to deprecate the use of the term 'deference' when referring to the

[202] Hickman (2010), Ch 5, where he welcomes the 'non-doctrinal approach' adopted in *Huang*; Kavanagh (2009a), Chs 7–9; Young (2009b); Keene (2007); Allan (2006a); Dyson (2006); Steyn (2005a); Jowell (2003); Hoffmann (2002); Edwards (2002). On 'democratic dialogue', see Young (2011) and (2009a).

[203] A point emphasised by Amos (2007), 689, but Hickman (2010) is more generous.

[204] [2007] 2 AC 167, [16]. The opinion delivered was of the whole court, comprising Lord Bingham, Lord Hoffmann, Baroness Hale, Lord Carswell, and Lord Brown.

[205] Amos (2007), 689. For a more philosophical approach, see Sen (2011).

[206] [2007] 2 AC 167, [17]. In 2012 the Home Secretary introduced new Immigration Rules clearly setting out how Parliament wants the balance to be struck between the need to control illegal immigration and the right to a family life. See too Ch 8 below, at 241. It can often be difficult for the Home Secretary to know

relationship between the judiciary and the two other branches of government. He did not think that the term's 'overtones of servility, or perhaps gracious concession' were appropriate to describe the reality:

> In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts… [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.[207]

There is something to be said for this view, but it is not of itself a justification for the abandonment of a process-driven approach such as occurred in *Shabina Begum* and *Miss Behavin'*. Moreover, it raises broader questions concerning the role of human rights as a mechanism for upholding the rule of law.

Human rights and the rule of law

It is somewhat ironic that, despite the absence of a written constitution in the United Kingdom and the fact that the Human Rights Act sets out very clearly a specific scheme for allowing courts to play a key role in protecting human rights in the United Kingdom, some commentators have persisted in designating what the courts now do as 'constitutional review'. For example, in her book on how the courts have operated the powers conferred on them by sections 3 and 4 of the Human Rights Act, Aileen Kavanagh calls the exercise of the powers 'constitutional review' in order to distinguish them from the courts' traditional powers of 'judicial review' in administrative law.[208] She points to the fact that Jeffrey Jowell used the same phrase.[209]

Given the top court's explicit rejection of the concept of constitutional rights, it would seem inappropriate to identify the basis for the Justices' approach to human rights as their commitment to a principle such as 'constitutionalism'. If the norms of the United Kingdom's constitution, and their relative significance, are so uncertain, judges would be unwise to justify their protection of human rights by relying upon such shaky foundations. But it is difficult to identify any other theoretical basis for the Justices' approach to human rights other than the principle that they must decide cases in accordance with legislation and precedent. There is certainly no discussion in the Supreme Court's judgments, in the opinions of the House of Lords, or in the extra-judicial writings of the United Kingdom's top judges, of what human rights 'theory' they prefer to adhere to when deciding human rights claims. We hear nothing, for example, of the will theory (whereby human rights *empower* rights-holders to control the actions of those who

which new immigration procedures need to be laid before Parliament for approval: see *R (Munir) and R (Alvi) v Secretary of State for the Home Dept* [2012] UKSC 32, [2012] 1 WLR 2192 and [2012] UKSC 33, [2012] 1 WLR 2208 respectively.

[207] [2003] UKHL 23, [2004] 1 AC 185, [75] and [76]. For comments on how Lord Hoffmann fluctuated in his approach to 'deference', see Hunt (2003), 344 and 370.

[208] Kavanagh (2009a), 5.

[209] Jowell (2000).

owe the corresponding duties) or the interest theory (which suggests that human rights *enrich* rights-holders by conferring real benefits on them).[210]

Judges may well conclude that finding a theoretical basis at such a deep level for their decisions on human rights is both unnecessary and distracting. Engaging in philosophizing is rare in common law adjudication, at least in the United Kingdom, where the emphasis is on practicality. Thus, a much more likely force underpinning a judge's approach to human rights will be his or her consciousness of a judge's role within the United Kingdom's democracy. Judges will not develop the law on issues which they deem are better left to Parliament, but when they are faced by government actions which seem to violate the rule of law they will perform their duty to uphold the separation of powers by striking down those actions as unlawful. They already speak out if Parliament itself breaches the rule of law by ignoring its obligations under EU law or the European Convention on Human Rights. The as yet unanswered question is whether, by relying on the rule of law, the Justices would uphold human rights that are not protected by the EU or the Convention if they were confronted by primary legislation which violated those rights.[211] If they did so they would be duty-bound to unpack the real meaning of the rule of law in the United Kingdom today,[212] and this would undoubtedly entail the provision of some theoretical justification for their approach to human rights. If, like Ronald Dworkin, they are prepared to use human rights as 'trumps',[213] they still need to provide a theory for why human rights have that status.

An alternative way of approaching human rights is to focus on the nature of the duties which rights-holders benefit from. There is a danger in so doing because it risks allowing the concerns of duty-bearers to acquire too great a weight in what some might see as a balancing exercise between the rights of some and the interests of others. At the same time, one of the reasons why judicial protection of human rights is so unpopular in some quarters is because it sometimes seems to insist on others' duties being fulfilled even though the rights-holder could be deemed to have waived the fulfilment of those duties. Trying to protect human rights while at the same time ensuring that the correlative duties do not become excessively burdensome and that rights-holders do not exploit their own flouting of other people's human rights is one of the greatest challenges facing the Supreme Court. The very survival of the concept of human rights rests upon that challenge being convincingly met.[214] In order to do so the Supreme Court Justices need to unpack more ardently and comprehensively the centrality of the rule of law to the entire legal system within which they operate.

[210] In many situations there will be no conflict between these approaches: Sreenivasan (2005).

[211] In *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, on the legality of the Hunting Act 2004, there are dicta by Lord Steyn [102], Lord Hope [104]–[108] and Baroness Hale [159] supporting of such judicial interventionism, but Lord Neuberger has made it clear that he is much more wedded to the doctrine of Parliamentary sovereignty: Neuberger (2011a) and (2011b).

[212] Bingham (2009) is a valiant attempt at such unpacking but, as Gardner (2010) notes, it still leaves many questions unanswered. See too Kerr (2007); Steyn (2006) and (2005b); Craig (2001) and (1997).

[213] Dworkin (1984). See too Oberdiek (2008), who speaks of 'specified' rights.

[214] Gearty (2006), Ch 3, argues that that there is a danger in over-legalizing human rights.

Conclusion

This chapter has tried to demonstrate a number of important points about the way in which the UK Supreme Court conceives of human rights. Firstly, the Supreme Court does not accept that there is a category known as common law constitutional rights, although the Justices are prepared to refer to some common law rights as 'basic' or 'fundamental'. Secondly, the Supreme Court recognizes that human rights are paradigmatically protected through the Human Rights Act 1998, but it is prepared to accept that other legislation, and indeed the common law, protects human rights too. Thirdly, the Supreme Court is bound to ensure that, on matters where EU law is being implemented, the provisions of the EU Charter on Fundamental Rights, with the possible exception of solidarity rights, will be upheld. Fourthly, the Supreme Court does not protect human rights in accordance with any grand theory, preferring instead to assess the merits of human rights claims in the context of competing claims based on the interests of society, the rights of others, and the role of judges in a democratic society. Finally, the main barrier to the Supreme Court protecting human rights more vigorously is the limits it imposes upon itself because of the doctrines of precedent and parliamentary sovereignty; in future, a determination to develop a 'thicker' theory of the rule of law may liberate the Justices to be more activist in the protection of human rights.

3

Approaches to the Human Rights Act

Introduction

While the core of this book is an exploration of the stance taken by the House of Lords and Supreme Court towards specific rights guaranteed by the European Convention, it is important to preface that exploration with scrutiny of the top court's attitudes to issues arising out of the interpretation of the Human Rights Act itself. This provides insights into the approaches of senior judges to 'procedural' or 'subsidiary' aspects of human rights law which nevertheless reveal much about prevailing inclinations and tendencies towards the rights themselves. On the whole, the two courts have been rather conservative in their application of the Act. This may just be an aspect of the judges' more general restraint, or it may reflect a specific reluctance to develop human rights jurisprudence too quickly, given the populist reaction there might be to so doing. Whatever the reason, the cautiousness of the Law Lords and Justices extends to comparatively technical dimensions of the Act, such as its retrospectivity, the meaning of 'public authority', and the availability of a 'legislative defence', as well as to more fundamental features, such as the impact of the Act on private law, the effectiveness of the remedies it provides, and the Act's applicability beyond the shores of the United Kingdom.[1]

The most revealing line of inquiry is the one which traces the top court's use of section 3 of the Act (the interpretative duty). It is from that that we can judge how far the top court is prepared to go to embed a human rights approach in the application of domestic law. More particularly, we can learn from those cases where the court prefers to draw the line between the field in which it is prepared to make law itself and the field in which it prefers to leave law-making to Parliament. When ceding the law-making ground the court will sometimes issue a declaration that existing legislation is incompatible with one or more Convention rights, but even then it is quite reserved as regards suggesting how that incompatibility could best be rectified.

Retrospectivity

It is unfortunate that when the House of Lords first had to grapple with the Human Rights Act it got itself into a considerable mess concerning the Act's application in time. It was in the summer of 1999, just eight months after the Act's enactment, that the Law Lords were first asked to apply the Act, notwithstanding that it was not yet in force.

[1] For further accounts of each of these aspects of the Human Rights Act, see Wadham et al (2011), Chs 3 and 4; Clayton and Tomlinson (2009a), Chs 3–5; Lester et al (2009), Ch 2; Beatson et al (2008), 40–5, 460–533, 659–709.

This was in *R v Director of Public Prosecutions, ex parte Kebilene*,[2] where the House considered whether a legal challenge could be made to the DPP's decision to consent to a prosecution under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. That section made it an offence to be in possession of an article in circumstances giving rise to a reasonable suspicion that the possession was for a purpose connected with acts of terrorism, but it added that it was a defence for anyone charged with the offence to prove that at the relevant time the article was not in his or her possession for such a purpose.[3] The House ruled that the applicants for judicial review in this case could not rely on any 'legitimate expectation' created by the Human Rights Act, because Parliament had made it clear that the Act's main provisions were to take effect on a date to be later appointed, not on enactment. Moreover, although there was no strict need to do so, the Lords went on to rule that section 16A was not necessarily in breach of the presumption of innocence set out in Article 6(2) of the European Convention: not all reverse onus provisions are contrary to that provision[4] and, even if they appear to be, section 3(1) of the Human Rights Act[5] allows them to be interpreted in a way that is compatible with the Convention (eg by requiring the defendant to raise only *prima facie* proof and then switching the onus back to the prosecution to refute that proof beyond reasonable doubt). In so deciding the Lords reversed the decision of the Divisional Court,[6] led by Lord Bingham CJ. In his view, section 16A (and also 16B) did 'undermine, in a blatant and obvious way, the presumption of innocence'.[7] He would not say whether he thought the sections could be saved by an application of the interpretative duty imposed by section 3,[8] but he strongly implied that he would have issued a declaration under section 4 of the Human Rights Act that the sections were incompatible with the Convention.[9]

Fair trial and commercial cases

Lord Bingham's enthusiasm for applying the Human Rights Act did nothing to blight his judicial career because eight months after the House's decision in *Kebilene*, in June 2000, he was appointed to be the Senior Law Lord in place of Lord Browne-Wilkinson, who was retiring. It is regrettable that in 2001 Lord Bingham was not one of the five Law Lords who heard another case involving the effect in time of the 1998 Act, *R v Lambert*.[10] He might have been able to steer his brethren away from some confusion. The defendant in that case had been convicted of possessing a bag of illegal drugs but he appealed on the basis that at his trial the onus had been placed on him to prove on

[2] [2000] 2 AC 326. See Roberts (2002).
[3] Section 16A(3). See too ss 16A(4) and 16B.
[4] This was the clear view of Lord Cooke, Lord Hope, and Lord Hobhouse. Lord Slynn and Lord Steyn did not express an opinion on the matter. See too Hamer (2007); Dennis (2005).
[5] On which see 63–72 below.
[6] Also reported at [2000] 2 AC 326.
[7] Ibid, 344G.
[8] Ibid, 346E. Laws LJ and Sullivan J agreed with Lord Bingham on ss 3 and 4 of the Human Rights Act.
[9] On which see 72–83 below.
[10] [2001] UKHL 37, [2002] 2 AC 545. But Lord Bingham was one of the three Law Lords who granted leave to Mr Lambert to take his appeal to the Lords: ibid, 547F.

the balance of probabilities that he did not know what the bag in question contained. His conviction (and first appeal) occurred before the Human Rights Act came into force, while his appeal to the Lords occurred after that date. Four of their Lordships followed *Kebilene* in holding that the Act was not intended to apply to events occurring before its commencement, but Lord Steyn dissented on this point. The Lords then went on to hold unanimously, as they had in *Kebilene*, that, even if the Act had applied, they would have used the section 3 power to interpret the relevant provisions in the Misuse of Drugs Act 1971[11] in a way that made them compatible with Convention rights.

Only three months later, four of the Law Lords who had sat in *Lambert* were confronted with the identical problem in *R v Kansal (No 2)*:[12] could a person convicted before the Human Rights Act 1998 came into force rely upon the Act's provisions after it had done so? The appellant had had his case referred to the Court of Appeal by the Criminal Cases Review Commission because the Commission thought there may have been a miscarriage of justice at the time of his trial in 1992. As in *Lambert*, the Court of Appeal held that the Act applied, but this time found the relevant legislative provision to be incompatible with the Convention.[13] The decision by the Court of Appeal had been made prior to the Lords' ruling in *Lambert*, and the Court of Appeal had given leave to appeal to the Lords, so the Lords had no option but to reconsider a point they had very recently determined. The House decided not to depart from its earlier decision, even though a clear majority explicitly stated that the decision in *Lambert* had been wrong. This strict adherence to the doctrine of precedent was perhaps understandable as far as Lord Lloyd was concerned, as he had not sat in *Lambert*. And Lord Hope's position is defensible too, as he identified a ground upon which to distinguish the facts of *Lambert* from those in *Kansal*.[14] But it is surprising that Lord Steyn, who had dissented in *Lambert*, should have thought himself obliged to suppress his personal views (which presumably remained unchanged) in favour of a decision which two other colleagues now thought was wrong as well. Two of the judges who had supposedly made the previous 'mistake', Lord Slynn and Lord Hutton, were not prepared to admit to any such error and so maintained the same line as in *Lambert*.

The net result of *Kansal*, following what Lord Rodger called 'this very public wobble',[15] was not only that a strict approach to the doctrine of precedent was given an unfortunate boost but also that alleged miscarriages of justice dating from before October 2000 could not be rectified by applying a Convention-based approach. While the impact of the top court's position on retrospectivity will diminish over time, it will not disappear. It also undermines the principle that courts, because they are themselves public authorities, are under a duty always to act in a way which is compatible with Convention rights.[16] The matter may come before the Supreme Court again, in the context of challenges to convictions by juryless 'Diplock courts' in Northern Ireland many years ago.

[11] Section 28(2) and (3).

[12] [2001] UKHL 62, [2002] 2 AC 69. Lord Clyde was replaced by Lord Lloyd.

[13] Also reported at [2001] 2 AC 69. The provision was the Insolvency Act 1986, s 433, which allowed statements prepared for insolvency purposes to be used in evidence against persons making the statements.

[14] He pointed out that *Lambert* was about the exercise of discretion by a prosecutor whereas in *Kansal* the prosecutor had been obeying a statutory requirement to tender the allegedly tainted evidence.

[15] Rodger (2005), 58. See too, on the presumption of innocence, Tadros and Tierney (2004).

[16] Human Rights Act 1998, s 6(1) and (3)(a).

The Court of Appeal in Northern Ireland has already granted several such appeals,[17] and it may at some point decide to frame a question of general public importance around the appropriate test for dealing with them for consideration by the Supreme Court.

Retrospectivity was also an issue in the commercial case of *Wilson v First County Trust Ltd (No 2)*,[18] where a money-lending company which had entered into a credit agreement with a consumer before the commencement of the Human Rights Act 1998 argued that once the Act was in force the agreement could not be applied against it in a way which arbitrarily deprived it of its right to property under Article 1 of Protocol No 1 to the European Convention.[19] But the House, reversing the Court of Appeal, did not agree that the Act was applicable. Even if it was, there was no incompatibility with the Convention, and there was no need to apply the interpretative duty in section 3(1) of the Act because Parliament could not have intended the Act to have the effect of altering parties' existing rights and obligations under the Consumer Credit Act 1974. This brings to mind the House's concern to preserve existing rights and obligations that was written into its 1966 Practice Statement on precedent: when deciding whether to depart from a previous decision the Law Lords must 'bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into'.[20] It seems that, important though human rights may be, they cannot be vindicated if doing so would unravel private financial agreements that were perfectly lawful when entered into. This is a further implied constraint on the courts' statutory duty to act compatibly with Convention rights at all times.

Right to life cases

There have also been significant decisions by the country's top judges in relation to the retrospective application of the right to life, in particular the aspect of that right which guarantees an independent and effective investigation of an otherwise unexplained death. It first arose in *Re McKerr*,[21] an appeal over whether the state was obliged to investigate a death caused by the police in Northern Ireland in 1982. The killing had already been considered by the European Court of Human Rights, which ruled that the United Kingdom had not fulfilled its obligation to conduct an effective investigation of the incident and awarded the deceased's family £10,000 as compensation.[22] The UK government paid that sum but did not conduct a further investigation. In a judicial review application the Court of Appeal in Northern Ireland ruled that an Article 2 compliant investigation *was* now required, because the obligation in question was a continuing one,[23] but the Law Lords unanimously held that no such investigation was

[17] eg *R v Brown, Wright, McDonald and McCaul* [2010] NICA 14; *R v McMenamin* [2007] NICA 22; *R v Mulholland* [2006] NICA 32.

[18] [2003] UKHL 40, [2004] 1 AC 816. This is the case which prompted academic reflections on retrospectivity by one of the judges involved: Rodger (2005).

[19] See too Ch 11 below, at 354. The company argued that s 127(3) of the Consumer Credit Act 1974 was incompatible with Art 1 of Protocol No 1.

[20] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

[21] [2004] UKHL 12, [2004] 1 WLR 807.

[22] *McKerr v UK* (2002) 34 EHRR 20.

[23] [2003] NICA 1, [2003] NI 117. The court's judgment was delivered by Carswell LCJ, as he then was.

required because prior to the Human Rights Act coming into force Convention rights had not, as such, been part of the UK domestic law. As no obligation to investigate the death existed before the Human Rights Act came into force, it could not 'continue' thereafter.[24] In what is further confirmation that the House of Lords viewed Convention rights as essentially 'imported', and also that their Lordships were solidly wedded to the 'dualist' approach to the incorporation of international law into the domestic system, the Law Lords asserted that the duties falling on the state under international law were of a different order from those falling on it under domestic law. Lord Hoffmann put it thus:

> In my opinion the reasoning which the Court of Appeal accepted does not sufficiently distinguish between the obligations under international law which the United Kingdom (as a state) accepted by accession to the Convention and the duties under domestic law which were imposed upon public authorities in the United Kingdom by section 6 of the 1998 Act. These obligations belong to different legal systems; they have different sources, are owed by different parties, have different contents and different mechanisms for enforcement.[25]

The House later applied *Re McKerr* when relatives of another victim of a police killing in Northern Ireland, Pearse Jordan, asked their Lordships to rule that a resumed inquest into that killing should be compliant with Article 2.[26] Yet in an appeal which was conjoined to the *Jordan* case, *McCaughey v Chief Constable of the PSNI*,[27] the Lords also held (without recourse to section 3 of the Human Rights Act) that the Coroners Act (NI) 1959 should be interpreted as placing a continuing duty on the police to supply the coroner with all relevant information obtained by the police relating to the death of the applicant's son, Martin McCaughey.[28] This ruling was a chink of light, but by no means a full-blown acceptance that Article 2 could be applied to deaths occurring prior to the commencement of the Human Rights Act.

The game-changer in this context was the decision by the Grand Chamber of the European Court in *Šilih v Slovenia*,[29] where it ruled that Slovenia was obliged to conduct an Article 2 compliant investigation into a death which had occurred in hospital just over a year before the European Convention entered into force for that country in 1994. Relying upon this decision, the relatives of two persons killed in Northern Ireland, one of whom was again Martin McCaughey, sought an inquest into the deaths that was fully compliant with Article 2. The courts in Northern Ireland, feeling that they were bound by *Re McKerr*, refused the request.[30] But in 2011 the Supreme Court, in *In re McCaughey*, allowed it, with one dissenter.[31] The majority of the Justices conceded

[24] The House also held that there was no obligation at common law to conduct such an investigation.

[25] [2004] 1 WLR 807, [62]. See too [80] (per Lord Rodger) and [88] (per Lord Brown).

[26] *Jordan v Lord Chancellor* [2007] UKHL 14, [2007] 2 AC 226. This death, which occurred in 1992, had also been previously considered by the European Court: *Jordan v UK* (2003) 37 EHRR 2.

[27] Ibid.

[28] This reversed a decision of the Court of Appeal of in Northern Ireland: [2001] NICA 1, [2005] NI 344. The killing in question took place in 1992, when Mr McCaughey was shot by a British soldier.

[29] (2009) 49 EHRR 37.

[30] [2010] NICA 13; [2009] NIQB 77.

[31] [2011] UKSC 20, [2012] 1 AC 725.

that, because of *Šilih v Slovenia*, *Re McKerr* was no longer good law. Although they found some of the phraseology in the Grand Chamber's judgment hard to fathom, they held that an Article 2 compliant investigation had to occur in relation to deaths occurring prior to the Human Rights Act's commencement if a 'significant proportion' of the investigative steps required to be taken had not by then occurred.[32] Lord Phillips, clearly taking an internationalist approach to the issue, held that the 'mirror principle' (under which UK courts should mirror what the European Court itself does—no more and no less) should trump the 'non-retroactive principle'.[33] Lord Rodger, taking a nationalist approach, dissented. For him, the UK courts should apply what Parliament chose to enact in 1998, not what the European Court thought it should have enacted. He felt that Parliament would have baulked at the idea that pre-Human Rights Act deaths in Northern Ireland could be subjected to Article 2 compliant investigations (although why that should be so undesirable is not made explicit). In his view, this kind of reform should be left to Parliament, not to a domestic court.[34]

All in all, the United Kingdom's top court has been far from activist in expanding the application of Convention rights in time. To some extent this attitude is explicable because of the wording Parliament chose to use in the Human Rights Act, but more generally the court has displayed a reluctance to assist in the full implementation of European Court judgments. More than a decade after the judgments in *McKerr v UK* and *Jordan v UK* the top domestic court has done little to insist that the effective investigations identified as necessary by the European Court should take place. The Committee of Ministers in Strasbourg has still not been able to conclude that those judgments have been fully implemented.[35] It is only with the Supreme Court's acceptance of *Šilih v Slovenia* that a greater openness to retrospective application of the Convention—or at least of the procedural aspect of Article 2—has been demonstrated. No doubt further cases will come before the Justices requiring them to tease out the precise ramifications of their volte-face in *In re McCaughey*.

Taking account of Strasbourg jurisprudence

The cases on retrospectivity discussed in the previous section provide a good introduction to the broader topic of how the House of Lords and Supreme Court have regarded Strasbourg jurisprudence and of the changes wrought in this field by section 2(1) of the Human Rights Act 1998. On its face, the sub-section seems quite clear. It states that, when a court or tribunal in the United Kingdom is determining a question which has arisen in connection with a Convention right, it must 'take into account', so far as 'it is relevant to the proceedings in which that question has arisen', any 'judgment, decision, declaration or advisory opinion of the European Court of Human Rights'.[36]

[32] That is the phrase used by the Grand Chamber at (2009) 49 EHRR 37, para 163, and endorsed by the Supreme Court: [2012] 1 AC 725, [50] and [52] (per Lord Phillips), [93] (per Lord Hope), [130] and [139] (per Lord Dyson).

[33] [2012] 1 AC 725, [57]–[62]. For further discussion of the 'mirror' principle see Ch 2 above, at 39–43.

[34] Ibid, [162].

[35] See the information supplied by the UK government on 1 September 2011 (DH-DD(2011)1139) and by two NGOs in February 2012 together with the UK government's response (DH-DD(2012)289).

[36] And also the views of the European Commission and Committee of Ministers. See Masterman (2005b).

There has, however, been some disagreement between the country's top judges as to what this duty actually entails.[37] This came to light, for example, when evidence was given to the House of Lords' Select Committee on the Constitution in 2011. Lord Phillips, the President of the Supreme Court, said that judges did follow decisions of the European Court of Human Rights very closely, while Lord Judge, the Lord Chief Justice, said that judges should be more flexible in their approach.[38] The issue has been considered at some length in three prominent cases decided at the highest domestic level by multi-judge courts: *Secretary of State for the Home Department v AF (No 3)*,[39] *R v Horncastle*,[40] and *Manchester City Council v Pinnock*.[41] In the first of these, a nine-judge Appellate Committee had to consider whether the procedure used during a hearing to determine whether an anti-terrorism control order had been validly issued was in breach of Article 6 of the European Convention. A year earlier, in *A v UK*,[42] the Grand Chamber of the European Court had ruled that the procedure did breach Article 6 because it failed to ensure that the controlee was provided with enough information to allow him or her to effectively resist the order. All nine Law Lords followed the Grand Chamber's ruling, although Lord Hoffmann did so 'with very considerable regret'[43] and Lord Carswell implied that he was not entirely happy to do so.[44] Lord Rodger seemed unenthusiastic too, expressing himself pithily in words of Latin which have already been much quoted by other judges and academics: 'Argentoratum locutum, iudicium finitum'.[45]

In *Horncastle* the Supreme Court was confronted by a decision of a Chamber of the European Court, *Al-Khawaja and Tahery v UK*,[46] which seemed to seriously undermine English law on the use of hearsay evidence in criminal cases. A seven-judge bench looked closely at all the relevant decisions of the European Commission and Court and held that, while it would follow decisions of the European Court when they applied clearly established principles, it would not do so where the decision appeared to insufficiently appreciate or accommodate particular aspects of the United Kingdom's domestic legal process. On this basis the Supreme Court did not follow *Al-Khawaja and Tahery*, using around 28,000 words to justify its position. Lord Judge CJ even penned a long Annex to the judgment in which he analysed many European Court decisions which had held that the admission of hearsay evidence would violate Article 6 of the Convention and which he showed would have been decided the same way under English law.

[37] See too the discussion of the *Ullah* principle in Ch 2 above, at 39–43. The present discussion focuses on the extent to which Strasbourg jurisprudence is binding on the UK Supreme Court, while the discussion in Ch 2 considers whether the Supreme Court can go beyond the Strasbourg jurisprudence.

[38] Evidence to the House of Lords Select Committee on the Constitution, 19 October 2011, available at <http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf> (last accessed 4 December 2012), 326–45, esp 328.

[39] [2009] UKHL 28, [2010] 2 AC 269. See too Ch 6 below, at 172, and Ch 7 below, at 218.

[40] [2009] UKSC 14, [2010] 2 AC 373. The appeal was heard by an Appellate Committee of the House of Lords in July 2009, but judgment was given by the Supreme Court in December 2009. See too Ch 7 below, at 213.

[41] [2010] UKSC 45, [2011] 2 AC 104. See too Ch 8 below, at 253.

[42] (2009) 49 EHRR 29.

[43] [2010] 2 AC 269, [70].

[44] Ibid, [108]. Lord Scott, at [96], said he agreed with Sedley LJ in the Court of Appeal that the common law leads to the same conclusion as the European Court reached in *A v UK*.

[45] Ibid, [98]. The words mean 'Strasbourg has spoken, the case is closed'. See Hale (2012); Kerr (2009).

[46] (2009) 49 EHRR 1.

In *Pinnock*, as in *AF*, the Supreme Court bowed to pressure from the European Court and finally conceded that English law could not continue to allow local housing authorities to evict tenants from social housing without first making sure that the eviction would not breach anyone's rights under Article 8 of the European Convention (the right to respect for one's home). In a judgment of the Court, written primarily by Lord Neuberger MR but to which eight other Justices contributed, emphasis was given to 'what is now the unambiguous and consistent approach of the European Court'.[47] The Justices departed from no fewer than three previous decisions of the House of Lords[48] and summed up the Supreme Court's position vis-à-vis European Court judgments in this way:

> This Court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law (see eg *R v Horncastle*).[49] Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator*.[50] But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber … Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.[51]

On this occasion the Supreme Court seems to have followed the European Court not because there was a clear judgment of the Grand Chamber pointing in a certain direction but because there had been as many as four judgments of a Chamber pointing in that direction, all delivered in 2009 and 2010 and post-dating the three House of Lords' decisions which were out of step with them.[52] Lord Neuberger MR added that there was no question of the jurisprudence of the European Court 'failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way' and that 'our domestic law was already moving in the direction of the European jurisprudence'.[53]

The principle set out in *Pinnock* was cited to their Lordships when the Supreme Court was asked to consider *Šilih v Slovenia* in *In re McCaughey*, discussed in the previous section, but it did not feature in any of the judgments. *Šilih v Slovenia* was not the culmination of 'a clear and constant line of decisions' and it did appear to be inconsistent with a fundamental aspect of UK domestic law. Nor was its reasoning very clear. Nevertheless, the Supreme Court (with the exception of Lord Rodger) was prepared to

[47] [2011] 2 AC 104, [46]. See too Neuberger (2011c) at para 25.
[48] *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] AC 367.
[49] [2010] 2 AC 373.
[50] [2004] 2 AC 323.
[51] *Manchester City Council v Pinnock* [2011] 2 AC 104, [48].
[52] Ibid, [47].
[53] Ibid, [49].

follow it in preference to a fairly recent decision of the House of Lords which suggested an alternative approach.

The case law therefore appears to suggest that there are two situations in which the Supreme Court will feel itself bound to follow Strasbourg jurisprudence. The first is where there has been a recent decision of the Grand Chamber expressly addressing the very point at issue, as in *AF* and *McCaughey*. The second is where there has been a series of recent Chamber decisions, not yet fully endorsed by the Grand Chamber, in which the attitude of the European Court to the very point at issue has been made clear, as in *Pinnock*. If the relevant Strasbourg decisions are in cases taken against the United Kingdom, they will inevitably carry even greater weight. In a case such as *Horncastle*, which falls into neither of the two categories, the Supreme Court can persist in adopting a national approach to the point at issue, arguing the validity of that approach as authoritatively as it can[54] in the hope that if and when the matter later comes before the Grand Chamber the national position will be endorsed. This is precisely what occurred in the aftermath of *Horncastle*: when the Grand Chamber re-examined *Al-Khawaja and Tahery* it effectively accepted the Supreme Court's criticism of the Chamber's judgment.[55] To some extent it was able to soften the blow as far as judges in the Chamber were concerned by upholding the conclusion reached in one of the two applications in question, but the Grand Chamber accepted the Supreme Court's basic point, which was that the 'sole and decisive' rule, favoured by the European Court when determining if a conviction based on hearsay evidence in criminal cases is in breach of the right to a fair trial, cannot be applied in a way which ignores other safeguards against unfairness which are embedded in the domestic legal system. This episode is an excellent example, bettered only by that involving re-possession proceedings in relation to social housing,[56] of the much-vaunted 'judicial dialogue' which is meant to characterize the relationship between the highest courts in domestic legal systems and the European Court in Strasbourg.[57]

The definition of 'public authority'

The top court has expatiated significantly upon the meaning of 'public authority' within the Human Rights Act on two occasions—in the *Aston Cantlow* and *YL* cases—but has touched upon it in several other cases too.[58] The first of the significant cases involved the rather obscure question of whether a parochial church council (PCC) was acting as a public authority when it directed the owners of 'rectorial' land to pay for repairs

[54] A senior Justice conceded to the author at a Chatham House Rules conference in 2010 that the LCJ had been asked to participate in *Horncastle* because his title would lend additional weight to the national court's decision as far as an international court was concerned.

[55] *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23.

[56] See Ch 8 below, at 246–56.

[57] See eg the report of the seminar held in Strasbourg on 27 January 2012 on 'Dialogue between judges: how can we ensure greater involvement of the national courts in the Convention system?' available at <http://www.echr.coe.int/NR/rdonlyres/4E9368B0-A5C9-49CB-A446-DE161D5A0F75/0/DIALOGUE_2012_EN.pdf> (last accessed 4 December 2012).

[58] See, generally, Lester et al (2009), 57–65; Joint Committee (2004) and (2007b).

to the area around the altar of the parish church.[59] The Lords approached the issue by distinguishing between 'core' public authorities (which are always operating as such) and 'hybrid' public authorities (which are sometimes operating as such). As a PCC is mainly concerned with pastoral and administrative issues within the parish, it was classified as a hybrid public authority. On this occasion the PCC was held not to be acting as a public authority, even though the public had certain rights in relation to the parish church, but was enforcing a private law duty arising out of the private ownership of land. On this point Lord Scott dissented: he thought the PCC was acting as a public authority because, amongst other reasons, the church was a public building,[60] the council was a charitable (and therefore a public) trust, and decisions of the PCC had to be taken in the interests of parishioners as a whole.[61] He added that, if the PCC took decisions in pursuit of private interests, it could be judicially reviewed, a further indication of its character as a public body. But the majority view, as Lord Hope put it, was that:

> The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State.[62]

The net result of the majority's position was to narrow the application of the Human Rights Act unduly.

In the second significant case, *YL v Birmingham City Council*,[63] the issue arose in a more prosaic and important context: is a residential care home,[64] to the extent that it accommodates people who are placed there and paid for by the local authority in the exercise of its welfare functions, itself a public authority? By three to two the Law Lords held that it was not. The majority felt, rather pedantically perhaps, that, while the arranging, regulating, and supervising of residential care were all public functions under the legislation in question,[65] the actual provision of care was not: the residents might therefore have public law and Convention rights against the local authority, but not against the owners of the care home. The majority looked at Strasbourg's case law to see what guidance was provided on the scope of state responsibility in this field—as if the House of Lords itself could not extend the liability of the UK state if it thought it appropriate to do so. The majority was also worried that it would be anomalous to allow some residents of care homes to enjoy Convention rights, but not residents who were paying fees out of their own resources.

In the view of the two judges who dissented—Lord Bingham and Baroness Hale—the majority were clearly wrong. Lord Bingham, without alluding to what he had said in *Ullah* about going as far as but no further than the European Court,[66] pointed out

[59] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

[60] It was open not only to people who wanted to worship but also to visitors who wanted to view the place in which William Shakespeare's parents were married.

[61] [2004] 1 AC 546, [130].

[62] Ibid, [64].

[63] [2007] UKHL 27, [2008] AC 95.

[64] Run in this case by Southern Cross Healthcare Ltd.

[65] National Assistance Act 1948, ss 21–26, as amended.

[66] See Ch 2 above, at 39.

that the term 'public authority' was not to be found in the Convention but was to be construed as a provision in a domestic statute. He then asserted, though without explicitly saying why this was so, that '[i]t is accordingly appropriate to give a generously wide scope to the expression'.[67] The factor which seems to have influenced him most in this instance was that since 1948 the British state had accepted a social welfare responsibility for those who are in need of care and attention not otherwise available to them.[68] Baroness Hale was similarly influenced, and had no doubt that Parliament intended the provision of accommodation, health, and social care for people who could not pay for it themselves to be 'a function of a public nature'. She thought that such a conclusion was 'inexorable',[69] although, like Lord Bingham, she stopped short of saying that people in the United Kingdom had a human right to such social goods. Even the government favoured interpreting the Human Rights Act in the way contended for by Mrs YL's lawyers,[70] and after losing in the courts it quickly rectified matters by ensuring that legislation was enacted making it clear that, throughout the United Kingdom, care homes looking after people whose fees are paid by local authorities *are* exercising a function of a public nature for the purposes of the Human Rights Act 1998.[71] Despite the fears of the majority in *YL*, the three legal systems in the United Kingdom are now coping with whatever distinction this creates between different categories of residents in care homes. It does not trouble the European Court of Human Rights—nor should it—that in this particular State Party Convention rights are extended to people who, in other states, may not be so fortunate.

Amongst the less significant House of Lords' pronouncements on the meaning of 'public authority' are those in *Quark* and *Barclay*—cases where the extra-territorial application of Convention rights was at issue.[72] They confirm the relatively restrictive approach to the definition which the majority of the top judges displayed in *Aston Cantlow* and *YL*. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*[73] the Commissioner of South Georgia and the South Sandwich Islands had refused to grant a fishing licence to a company, which then complained that its property rights under Article 1 of Protocol No 1 to the European Convention had been violated. The short answer to the claim was that, while the Convention itself had been extended to these South Atlantic islands, Protocol No 1 had not been.[74] But the House also said, *obiter*, that as the Commissioner was obeying the Foreign Secretary, who was acting for the Queen not as Queen of the United Kingdom but as Queen of the islands, he was not acting as a UK public authority. Lord Hoffmann put it thus:

> The test for whether someone exercising statutory powers was exercising them as a United Kingdom public authority is in my opinion whether they were exercised under the law of the United Kingdom. In this case they were not. The acts of the

[67] [2008] AC 95, [4].
[68] Ibid, [14]–[16].
[69] Ibid, [73]. See McDermont et al (2010).
[70] The Secretary of State for Constitutional Affairs intervened to that effect.
[71] Health and Social Care Act 2008, s 145.
[72] On which see 94–8 below.
[73] [2005] UKHL 57, [2006] 1 AC 529.
[74] An application by the company to the European Court of Human Rights was declared inadmissible on that ground: *Quark Fishing Ltd v UK* (2007) 44 EHRR SE4.

> Secretary of State in advising Her Majesty and communicating her instructions to the Commissioner had legal effect only by virtue of the [South Georgia and South Sandwich Islands Order 1985], which is the constitution of SGSSI and not part of the law of the United Kingdom.[75]

But Lord Nicholls and Baroness Hale did not wholly agree with this view. For the former, the capacity in which the Secretary of State acted for the Queen was a 'non-issue'.[76] He suggested that, for the purposes of the Human Rights Act, the Secretary of State was always a public authority, regardless of the capacity in which he was acting. Baroness Hale thought that to distinguish between the capacities in which the Foreign Secretary was acting was to give preference to form over substance. In truth, the distinction drawn by Lord Hoffmann seems a specious one, and in a later case, *Bancoult*, he himself admitted as much.[77]

R (Barclay) v Lord Chancellor and Secretary of State for Justice[78] was where Sir David and Sir Frederick Barclay, newspaper magnates, tried to challenge new constitutional arrangements for Sark, in the Channel Islands (which has about 600 inhabitants), as set out in the Reform (Sark) Law 2008. The reform allowed the electorate of Sark to vote for 28 members of the local legislature, the 'Chief Pleas', but preserved the right of two office-holders to be members *ex officio*: the island's 'Seigneur' (or Lord) and 'Seneschal' (or Steward). The Barclays argued that allowing such officials to be part of the legislature was incompatible with Article 3 of Protocol No 1 to the European Convention (the right to free elections), a view which was not accepted by the Supreme Court.[79] During the course of what Lord Neuberger described as a 'magisterial' judgment,[80] Lord Collins considered, again *obiter*, whether in this case the Lord Chancellor and Secretary of State had acted as a public authority in the United Kingdom when presenting to the Privy Council the Order in Council by which the 2008 Law was given Royal Assent. The learned judge cited *Quark* and noted Lord Hoffmann's change of mind in *Bancoult*,[81] but nevertheless concluded that it would be wrong for a bench of only five Justices to revisit the correctness of *Quark*.

The law has therefore been left in limbo: we do not know for certain when a minister in the UK government might be under a duty to act compatibly with Convention rights if he or she is undertaking a task relating to an overseas territory of the United Kingdom. All we can say, more generally, is that our top judges have been slow to

[75] [2006] 1 AC 529, [64]. Lord Hoffmann cited in support a decision of the European Commission of Human Rights, *Bui van Thanh v UK* App No 16137/90, 12 March 1990.

[76] Ibid, [45].

[77] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, [48]. This is the case where the House decided that no human rights had been violated when the residents of the Chagos Islands in the Indian Ocean were forcibly evicted from their homeland in 1971. Lord Hoffmann recanted the view he expressed in *Quark* about the test for deciding whether someone was exercising powers as a UK public authority, saying that Lord Nicholls' approach in *Quark* was to be preferred. He had been persuaded to change his mind after reading an unpublished paper by Professor Finnis of Oxford University: ibid, [39]. The paper is available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628> (last accessed 4 December 2012).

[78] [2009] UKSC 9, [2010] 1 AC 464.

[79] See further Ch 12 below, at 371.

[80] [2010] 1 AC 464, [120].

[81] See n 77 above.

expand the definition of 'public authority'. Part of the reason for this might be that, to the extent that a body qualifies as a public authority, it is correspondingly deprived of the right to claim to be a victim of a violation of Convention rights, a point further explored by Davis.[82] But the reluctance to adopt an expansive interpretation of the term means that the duty to uphold human rights becomes a relatively exclusive duty, not a default one. The contrast with legislation on discrimination is notable: the various Acts outlawing discrimination apply to private sector bodies as well as public authorities. There is a case for expanding the reach of the Human Rights Act in the same way.[83]

The section 3 interpretative duty

As alluded to in the introduction to this chapter, perhaps no aspect of the Human Rights Act has given rise to more controversy than the duty imposed by section 3 to read and give effect to primary and subordinate legislation, 'so far as it is possible to do so', in a way which is compatible with Convention rights. It is a duty which is imposed on everyone, not just the public authorities which, under sections 6 and 7 of the Act, can be sued by those who claim to be victims of breaches of Convention rights. It is also a duty which applies to all legislation, whenever enacted, thereby giving courts and other law-enforcers the duty to change the accepted interpretation of pre-existing legislation if it no longer fits with the requirements of the European Convention. As to when it is 'possible' to apply the section, presumably Parliament did not intend to confer on the courts some entirely new constitutional role and was conscious that under their existing role they have to operate within certain constraints which restrict judges (and anyone else) from treating words in legislation as meaning whatever they would like them to mean. Thus, if the words are very clear and unambiguous, and were quite recently approved by Parliament, they can hardly be interpreted as meaning something different from what they purport to mean. Likewise, if a higher authority—a superior court or Parliament itself—has since made it clear what pre-existing legislation must be taken to mean, then lower courts, and even the Supreme Court in cases where Parliament has spoken, must abide by the higher authority's interpretation. Moreover, if courts below the Supreme Court are faced with an earlier House of Lords or Supreme Court interpretation of a legislative word or phrase which is at odds with a decision of the European Court of Human Rights, whether that decision was issued before or after the interpretation provided by the top domestic court, it is the duty of the lower courts to follow the ruling of their superior domestic court, leaving that court itself, on appeal, to rectify any discrepancy with the European Court's jurisprudence.[84]

[82] Davis (2005).

[83] The application of the Human Rights Act is no doubt limited to public authorities because Convention rights are conceived of as claims that can be brought against the state. But that conception is a function of the origin of those particular rights in an inter-state treaty. There is no *a priori* reason why human rights recognized by the common law should not be made enforceable against private bodies as well as public bodies.

[84] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.

Primary legislation

Probably the most obvious of the constraints facing domestic courts when deciding whether it is possible to use the interpretative power conferred by section 3 is that, by common consent, some matters are better left to Parliament to decide, not judges. The problem is that there is disagreement amongst top judges as to what precisely those matters are. Some Supreme Court Justices, for example, are much less willing than others to make laws in fields which involve issues of social or economic policy. It has been claimed[85] that the section 3 duty is analogous to the duty under EU law whereby national courts have to interpret and apply their national law 'as far as possible, in light of the wording and purpose of the Directive in order to achieve the result pursued by the latter'[86] (the *Marleasing* principle), but the crucial difference is that in the latter context Parliament itself has provided that if there is a conflict between domestic law and EU law it is EU law which must prevail,[87] whereas under the Human Rights Act the courts need only 'take account' of Strasbourg jurisprudence, not consider themselves bound by it.

When interpreting section 3 the House of Lords and Supreme Court have been conscious that it must be read in conjunction with section 4, the provision which allows the High Court and appeal courts to issue declarations of incompatibility if they think that it is *not* possible to read and give effect to primary legislation in a way that is compatible with Convention rights. In one case Lord Bingham pointed out that 'Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 is an exceptional course'.[88] During the Parliamentary debates on the Human Rights Bill, members of the Labour government could not have been clearer in saying that they wanted the judges to strive for a Convention-compliant interpretation and to issue declarations of incompatibility only as a last resort.[89] Interestingly, the Conservative opposition tried unsuccessfully to have section 3 amended so that courts should have to come up with a Convention-compliant interpretation only when it was 'reasonable' (rather than 'possible') to do so, even though that might have had the unintended consequence of producing a higher number of declarations of incompatibility.[90] But if such an amendment had been passed, it is doubtful if it would have made any profound difference to the way in which the judges in the top court have utilized section 3. With one or two exceptions, in their application of the possibility criterion the top judges have, it is submitted, acted 'reasonably'. They have asked themselves, albeit on most occasions impliedly, whether

[85] eg by Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [45]; see too Beatson et al (2008), paras 5.64 and 5.87 to 5.97.

[86] *Marleasing SA v La Commercial Internacional de Alimentacion SA* Case C106/89, [1990] ECR I-4135, 4159.

[87] European Communities Act 1972, ss 2(1) and (4).

[88] *Attorney General's Reference No 4 of 2002* [2004] UKHL 43, [2005] 1 AC 264, [28]. See too Lord Steyn in *Ghaidan v Godin-Mendoza*, n 92 below, [39], [46], and [50].

[89] See eg the speech of Lord Irvine LC during the Committee stage debate on 24 November 1997: HL Debs, vol 583, col 795.

[90] HC Debs, vol 313, cols 415–26, 3 June 1998.

the legislative provision in question would withstand scrutiny by the European Court and have been assiduous in examining the relevant European Court jurisprudence before coming to a conclusion. Now and again, however, even in situations where the meaning of Parliament's words has appeared to be very clear, our top judges *have* been prepared to change that meaning.

Perhaps the two most 'extreme' cases in which the House of Lords or Supreme Court has stretched the language of Parliament are *R v A (No 2) (Rape Shield)*[91] and *Ghaidan v Godin-Mendoza*.[92] In the first of these the Lords held that, despite the wording of recently enacted legislation which seemed to indicate the contrary,[93] and because of the need to preserve the defendant's right to a fair trial, a complainant in a rape case *could* be cross-examined about his or her previous sexual experience. This was a startling decision, because it came so soon after Parliament had made its intention clear. The decision to prohibit such cross-examination was a deliberate one, taken with a view to protecting complainants in rape cases from indignity and humiliation and to countering the assumptions that a woman who had had previous sexual intercourse was more likely to consent to sex and to be a less credible witness. But, in an excellent illustration of the priority judges like to give to fair trial rights, the Lords held that the defendant's Article 6 rights had to override the legislation. Lord Steyn, in particular, stressed the 'absolute' nature of the right to a fair trial.[94] Lord Hope did not think it was appropriate to read words into the relevant statutory provision,[95] and he did not believe that section 41 in the 1999 Act was incompatible with the defendant's Convention rights,[96] but he was nevertheless prepared to countenance the words of that section being 'read down' so as to be compatible with the Convention.[97] Lord Hutton *did* think that on ordinary principles of construction section 41 was incompatible with the right to a fair trial,[98] but was also quite prepared to use section 3 to remedy that incompatibility.[99] Lords Slynn, Clyde, and Hutton agreed that the case should be remitted to the Crown Court so that the trial judge could consider any further application from the defendant for leave to cross-examine the complainant in the light of the comments made by their Lordships. The case is a good example of section 3 being applied in a way which does not depend on the precise language used in the statutory provision under scrutiny: the top court was more concerned with the proper application of Article 6 than with the specific wording of legislation that happened to touch upon Article 6. Moreover, what was at issue here was the admissibility of evidence, a matter which judges have traditionally treated as their own preserve, not Parliament's.[100] Clayton sees *R v A (No 2)* as laying down clear guidelines regarding the boundaries of section 3 and suggests that, if this means that judges can now radically alter (but not subvert) Parliamentary intention, this is an

[91] [2001] UKHL 25, [2002] 1 AC 45.
[92] [2004] UKHL 30, [2004] 2 AC 557.
[93] Youth Justice and Criminal Evidence Act 1999, s 41(3)(b).
[94] [2002] 1 AC 45, [38]. He added that 'a conviction obtained in breach of [Art 6] cannot stand', citing *R v Forbes* [2001] 1 AC 473, [24]. But that may be going too far: see eg *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976.
[95] Ibid, [108]–[109].
[96] Ibid, [106]. [97] Ibid, [110]. [98] Ibid, [161]. [99] Ibid, [163].
[100] See too Phillipson (2003), 188.

inevitable and intended consequence of the 1998 Act, which is itself 'a constitutional instrument'; he claims that '[a] refusal to apply a possible section 3 interpretation because it breaches constitutional principle by encroaching into the legislative area cannot be justified'.[101] Kavanagh, on the other hand, suggests that the approach preferred in *R v A (No 2)*, even by Lord Steyn, was not actually very radical and that the decision has been criticized more because of its impact on female complainants of rape than because of its support for judicial activism per se.[102] It must surely be conceded, however, that what the Law Lords did in this case was to countermand Parliament.

The second apparently extreme application of section 3, the *Ghaidan* case,[103] involved the House of Lords interpreting the word 'spouse' in the Rent Act 1977 as including the partner of a gay person, even though the Civil Partnership Act 2004, which granted legal recognition to gay partnerships for the first time in the United Kingdom, was not yet in force. Not only did this appear to run counter to the idea that words which are very clear cannot be interpreted as meaning something else, it also required the House of Lords to depart from a decision it had taken just four years earlier, in *Fitzpatrick v Sterling Housing Association Ltd*.[104] In *Ghaidan* the House was particularly influenced by the fact that in 1988 the Rent Act 1977 had been amended[105] so as to give survivorship rights to people living together 'as husband and wife', but that amendment was already in place at the time of the *Fitzpatrick* decision and it still begged the question whether gay people who live together do so 'as husband and wife'. The issue was, as well, one with significant social consequences. It meant that the rules on the allocation of social housing were drastically altered, a matter some would say is better left to Parliament to regulate. Lord Nicholls, giving the lead judgment, summarized the import of section 3 thus:

> Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament when enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve… Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative intervention.[106]

[101] Clayton (2002), 566. See too Samuels (2008); Bonner et al (2003); Browne-Wilkinson (1998).

[102] Kavanagh (2005), 265–7 and 270. See too Beatson (2006).

[103] See n 92 above. Van Zyl Smit (2007) calls it 'a remarkable case' (at 306) and labels the approach adopted 'abstract purposive interpretation'. He thinks this was modified in a helpful way by the Lords' comments in *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718.

[104] [2001] 1 AC 27.

[105] By the Housing Act 1988, s 39 and Sch 4, para 2.

[106] [2004] 2 AC 557, [32]–[33]. For a current Justice's view, see Hale (2011).

As examples of where the House had refused to use section 3 because to do so would give the provision in question a meaning inconsistent with an important feature clearly expressed in the legislation, Lord Nicholls cited *In re S (Minors) (Care Order: Implementation of Care Plan)*[107] and *R (Anderson) v Secretary of State for the Home Department*.[108] The features in question in those cases were, respectively, the desire to give local authorities exclusive control over how children in need should be cared for and the desire to give a representative of the government the final say on when it would be appropriate to release convicted murderers from prison. Writing extra-judicially, Sir Stephen Sedley has argued that *In re S* represented a serious judicial failure to protect children,[109] but in *Anderson* Lord Bingham said it would have been 'judicial vandalism' to read the relevant statutory provision[110] as depriving the Home Secretary of the power expressly conferred upon him by Parliament. As examples of where the use of section 3 would have required the House to make laws in areas unsuited for it, Lord Nicholls again cited *In re S* and also *Bellinger v Bellinger*,[111] the case on whether a transsexual should be allowed to marry a person of the same gender which the transsexual had at birth. Lord Steyn likewise cited *Anderson* and *Bellinger* as cases where to have applied section 3 (rather than section 4) would have been to 'cross the Rubicon', but unfortunately he chose not to formulate criteria as to when it *would* be appropriate to use section 3: '[l]ike the proverbial elephant such a case ought generally to be easily identifiable'.[112] His Lordship's judgment is nevertheless very important for pointing out that use of section 3 should not be limited by 'an excessive concentration on linguistic features of the particular statute'.[113] Lord Rodger, too, did not try to set out criteria for when section 3 could be applied: he said that the answer to that question 'cannot be clear-cut and will involve matters of degree which cannot be determined in the abstract but only by considering the particular legislation in issue'.[114]

There is obviously a degree of side-stepping in these judgments, all the more regrettable because another of the Law Lords, Lord Millett, dissented. For him the majority in *Ghaidan* were applying the ambit of section 3 'beyond its proper scope'.[115] He was not saying that the doctrine of Parliamentary supremacy is sacrosanct, 'but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning'.[116] He observed

[107] [2002] UKHL 10, [2002] 2 AC 291.
[108] [2002] UKHL 46, [2003] 1 AC 837.
[109] Sedley (2005).
[110] Crime (Sentences) Act 1997, s 29.
[111] [2003] UKHL 21, [2003] 2 AC 467. See further Ch 8 below, at 232.
[112] [2004] 2 AC 557, [50].
[113] Ibid, [41]. Lord Steyn added an appendix to his opinion setting out (a) the 10 cases in which declarations of incompatibility had so far been issued under s 4, (b) the five cases in which such declarations had been overturned on appeal (in one of these the declaration was later restored by the Lords: *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68), and (c) the 10 cases in which the interpretative power in s 3(1) had been exercised.
[114] Ibid, [115]. Baroness Hale agreed with what Lord Steyn and Lord Rodger said about the scope and application of s 3: [145].
[115] Ibid, [57].
[116] Ibid.

that the 'command'[117] conferred by section 3 was 'dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will almost invariably be a good cause'.[118] He gave his approval to the House's approach to section 3 in *R v A (No 2)*, *In re S*, *Anderson* and *Bellinger* and he approved of Lord Nicholls' view that section 3 should not be used to supply words which are inconsistent with a fundamental feature of a legislative scheme, but for Lord Millett it was obvious that the word 'spouse' and the phrase 'as husband and wife' referred to people of particular genders. Noting that the Civil Partnership Bill was before Parliament at the time he was writing his judgment, he added:

> It is noticeable, now that Parliament is introducing remedial legislation, it has not sought to do anything as silly as to treat same sex relationships as marriages, whether legal or de facto. It pays them the respect to which they are entitled by treating them as conceptually different but entitled to equality of treatment.[119]

Lord Millett therefore concluded, having also considered the legislative history of the relevant provision in the Rent Act 1977, that whether gay people should be able to take over the tenancies of their deceased partners was a question of social policy which should be left to Parliament to decide.[120] While Lord Rodger and Baroness Hale expressly disagreed with Lord Millett's interpretation of the phrase 'as husband and wife', it is possible to have some sympathy for his point of view given that, just over a year earlier, the House in *Bellinger* (including Lord Nicholls and Lord Rodger) had unanimously held that a statutory provision concerning marriage could not be interpreted as including post-operative transsexuals. Why was it appropriate to use section 3 in *Ghaidan* but not in *Bellinger*?

Three more recent instances of the use of section 3 are worth noting because they provide further illustrations of the difficulty in predicting whether the top court will opt for the section 3 route rather than the section 4 route. In *Secretary of State for the Home Department v MB*,[121] discussed further in relation to section 4 below, Lord Bingham would have preferred to resort to section 4 but, choosing not to press his opinion to the point of dissent, he accepted the view of Baroness Hale, Lord Carswell, and Lord Brown that provisions in the Prevention of Terrorism Act 2005 could be read down 'so that they would take effect only when it was consistent with fairness for them to do so'.[122] Lord Hoffmann thought there was no need to read down the provisions because the special advocate procedure under the 2005 Act meant that there would never be a breach of Convention rights. It became clear less than two years later, when the same issue reached the Lords after having been examined in the interim by the European Court,[123] that Lord Bingham's preferred approach was indeed the correct one, and Lord Hoffmann's definitely not.[124]

[117] Ibid, [59]. This goes beyond Lord Cooke of Thorndon's description of the duty in s 3 as 'a strong adjuration': *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 373.
[118] Ibid, [61]
[119] Ibid, [82]. The UK Parliament will soon be voting on same-sex marriages.
[120] Ibid, [101].
[121] [2007] UKHL 46, [2008] AC 440.
[122] Ibid, [44].
[123] *A v UK* (2009) 49 EHRR 29.
[124] *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

In *R v Biggs-Price* the House had to decide whether a provision in the Drug Trafficking Act 1994, which allowed the civil standard of proof to be used when determining whether a person had benefited from drug trafficking,[125] was incompatible with Article 6 of the European Convention in situations where the prosecution was relying on evidence of drug trafficking other than a conviction for that offence in order to prove the existence of the benefit. Rather than declare the provision to be incompatible,[126] the House unanimously held that it should be read down so as to require proof to the criminal standard in these situations. This was made explicit by Lord Rodger, Lord Brown, and Lord Neuberger.[127] The fact that none of the Law Lords suggested what words needed to be 'read into' the statutory provision shows that by this time the top court had firmly adopted a conceptual rather than a linguistic approach to the application of section 3.

Unfortunately, in the Scottish appeal of *Principal Reporter v K*,[128] the Supreme Court reverted to a plainly linguistic approach. Having held that legislation which applied to the facts of this case at the time they occurred[129] was incompatible with Article 8 of the Convention, because it excluded the unmarried father of a child from a hearing which related to the child's future, the Supreme Court read specific words into the relevant statutory provision in order to correct the incompatibility. It did so, rather than issue a declaration of incompatibility (which none of the parties to the case wanted, including the Scottish government), because the new words would not be 'inconsistent with the scheme of the legislation'.[130] The words being proposed would not give attendance rights to all unmarried fathers but only to those who had established family life with their child. They went 'with, rather than against, the grain of the legislation',[131] given that another sub-paragraph in the legislation already referred to 'any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child'.[132]

In the year in which the Human Rights Act was enacted, one of its principal architects, Lord Irvine of Lairg QC, argued for an expansive approach to section 3, but he did not provide any suggestions as to how to decide where the boundaries of what was possible actually lay.[133] In the year in which the Act came into force, the guru of statutory interpretation in the United Kingdom, Francis Bennion, claimed to be proposing

[125] Section 2(8)(a).

[126] A contention which the defendant's counsel was reluctant to push because any such declaration would have had no impact on the confiscation of this particular defendant's assets: see [2009] AC 1049, [111] (per Lord Mance).

[127] [2009] AC 1049, [79], [95], and [152] respectively. Lord Phillips and Lord Mance were not as explicit, being apparently content to hold that in this particular case the prosecution had proved the defendant's guilt of drug trafficking beyond reasonable doubt: [41]–[43] and [134] respectively.

[128] [2010] UKSC 56, [2011] 1 WLR 18.

[129] Children (Scotland) Act 1995, s 93(2)(b), which listed the 'relevant persons' who were entitled to attend children's hearings.

[130] This was the test laid down by Lord Rodger in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, and it was he and Baroness Hale who delivered a joint judgment on behalf of the whole Court in *Principal Reporter v K*.

[131] [2011] 1 WLR 18, [69].

[132] Section 93(2)(b)(c).

[133] Irvine (1998).

'fairly precise answers' to the question, what is 'possible'?[134] But in fact his proposal amounted to little more than suggesting that UK courts now have to adopt a 'developmental construction', whereby the design, purpose, and spirit of the legislation have to be taken into account.[135] Gearty claims that section 3(1) should be applied with proper regard for the other provisions in the Act which suggest that Parliamentary sovereignty is alive and well,[136] but Phillipson, rightly it is submitted, points out the flaws in Gearty's reasoning.[137] Phillipson himself, however, by suggesting that section 3(1) has to be interpreted expansively because it calls for *all* legislation to be so interpreted, surely falls into the same question-begging trap which he accuses Gearty of occupying. Kavanagh is largely supportive of the Bennion approach, observing that when courts seek to apply Parliament's intention they can take into account the words enacted (the 'enacted intention'), the aims of the legislation (the 'legislative purposes'), and existing common law presumptions (the 'presumed intentions'), although she too does not unpack what it means to say that 'far-reaching legal change . . . might be better for Parliament to carry out' or that there is a 'judicial obligation to secure continuity between changes in the law and the existing body of law'.[138] The test for choosing between the section 3 path and the section 4 path remains highly elusive and further clarification from the Supreme Court would be welcome.

Secondary legislation

It must be remembered that section 3(2) differentiates between primary legislation and secondary legislation. While it makes clear that the interpretative duty applies to both types of legislation, and that its operation does not affect the validity of any incompatible legislation, it restricts the latter qualification to situations where secondary legislation cannot be declared invalid because primary legislation prevents removal of the incompatibility. To date the House of Lords and Supreme Court have declared secondary legislation to be invalid for incompatibility with Convention rights on only two occasions. The first was in the seminal case of *A v Secretary of State for the Home Department*,[139] where the Order in Council derogating from Article 5 of the European Convention was declared invalid because it was disproportionate and discriminatory.[140] The second was in *In re G (Adoption: Unmarried Couple)*,[141] where the House ruled that Article 14 of the Adoption (NI) Order 1987, which prevented unmarried couples from applying to adopt, was in breach of Convention rights. Lord Hoffmann said the provision was irrational and disproportionate. Remarkably, notwithstanding the *Ullah* principle,[142] he added that even if the European Court were to regard eligibility as an adoptive parent to be a matter within each state's margin of appreciation, courts in the United Kingdom, as

[134] Bennion (2000).
[135] Ibid, 81–2 and 91.
[136] Gearty (2002a).
[137] Phillipson (2003), 184.
[138] Kavanagh (2006), 205 and 206.
[139] [2004] UKHL 56, [2005] 2 AC 68.
[140] Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644).
[141] [2008] UKHL 38, [2009] 1 AC 173.
[142] See Ch 2 above, at 39–43.

well as Parliament, could determine the scope of Convention rights within the United Kingdom. Lord Walker, seeing this as a reform which Parliament had deliberately chosen not to make, dissented. In effect, Article 14 was 'disapplied' by the majority, but neither the UK Parliament nor the Northern Ireland Assembly then intervened to replace it with another provision making it clear that unmarried couples *can* adopt. In practice, it seems, those who manage adoptions in Northern Ireland have continued to apply the law as it stood prior to the House of Lords' decision, with the result that the Northern Ireland Human Rights Commission, taking advantage of its statutory power to invoke the Human Rights Act 1998 even though it is not itself a 'victim',[143] successfully brought judicial review proceedings challenging the decision by the Northern Ireland Executive not to take action on the point.[144]

Some might suggest that the Supreme Court's decision in the more recent case of *Ahmed v HM Treasury*[145] is another instance of the Human Rights Act being applied to invalidate secondary legislation on human rights grounds, but in fact this is not so. True, a seven-judge bench held that the whole of the Terrorism (United Nations Measures) Order 2006, and one provision in the Al-Qaida and Taliban (United Nations Measures) Order 2006,[146] were invalid because they breached the applicants' fundamental rights.[147] The Orders effectively froze the financial assets of designated persons without first providing them with an opportunity to challenge the justification for such measures, except by way of judicial review. Although the parent Act, the United Nations Act 1946, said that Orders in Council could be made if they were 'expedient' for enabling UN Security Council Resolutions to be effectively applied,[148] the Supreme Court said that it could not be inferred from that that Orders could be based on reasonable suspicion that a designated person 'may be' participating in the financing of terrorism. So the Court's decision was grounded on the traditional *ultra vires* doctrine, supplemented by reliance on two fundamental rights recognized by the common law—the right to peaceful enjoyment of one's property and the right of unimpeded access to a court.[149] The applicants' attempt to base their claims on Convention rights was unsuccessful. None of the judges was prepared to revisit the House's decision in *R (Al-Jedda) v Secretary of State for Defence*,[150] which held that action taken under the authority of the UN Charter could not be challenged under the European Convention.[151] Lord Hope purported to justify this by referring to the *Ullah* case,[152] as if the mirror principle

[143] Northern Ireland Act 1998, s 71(2B)(a), inserted by the Justice and Security (NI) Act 2007, s 14(2).

[144] *Re Northern Ireland Human Rights Commission's Application* [2012] NIQB 77.

[145] [2010] UKSC 2, [2010] 2 AC 534.

[146] Article 3(1)(b).

[147] The Court of Appeal, which comprised two future Supreme Court Justices, Sir Anthony Clarke MR and Wilson LJ, as well as Sedley LJ, had held that the Orders could be interpreted in a way which made them compatible with Art 6: [2008] EWCA Civ 1187, [2010] 2 AC 534.

[148] Section 1.

[149] [2010] 2 AC 534, [75]–[76] (per Lord Hope), approving the argument put by Rabinder Singh QC, who relied on the cases of *Entick v Carrington* (1765) 19 State Tr 1029, 95 ER 807 and *R (Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2004] 1 AC 604.

[150] [2007] UKHL 58, [2008] AC 332. This case is discussed in more detail below, at 96.

[151] Article 103 of the UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

[152] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.

enunciated there had to determine the extent to which common law rights as well as Convention rights should be protected.[153]

In response to the Supreme Court's decision in *Ahmed* the government pushed emergency legislation through Parliament.[154] This legislation deemed the existing Orders in Council to have been validly made, and preserved until the end of 2010 the validity of asset-freezing restrictions already imposed. In the meantime, a consultation paper was issued on the most appropriate way forward. The legislation which was enacted in the wake of that consultation, the Terrorist Asset-Freezing etc Act 2010, no longer allows restrictions to be placed on people who 'may be' participating in terrorist activity. Instead, it requires the Treasury to have a reasonable belief that the designated person is 'or has been' so involved.[155] Moreover, the Act allows a designated person to appeal against his or her designation to a court, thereby guaranteeing the right to a fair hearing.[156] But it remains to be seen whether in any such hearing the appellant will be permitted to raise other human rights, whether Convention-based or derived from the common law.

So we see again a certain lack of ambition on the part of our most senior judges. They were reluctant to develop the common law of human rights in a way which would slip the bonds of the constraints imposed by the European Court. On the upside, the judgments in *Ahmed* are significant for the emphasis they place on the *Simms* principle, derived from Lord Hoffmann's judgment in *R v Secretary of State for the Home Department, ex parte Simms*.[157] As we observed in Chapter 2,[158] that is where Lord Hoffmann explained that, while Parliament is sovereign, and can therefore legislate contrary to fundamental principles of human rights if it so wishes, it cannot do so 'by general or ambiguous words' but only by express language or 'necessary implication'.[159]

Declarations of incompatibility

So far, the House of Lords and Supreme Court have between them issued declarations of incompatibility in six cases.[160] Two of these were mentioned above (*Anderson* and *Bellinger*);[161] declarations were also issued by the Lords in *A v Secretary of State for the Home Department* (the first Belmarsh case),[162] *R (Hindawi) v Secretary of State for the Home Department*,[163] and *R (Wright) v Secretary of State for Health*.[164] Only one

[153] [2010] 2 AC 534, [74]. See too [106] (per Lord Phillips), [183] (per Lord Rodger), and [203] (per Lord Brown). Lord Mance found it unnecessary to rule on the Human Rights Act points: ibid, [238]–[250].

[154] Terrorist Asset-Freezing (Temporary Provisions) Act 2010.

[155] Section 2(1)(a). The Treasury can also make interim designations if it 'reasonably suspects' involvement in terrorist activity: s 6(1)(a).

[156] Section 26.

[157] [2000] 2 AC 115.

[158] At 25.

[159] [2000] 2 AC 115, 131F.

[160] For information on the 27 declarations issued up to September 2012 (eight of which were overturned on appeal), see Ministry of Justice (2012), 5 and Annex A. For the position in June 2008, see Beatson et al (2008), 522–33.

[161] [2002] UKHL 46, [2003] 1 AC 837 and [2003] UKHL 21, [2003] 2 AC 467, respectively. See too 67 above.

[162] [2004] UKHL 56, [2005] 2 AC 68.

[163] [2006] UKHL 54, [2007] 1 AC 484.

[164] [2009] UKHL 3, [2009] AC 739.

declaration has been issued by the Supreme Court, in *R (F (A Child)) v Secretary of State for Justice*.[165] In a further six cases the House of Lords overturned a declaration of incompatibility issued by a lower court, but the Supreme Court has not yet done so. On at least 14 further occasions the top court has endorsed a lower court's refusal to issue a declaration. On the other hand, in three cases the House of Lords or Supreme Court has refused to issue a declaration of legislative incompatibility only to find that when the matter later made its way to Strasbourg the European Court ruled that there was indeed a violation of the European Convention.

All of the cases referred to above are analysed below. It is important to bear in mind that a declaration of incompatibility can be issued even in a situation where there is no identifiable 'victim' of the incompatibility: the 'victim' requirement imposed by section 7(7) of the Human Rights Act applies only to proceedings brought under section 7 itself, while compatibility issues can arise in the course of many other kinds of proceedings.

Declarations issued or endorsed by the top court

In *R (Anderson) v Secretary of State for the Home Department* a seven-judge House of Lords, reversing the Court of Appeal,[166] found that the fixing of a convicted murderer's prison tariff by the Home Secretary, under section 29 of the Crime (Sentences) Act 1997, was incompatible with Article 6(1) of the European Convention on Human Rights because it allowed a government minister to interfere in what was supposed to be an independent judicial function. Section 4 of the Human Rights Act 1998 had to be invoked (the first time the Lords had done so) because the section in question could not be 'read down' under section 3. This is the case in which Lord Bingham said that to have employed section 3 would have amounted to 'judicial vandalism'.[167] With the greatest of respect, it is difficult to see how this would actually have been so, for the section in question is by no means explicit in giving the Home Secretary power to increase a tariff period set for a murderer by the courts.[168] It would surely have been 'possible' to read down the section so as to ensure that it did not allow the Home Secretary to *increase* the tariff period set by the courts. Having said that, the Lords were confronted by a decision of the Grand Chamber of the European Court of Human Rights, *Stafford v UK*,[169] which indicated clearly that government ministers should not be involved in the sentencing function at all, so a declaration of incompatibility was not unjustified. In *Anderson* the House was not just flexing its muscles under section 4 of the Human Rights Act for the first time, it was also demonstrating that it 'will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber'.[170] The government responded to the decision

[165] [2010] UKSC 17, [2011] 1 AC 331.

[166] [2001] EWCA Civ 1698, [2003] 1 AC 837 (Lord Woolf CJ, Simon Brown and Buxton LJJ).

[167] [2003] 1 AC 837, [30]. See also 67 above.

[168] Indeed, Lord Bingham admitted that the section 'gives little indication of the procedures which in practice follow imposition of a mandatory life sentence on a convicted murderer': ibid, [6].

[169] (2002) 35 EHRR 32. This disapproved of the Law Lords' decision in *R v Secretary of State for the Home Dept, ex parte Stafford* [1999] 2 AC 38.

[170] [2003] 1 AC 837, [18] (per Lord Bingham).

by including new provisions on tariff periods for people convicted of murder in what became the Criminal Justice Act 2003.[171]

The declaration of incompatibility issued in *Bellinger v Bellinger* was prompted by the fact that a person whose sex had been correctly classified at birth could not lawfully enter into a marriage with a person of the same sex even after the first person had undergone gender reassignment surgery. Going beyond the decision of the Court of Appeal in the case,[172] the Law Lords unanimously said that the relevant provision in the Matrimonial Causes Act 1973[173] was incompatible with Articles 8 and 12 of the European Convention. Again it was a decision of the Grand Chamber in Strasbourg, *Goodwin v UK*,[174] which compelled such a conclusion. Rather than read down the provision (as the House later did in *Ghaidan v Godin-Mendoza* in relation to the status of homosexuals[175]), the court preferred to leave the exact nature of the required reform to Parliament. A Bill to that end had already been prepared and it would have been inappropriate to pre-empt the forthcoming debates. In due course the Bill became the Gender Recognition Act 2004.

What distinguished the next declaration of incompatibility, in *A v Secretary of State for the Home Department* (the first Belmarsh case), was that it was not preceded by a decision of the Grand Chamber pointing in a certain direction. Instead, the House of Lords deduced for itself, with little reference to Strasbourg case law,[176] that the indefinite detention of foreign nationals without trial[177] was a violation of Article 14 of the Convention read in conjunction with Article 5. The possibility of 'reading down' the statutory provision was not even discussed in the opinions, because it was obvious that its validity could in no such way be rescued. The government responded by allowing the indefinite detention provision to lapse a few months later. It was replaced with the control order regime set out in the Prevention of Terrorism Act 2005.

By this time, therefore, two of the three declarations of incompatibility issued by the Lords related to breaches of the right to liberty. That right was also at stake in the fourth declaration. In *Hindawi*[178] the Law Lords held that provisions on the early release of prisoners in the Criminal Justice Act 1991[179] were incompatible with the Convention to the extent that they prevented prisoners who were liable to be deported from the United Kingdom after serving their prison sentence from having their cases reviewed by the Parole Board in the same manner as other long-term prisoners who were not liable to be deported. Reversing the Court of Appeal,[180] the Lords had little difficulty in

[171] Section 269. See too Joint Committee (2003a), paras 77–96. The Committee did not think that the new provisions gave rise to a significant risk of violating Convention rights.

[172] [2001] EWCA Civ 1140, [2002] Fam 150. Thorpe LJ, dissenting, would have allowed Mrs Bellinger's appeal, holding her 'marriage' to be valid.

[173] Section 11(c).

[174] (2002) 35 EHRR 18.

[175] See the discussion at 66 above.

[176] In his lead opinion, Lord Bingham referred principally to *Aksoy v Turkey* (1997) 23 EHRR 553; *Garcia Alva v Germany* (2001) 37 EHRR 335; *Gaygusuz v Austria* (1997) 23 EHRR 364; and the *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252: [2005] 2 AC 68, [36], [41], [49], [50], and [54].

[177] Under the Anti-terrorism, Crime and Security Act 2001, s 23.

[178] [2006] UKHL 54, [2007] 1 AC 484.

[179] Sections 46(1) and 50(2).

[180] [2004] EWCA Civ 1309, [2005] 1 WLR 1102.

seeing the incompatibility with Article 14, read with Article 5: there was no objective justification for treating foreign prisoners differently because, as regards such prisoners who had been sentenced more recently, criteria for their early release *had* already been devised and applied without any apparent difficulty.[181] The parties to the case had agreed that it was not possible to read down the legislation in question under section 3 of the Human Rights Act so as to make it compatible with the European Convention.[182]

In *Wright*[183] the Lords deliberately chose the section 4 route over the section 3 route, which the Court of Appeal had preferred.[184] The appellants were care workers whose names the Secretary of State had provisionally included on the list of people considered to be unsuitable for working with vulnerable adults; this was done under the Care Standards Act 2000,[185] which said nothing about giving such people a hearing before their names were so listed. The Court of Appeal thought that the apparent incompatibility could be remedied by interpreting the statutory provision as including a requirement that the Secretary of State should give care workers an opportunity to make representations before having their names included in the list. The Lords did not believe that this was a comprehensive solution to the problem because it still left open the possibility that, in apparently urgent cases, names could be added to the list without notice first being given to the care workers in question. Giving the leading opinion in the case, however, Baroness Hale refrained from suggesting how the incompatibility might best be resolved, for the very good reasons that (a) a delicate balance had to be struck between protecting the rights of the care workers and protecting the welfare and rights of the vulnerable people with whom they work and 'it is right that that balance be struck in the first instance by the legislature', and (b) the legislation in question was about to be replaced by new legislation already enacted.[186]

F (A Child)[187] is the only case in which the Supreme Court has issued a declaration of incompatibility and, surprisingly, is the first occasion on which either that court or the House of Lords has issued a declaration which confirms one issued by the Court of Appeal.[188] The five Justices unanimously held that legislation requiring people on the Sex Offenders Register to notify the police, during the rest of their lives, of where they are currently living and of their plans to travel abroad for three or more days,[189] was incompatible with Article 8 of the European Convention (the right to a private life). The lifetime requirement was disproportionate, because there was no provision for a review of its necessity in individual cases. The decision was a brave one, as the Court would have been well aware of the reaction it would provoke in the popular press.[190] It even led (albeit 10 months later) to questions being asked of the Prime Minister in

[181] [2007] 1 AC 484, [37]–[38] (per Lord Bingham). The four other judges agreed with Lord Bingham.
[182] Ibid, [40]. See too Ch 6 below, at 186.
[183] [2009] UKHL 3, [2009] AC 739.
[184] [2007] EWCA Civ 999, [2008] QB 422.
[185] Section 82(4)(b).
[186] Safeguarding Vulnerable Groups Act 2006: [2009] AC 739, [39].
[187] [2010] UKSC 17, [2011] 1 AC 331.
[188] [2009] EWCA Civ 792, [2010] 1 WLR 76.
[189] Sexual Offences Act 2003, ss 82–86, and the Sexual Offences Act 2003 (Travel Notification Requirements) Regs 2004 (SI 2004/1220).
[190] See eg <http://www.dailymail.co.uk/news/article-1267756/Sex-offenders-win-right-challenge-length-time-remain-register.html> (last accessed 4 December 2012).

the House of Commons: was he aware that constituents were sick to the back teeth of the human rights of criminals and prisoners being put before the rights of law-abiding citizens in this country and was it not time that we scrapped the Human Rights Act and, if necessary, withdrew from the European Convention on Human Rights?[191] David Cameron replied thus:

> I am appalled by the Supreme Court ruling. We will take the minimum possible approach to this ruling and use the opportunity to close some loopholes in the sex offenders register. For instance, we will make it compulsory for sex offenders to report to the authorities before any travel and will not allow them to change their name by deed poll to avoid having their name on the register. I can also tell my honourable Friend that a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts.[192]

The commission referred to had already been promised, but the brouhaha over *F (A Child)* seems to have expedited its establishment.[193] Later that day the Home Secretary, Theresa May, told the Commons that the government was disappointed and appalled by the Supreme Court's decision.[194] However, she was evasive when it was pointed out by Jack Straw, who was Home Secretary at the time the Human Rights Act was enacted, that under section 4 of the Act there was 'absolutely no obligation on her or the House to change the law one bit'.[195] Mrs May could well have replied that an application on the matter might be made to Strasbourg and that it was likely that the European Court would take the same line as the UK Supreme Court, especially as the latter had relied heavily on two decisions of the European Court when arriving at its conclusion.[196]

The Supreme Court's decision in *F (A Child)* demonstrates a commendable reaffirmation of the top judges' commitment to the idea of individualized justice. While laws need to apply to everyone, the punishment meted out to offenders needs to take some account of the particular characteristics of the individual in question. Some would argue that the essence of 'human rights' (whatever their deeper philosophical basis) is the notion that all people deserve to be treated as separate personalities—not, as Kant put it, as a means to an end. Lord Rodger emphasized this point at the end of his judgment when he observed that children who commit serious sex offences ought to have the chance to demonstrate that they have 'grown out of' their offending.[197]

[191] HC Debs, vol 523, col 955, 16 February 2011.

[192] Ibid.

[193] Its membership was eventually announced on 18 March 2011. See <http://www.justice.gov.uk/about/cbr> (last accessed 4 December 2012). See Ch 2 above, at 36, n 133.

[194] HC Debs, vol 523, col 959, 16 February 2011.

[195] Ibid, col 963.

[196] *S v UK* (2008) 48 EHRR 50, a judgment of the Grand Chamber; *Bouchacourt v France* App No 5335/06, judgment of 17 December 2009.

[197] [2011] 1 AC 331, [66].

Declarations overturned by the top court

In contrast to the six cases in which the top court has thrown its weight behind a declaration of incompatibility, there are six instances in which it has overturned a lower court's judgment in favour of such a declaration.

The first and probably most significant of these was *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, where the reason for the reversal was that the House believed that allowing a challenge to certain planning decisions only by way of judicial review was enough to satisfy the requirements of Article 6 of the European Convention.[198] This view was vindicated when the losing side had its application in Strasbourg dismissed as manifestly ill-founded.[199] In *Wilson v First County Trust Ltd*[200] the Lords again found no incompatibility because, if the Human Rights Act applied at all,[201] the alleged statutory interference with contractual rights was compatible with Article 1 of Protocol No 1 to the Convention. In *R (Uttley) v Secretary of State for the Home Department*[202] the Lords reversed the Court of Appeal's declaration[203] because the applicant in question had not been the victim of a violation of Article 7 of the European Convention: having been convicted in 1995 of various serious sexual offences committed before 1983, the fact that he was then released in 2003 under the terms of a licence which only became applicable to such offenders under legislation passed in 1991 did not mean that he was suffering a higher penalty than that available for his offences when he committed them (at that time he could have been sentenced up to life imprisonment, whereas in 1995 he was sentenced to only 12 years' imprisonment). In *R (H) v Secretary of State for the Department of Health*[204] the Court of Appeal had actually issued two declarations of incompatibility, because provisions in the Mental Health Act 1983, contrary to the requirements of Article 5(4) of the Convention, did not provide a practical and effective right of access to a court for a patient detained under section 2 of the Act who lacked the capacity to apply to a tribunal him- or herself and nor did it provide a right of review at reasonable intervals to patients who were detained under section 29(4) of the Act while a social worker applied for permission to exercise the functions of the patient's nearest relative.[205] The House reversed each declaration because (unlike in *Anderson*[206]) it felt that the statutory scheme *was* capable of being operated in a way which gave practical effect to the patient's rights under Article 5(4). Baroness Hale gave the only substantive opinion, the other four Law Lords concurring with what she said. In relation to section 29(4) she pointed out that the provision itself was not incompatible with the Convention but that the action or inaction of the authorities might be (which of course would be grounds

[198] [2001] UKHL 23, [2003] 2 AC 295. The Lords reversed the Divisional Court: [2001] 2 All ER 929.
[199] *Holding and Barnes plc v UK* App No 2352/02, decision of 12 March 2002.
[200] [2003] UKHL 40, [2004] 1 AC 816. See too 54 above.
[201] It was held not to, because the contract was entered into before the Act came into force.
[202] [2004] UKHL 38, [2004] 1 WLR 2278.
[203] [2003] EWCA Civ 1130, [2003] 1 WLR 2590.
[204] [2005] UKHL 60, [2006] 1 AC 441.
[205] [2004] EWCA Civ 1609, [2005] 1 WLR 1209.
[206] See 73–4 above.

for suing under section 7 of the Act).[207] In *R (Black) v Secretary of State for Justice*,[208] the Court of Appeal had held that the Home Secretary's power to reject a Parole Board recommendation concerning a prisoner who was serving a determinate sentence of more than 15 years was incompatible with Article 5(4) of the Convention, but the Law Lords overturned this on the basis that the European Court had itself allowed people sentenced to determinate and indeterminate terms of imprisonment to be treated differently. In *R (Baiai) v Secretary of State for the Home Department* the House preferred to use section 3 rather than section 4 in relation to statutory provisions aimed at preventing marriages of convenience.[209]

These reversals of the Court of Appeal indicate that the House of Lords, and its successor body, have been cautious in resorting to the section 4 power. Usually the top court has been able to give effect to the Human Rights Act not by exaggerating its reliance on the interpretative duty imposed by section 3 of the Act but by carefully unpacking what is actually required by the relevant provisions of the European Convention. Only in *H* did the House effectively apply section 3 and 'read down' the relevant statutory provisions so as to make them operate in a Convention-compatible manner. In the area of sentencing (*Uttley* and *Black*), the House took care to rely on relevant Strasbourg jurisprudence so as to justify its departure from the view preferred by the Court of Appeal. Of course it is possible that the European Court might depart from its established position on a sentencing issue—as it did in *Stafford v UK*[210]—thereby highlighting the timidity of the United Kingdom's top court in not daring to protect human rights in ways which exceed Strasbourg's current standards.

Refusals of declarations by lower courts endorsed by the top court

In three further cases the Law Lords affirmed decisions by the Court of Appeal in which a declaration of incompatibility issued by a High Court judge had been overturned on appeal. In the first of these, *Matthews v Ministry of Defence*,[211] the Crown's statutory immunity from suit in respect of a claim in tort by a serviceman who had sustained personal injury during service[212] was held to be compatible with Article 6 of the Convention because it was a substantive limitation on claims, not a procedural one, and it therefore fell within the state's margin of appreciation as to the causes of action it wishes to make available under its national legal system. In an unrelated later case the European Court approved of the House's conclusions in *Matthews*.[213]

In *Secretary of State for the Home Department v MB and AF*[214] one of the questions was whether the legislation on how persons who are the subject of control orders can

[207] [2006] 1 AC 441, [32].
[208] [2009] UKHL 1, [2009] 1 AC 949.
[209] [2008] UKHL 53, [2009] 1 AC 287. See Ch 9 below, at 277–8.
[210] (2002) 35 EHRR 32. See text at n 169 above, and also *James, Well and Lee v UK* App Nos 25119/09, 57715/09, and 57877/09, judgment of 18 September 2012, disapproving of *R (Walker) v Secretary of State for the Home Dept* [2009] UKHL 22, [2010] 1 AC 553, on which see 82–3 below.
[211] [2003] UKHL 3, [2003] 1 AC 1163.
[212] The immunity was conferred by the Crown Proceedings Act 1947, s 10.
[213] *Roche v UK* (2006) 42 EHRR 30. See Hickman (2010) 311–20 and 323–4.
[214] [2007] UKHL 46, [2008] AC 440.

challenge the legality of those orders was compatible with Article 6.[215] In the first of the two conjoined appeals (*MB*) the High Court judge had issued a declaration of incompatibility, but the Court of Appeal had then reversed that decision;[216] in the other appeal (*AF*) the High Court judge had refused to issue a declaration of incompatibility but had given leave for a leapfrog appeal direct to the House of Lords.[217] The House held that in both appeals the control orders did not breach Article 5 and that, in so far as the procedures for challenging the orders breached Article 6, those breaches could be rectified by 'reading down' the relevant legislation using section 3 of the Human Rights Act.[218] Both cases were remitted to the High Court for reconsideration. Lord Bingham, it seems, would initially have preferred to issue a declaration of incompatibility rather than rely on section 3. He said that 'any weakening of the mandatory language used by Parliament would very clearly fly in the face of Parliament's intention'. But in the end he was persuaded by the opinions of Baroness Hale, Lord Carswell, and Lord Brown that section 3 should be applied instead. Much as in the case on mental health law discussed in the previous section, *R (H) v Secretary of State for the Department of Health*, Baroness Hale concluded that, because the procedures could be made to work fairly and compatibly in many cases, it would not be appropriate to make a declaration of incompatibility. Just as in *R v A (No 2)*[219] and *R (Hammond) v Secretary of State for the Home Department*,[220] it was *possible* to read the legislation subject to an implied condition that the judge had power to alter the procedure so as to ensure that Article 6 rights were guaranteed. As we shall see below,[221] when the second of the two appellants in *MB and AF* took his case to Strasbourg, the judges there held that the statutory provisions in question *were* incompatible with Article 5,[222] thereby vindicating the approach which Lord Bingham would initially have preferred to adopt. Armed with that judgment, *AF* was then able to persuade the House of Lords in a further appeal that he was entitled to know more details of the case against him which supposedly justified the issue of a control order.[223]

In the last of the three cases where the top court confirmed a lower court's overturning of a declaration of incompatibility, *R (Nasseri) v Secretary of State for the Home Department*,[224] the issue was whether the applicant, an Afghan national seeking asylum, should be returned to Greece, the European country he had first entered.[225] McCombe J

[215] The legislation was the Prevention of Terrorism Act 2005, Sch, paras 4(2)(a) and 4(3)(d), and Civil Procedure Rules 76.29(7) and (8).

[216] [2006] EWCA Civ 1140, [2007] QB 415.

[217] [2007] EWHC 651 (Admin).

[218] Lord Hoffmann did not expressly dissent on the s 3 point, but he clearly thought that, in principle, the special advocate procedure contained enough safeguards to comply with Art 6.

[219] [2001] UKHL 25, [2002] 1 AC 45.

[220] [2005] UKHL 69, [2006] 1 AC 603. In this case a provision which required a judge to set minimum terms for certain prisoners sentenced to life imprisonment 'without an oral hearing' was ordered to be read subject to an implied condition that the judge had power to order a hearing where this was required to comply with Art 6.

[221] See Ch 7 below, at 218–21.

[222] *A v UK* (2009) 49 EHRR 29.

[223] *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

[224] [2009] UKHL 23, [2010] 1 AC 1. Lord Hoffmann (at [12]) strongly endorsed the 'outcome not process' approach to Convention rights: see Ch 2 above, at 43–8.

[225] In *TI v UK* App No 43844/98, judgment of 7 March 2000, the European Court of Human Rights decided that the Dublin II Regulation did not absolve the United Kingdom from the responsibility to ensure that a

had held that a statutory provision deeming certain countries to be places where an asylum seeker's life and liberty would not be threatened by reason of his or her race, religion, nationality, membership of a particular social group, or political opinion[226] was incompatible with Article 3 of the Convention because it impeded the returning state's positive obligation to investigate whether ill-treatment was likely to occur abroad. But the Court of Appeal and House of Lords disagreed, holding that there was no obligation on returning states to investigate if there was a risk of violating Article 3 in sending someone to a receiving state. Five months before the Lords' decision, a Chamber of the European Court of Human Rights had declared manifestly ill-founded an application by an asylum seeker in a very similar position to that of Mr Nasseri.[227] It now seems, however, that both the House of Lords and the Chamber of the European Court may have been incorrect in their assessment, for in subsequent cases both the Grand Chamber of the European Court of Human Rights[228] and the Grand Chamber of the Court of Justice of the European Union[229] held that Greece's procedures for dealing with asylum seekers were indeed so bad as to require other states not to return asylum seekers to that country.

There are, as well, a number of cases in which the House of Lords or Supreme Court has confirmed the refusal of two lower courts to issue a declaration of incompatibility. Four of these were cases about the right to liberty or a fair trial. Thus, in *R (Wardle) v Crown Court at Leeds* the House held that, although the laying of a manslaughter charge, in place of an earlier murder charge, did give rise to a new 70-day custody time limit,[230] this was compatible with Article 5 of the Convention.[231] The applicant's subsequent application to the European Court of Human Rights was declared inadmissible.[232] In *Gillan* the Lords found no incompatibility with Articles 5 or 8 when the police used anti-terrorism powers to stop and search people as they approached an exhibition centre in London.[233] In *R v G*[234] the defendant, aged 15, had been charged with the rape of a child under the age of 13, contrary to the Sexual Offences Act 2003.[235] He pleaded guilty because he had been advised that his belief that the girl in question was aged 15 was no defence, but he later appealed, arguing that the Act was incompatible with the presumption of his innocence guaranteed by Article 6(2) of the Convention and that his prosecution was a disproportionate interference with his Article 8 right to respect for his private life. The Law Lords unanimously held that the statute was not

decision to expel an asylum seeker to another Member State did not expose him or her to treatment contrary to Art 3 of the Convention.

[226] Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 3, Pt 2, para 3(2)(a).

[227] *KRS v UK* App No 32733/08, decision of 2 December 2008.

[228] *MSS v Belgium and Greece* (2011) 53 EHRR 2.

[229] *NS v Secretary of State for the Home Dept*, Joined Cases C-411/10 and C-493/10, [2012] 2 CMLR 9.

[230] Under the Prosecution of Offences (Custody Time Limits) Regs 1987 (SI 1987/299), reg 4(4).

[231] [2001] UKHL 12, [2002] 1 AC 754, affirming the Divisional Court. Lords Nicholls and Scott dissented because they thought the regulations could not be interpreted as creating a new custody time limit when the charge of manslaughter was substituted for that of murder. See too Ch 6 below, at 184.

[232] *Wardle v UK* App No 72219/01, decision of 27 March 2003.

[233] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307. See too 82 below.

[234] [2008] UKHL 37, [2009] 1 AC 93.

[235] Section 5.

incompatible with Article 6(2) and, by three to two, that there was no breach of Article 8. Again, the appellant later lost in the European Court of Human Rights.[236] In the Scottish case of *McGowan v B*[237] the question was whether it would be incompatible with Article 6 of the Convention for the Lord Advocate to use as evidence in a criminal trial the answers given during a police interview by a suspect who, although he was in police custody at the time and had been informed that he had the right to legal advice before being interviewed, had stated that he did not wish to exercise his right. Four of their Lordships, including two Scottish judges (one of whom was sitting ad hoc) held that there was no incompatibility. Only Lord Kerr dissented.

The top court also approved the refusal of declarations of incompatibility in cases involving the right to respect for a home,[238] the right to a private life,[239] the right to freedom of conscience,[240] and the right to free elections.[241] It did so, too, in three cases involving the right to property. Two of these concerned a challenge to the statutory ban on fox-hunting with hounds[242] and the European Court of Human Rights later confirmed the correctness of the House's conclusions.[243] In the third case, *AXA General Insurance Ltd v Lord Advocate*,[244] the appellant companies challenged the lawfulness of the Damages (Asbestos-related Conditions) (Scotland) Act 2009, an Act of the Scottish Parliament, which provides that various asbestos-related conditions constitute personal injury actionable under Scots law. The Supreme Court rejected the argument that the Act violated the companies' rights under Article 1 of Protocol No 1 to the Convention, saying that the courts should respect the judgment of the Scottish Parliament as to what was in the public interest in the context of qualified Convention rights. The Act was pursuing a legitimate aim and its provisions were reasonably proportionate to that aim.

There was clearly a mixture of reasons why, in these cases, the top court was unwilling to overturn the refusal by lower courts to issue a declaration of incompatibility, but the commonest motivation was that the section 3 interpretative duty was able to correct

[236] *G v UK* (2011) 53 EHRR SE25. See too *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270 (Ch 5 below, at 151–2, where the State Immunity Act 1978 was found compatible with Art 6; an application resulting from this decision appears to be still pending in Strasbourg.

[237] [2011] UKSC 54, [2011] 1 WLR 3121.

[238] *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367. See too *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186.

[239] *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, where the Lords affirmed the lower courts in ruling that legislation on the retention of fingerprints and DNA samples did not violate the right to a private life.

[240] *Williamson v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, where the Lords agreed that the statutory ban on corporal punishment in schools was compatible with Art 9 of the Convention.

[241] *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464, discussed at 62 above. This was the first occasion on which the Supreme Court considered applying s 4 of the Human Rights Act, although the appeal hearing itself took place before the Appellate Committee.

[242] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719, where the Hunting Act 2004 was at issue; and *Whaley v Lord Advocate* [2007] UKHL 53, 2008 SC (HL) 107, where the Protection of Wild Mammals (Scotland) Act 2002 was in question. The Hunting Act 2004 was also unsuccessfully challenged in *R (Jackson) v Attorney General* [2006] UKHL 56, [2006] 1 AC 262, but there the arguments were limited to whether it had been enacted in breach of the Parliament Acts 1911 and 1949.

[243] *Countryside Alliance v UK* (2010) 50 EHRR SE6.

[244] [2011] UKSC 46, [2012] 1 AC 868.

any apparent incompatibility with Convention rights. This brings home the point that section 3 is the remedy of first resort when there appears to be an incompatibility; section 4 is very much the last resort. In addition, meticulous consideration of what the current Strasbourg standards actually require, coupled with application of the *Ullah* principle,[245] allows the Supreme Court to keep to a minimum the occasions on which it has to upset the apple-cart by issuing a declaration. To date the government has always responded to a declaration by promising to alter the law.

Refusals of declarations by the top court later 'overturned' by the European Court

A sizeable number of the decisions issued by the House of Lords on human rights have subsequently been examined by the European Commission or Court in Strasbourg. Seventy cases decided under pre-Human Rights Act law have been considered, and 63 which were decided under the Act. Of those 63 decisions, 11 eventually resulted in a judgment of the European Court running counter to that of the Law Lords.[246] Of those 11 cases, there are at least three clear-cut instances of the House specifically refusing to declare a piece of primary legislation to be incompatible with the Convention, only for the Court to rule that the legislation was indeed incompatible.[247] The most spectacular of these instances is *S and Marper*, where all 10 judges who considered the matter in England[248] held that there was no breach of Article 8 in relation to the indefinite retention of fingerprints and DNA samples, while all 17 judges in Strasbourg held to the contrary.[249] Another startling difference of opinion occurred in *Gillan*, where again 10 judges in England found nothing wrong, in Convention terms, with a stop and search power conferred by the Terrorism Act 2000, yet seven judges in Strasbourg viewed it as a violation of Article 8.[250] In *Clift*, an appeal heard alongside *Hindawi*, discussed above,[251] five Law Lords refused to issue a declaration of incompatibility relating to provisions in the Criminal Justice Act 1991, only to discover that the European Court again unanimously disagreed with that position.[252] In *Walker*,[253] a case on the rights of persons given indeterminate sentences for public protection, the European Court again

[245] See Ch 2 above, at 39–43.

[246] Dickson (2012a), 368–79. See Appendix 3 to this book for a table of all the cases.

[247] The remaining cases involved alleged violations of the common law or some act by a public authority the legality of which did not depend on the wording of primary legislation. In some cases the Lords did not expressly consider the incompatibility point because they thought the legislation was not in breach of a Convention right in the first place: see eg *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 (see too Ch 8 below, at 248–50).

[248] Five in the House of Lords, three in the Court of Appeal, and two in the Divisional Court.

[249] Contrast *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, with *S and Marper v UK* (2009) 48 EHRR 50. The legislation in question was the Police and Criminal Evidence Act 1984, s 64(1A). See Beattie (2009).

[250] Contrast *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307, with *Gillan and Quinton v UK* (2010) 50 EHRR 45. The Strasbourg Court found it unnecessary to consider the Art 5 point. See too Ch 6 below, at 160–2.

[251] [2006] UKHL 54, [2007] 1 AC 484. See 74–5 above.

[252] Contrast *R (Clift) v Secretary of State for the Home Dept* [2006] UKHL 54, [2007] 1 AC 484, with *Clift v UK* App No 7205/07, decision of 13 July 2010. The provisions in question were ss 35(1), 46(1) and 50(2). See too Ch 6 below, at 186–7.

[253] *R (Walker) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553.

unanimously found a violation of Article 5 after the House had found none, but that was not a case in which the incompatibility of *legislation* was at issue, only the way in which the Home Secretary was implementing it.[254]

The task of the European Court is to adjudicate on whether a Member State of the Council of Europe has violated an individual's (or company's) Convention rights, and it rarely stipulates that the violation is due to an inherent incompatibility between domestic legislation and the Convention. Likewise, only very recently, under its self-developed 'pilot judgment' procedure, has the European Court begun to indicate what kind of legislative reforms a state needs to make in order to bring its law into line with the Convention.[255] As far as the United Kingdom's system is concerned, the European Court does not, at present, consider a declaration of incompatibility to be an effective remedy for the purposes of Article 13 of the Convention,[256] because it does not render legislation inapplicable and it puts the victim of the incompatibility in no better position than if a declaration had not been issued. For this reason, too, the European Court does not require applicants to have applied for a declaration of incompatibility before they will be considered to have exhausted their domestic remedies. It does not follow, therefore, that just because the European Court finds a violation of a Convention right, the domestic court should have issued a declaration of incompatibility in the case: the domestic court might have been able to correct the problem by reading down the legislation in question. It remains a fact, however, that the United Kingdom's top court has issued declarations of incompatibility on only six occasions and has refused them in at least 19 other cases. Overall, the House of Lords and Supreme Court have been cautious in their approach; they have indeed treated such declarations as a remedy of last resort.

The 'primary legislation' defence

Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, but section 6(2) goes on to create an exception to that liability if:

> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

Section 6(2) is designed to preserve Parliamentary sovereignty, but its wording leaves a lot to be desired and has given rise to considerable controversy.

For a start, in relation to section 6(2)(a), it will often be a matter of interpretation whether a piece of primary legislation not only requires a public authority to act in a certain way but also prevents it from acting in a different way, one which *would*

[254] *James, Well and Lee v UK* App Nos 25119/09, 57715/09, and 57877/09, judgment of 18 September 2012.
[255] Wallace (2011); Leach et al (2010).
[256] *Burden and Burden v UK* (2008) 47 EHRR 38 (GC).

be compatible with the Convention. If, for instance, the authority has common law powers, could these not be invoked to ensure that the Convention has been complied with? Beyond that, even if other such additional powers could be invoked, it would seem that the effect of section 6(2)(b) is that, if primary or secondary legislation has already been passed on the matter and it cannot be interpreted in a way which makes it compatible with Convention rights, then the authority still has a defence to a claim under section 6(1) whether or not it considered exercising its additional powers. In *R (Hooper) v Secretary of State for Work and Pensions*[257] the Law Lords were agreed that the Secretary of State had a section 6(2) defence to the argument that the law was discriminatory because it allowed for certain benefits to be paid only to widows (and not, by implication, to widowers), but they could not agree on whether the defence arose under section 6(2)(a) or 6(2)(b). With respect, to suggest that it arose under section 6(2)(b) entails putting a very strained interpretation on the words 'read or give effect to' in that paragraph; there is surely something artificial in Lord Nicholls' statement that 'in not making corresponding payments to widowers the Secretary of State was giving effect to those statutory provisions'.[258] Lord Hoffmann said much the same but, with respect, he did not satisfactorily answer the widowers' argument that the incompatibility arose not because the Secretary of State was giving effect to the relevant statutory provisions[259] but because he did not make equivalent extra-statutory payments.[260] Perhaps it was Lord Hope who, not for the first time, explained the thinking behind their Lordships' decision most clearly:

> There is no indication in section 6(2)(b) or elsewhere that public authorities whose powers are not derived from statute or whose powers are derived in part from the common law are in a less favourable position for the purposes of the defence which it provides than those which are entirely the creatures of statute. The primacy that is given to the sovereignty of Parliament requires that they be treated in the same way, irrespective of the source of the power.

Even this reading of section 6(2)(b) is not one which is immediately apparent on its face. It reminds us that the wording of section 3(2) of the same Act also disguises the fact that it permits courts to declare subordinate legislation invalid if it is incompatible with Convention rights, so long as primary legislation does not prevent removal of the incompatibility. Lord Scott and Lord Brown were not totally convinced by Lord Hope's explanation in *Hooper* and preferred to hold that in that case the Secretary of State had a defence based solely on section 6(2)(a).[261] Lord Brown had a specific difficulty in accepting Lord Hoffmann's approach, for it suggests that the Secretary of State would have had a defence even if the statute had expressly conferred on him discretion to pay benefits to widowers as well as widows.[262] As Lord Brown pointed out, 'it should be borne in mind that the wider the ambit given to section 6(2) the more often will

[257] [2005] UKHL 29, [2005] 1 WLR 1681.
[258] Ibid, [6].
[259] Social Security Contributions and Benefits Act 1992, ss 36 and 37.
[260] [2005] 1 WLR 1681, [50]–[52].
[261] Ibid, [95] (per Lord Scott) and [124] (per Lord Brown).
[262] Ibid, [125].

the United Kingdom be acting incompatibly with Article 13 of the Convention'[263] (the requirement to provide an effective domestic remedy for a breach of the Convention). Textbook writers, he added, have tended to argue in favour of a narrow construction of the sub-section.[264]

The more difficult scenario is where legislation confers a power which a public authority could exercise either in a way which is compatible with Convention rights or in a way which is not compatible. It is submitted that in such situations a defence should be available under section 6(2)(b) if, by choosing to exercise the power in a way which is not compatible with Convention rights, the public authority was implementing a fundamental feature of the legislative scheme in question.[265] In answer to objections that this provides too wide a defence, it needs to be recalled that what we are talking about here is whether a civil suit is available under section 6(1), not whether a declaration of incompatibility can be issued under section 4: just because no civil suit is available does not mean that no declaration of incompatibility can be issued. In the top court's most recent pronouncement in this area, in *Doherty v Birmingham City Council*, both Lord Hope and Lord Walker suggested that the test should be whether the public authority's act or omission is giving effect to the considered intention of Parliament as set out in the legislation.[266]

This is an area in which a lot more certainty needs to be introduced into the law. If the Supreme Court Justices cannot or will not provide that certainty there is a strong argument for Parliament to amend the Human Rights Act in a way which makes its intention crystal clear. As presently worded, section 6(2)(a) and (b) overlap: each of them applies to 'provisions of primary legislation', and 'acting so as to give effect to those provisions' in the latter is a sub-set of 'could not have acted differently' in the former. It might be better if section 6(2)(a) were worded in a way which confined itself to provisions of primary legislation (merging parts of the current paragraphs) and section 6(2)(b) were reserved for provisions in secondary legislation.

Horizontality

Around the time of the Human Rights Act's enactment there was considerable debate over whether it would have a horizontal as well as a vertical effect, ie whether it would lead to reforms of private law as well as public law, so that the rules of contract law, tort law, property law, etc would gradually be brought into line with the values running through the European Convention on Human Rights. Sir William Wade was the most fervent of the UK advocates in favour of horizontality,[267] and he was supported

[263] Ibid, [120].

[264] Ibid. See eg Clayton and Tomlinson (2009a), paras 5.123 to 5.131; Beatson et al (2008), paras 6–18 to 6–27 (critical of Lord Hoffmann and Lord Hope in *Hooper*). Lester et al (2009), para 2.6.2 take a much more relaxed position.

[265] This is not the same as the test proposed by Beatson et al (2008), paras 6.23 to 6.27, who appear to say that s 6(2)(b) would be available as a defence if the public body is acting under an 'irreducible authority' (ie an authority which cannot be read down by any process of statutory construction).

[266] [2008] UKHL 57, [2009] 1 AC 367, [39] (per Lord Hope) and [105] (per Lord Walker).

[267] Wade (2000) and (1998).

to a large extent by Beyleveld and Pattinson.[268] Others, such as Murray Hunt and Sir Richard Buxton, were not prepared to go so far.[269]

As things have turned out, during the first dozen years of the Act's operation the country's top judges have been very conservative in their approach to the horizontal application of the Human Rights Act. The Law Lords and Justices have done very little to ensure that human rights values infiltrate the common law (or, indeed, legislation) concerning purely private relationships. This is despite the fact that the interpretative duty imposed by section 3(1) of the Human Rights Act applies to *all* legislation, not just to that affecting public authorities. Moreover, section 6(3)(a) explicitly states that 'public authority' includes 'a court or tribunal', not confining the definition to situations in which the court or tribunal is dealing with cases involving public law. In addition, section 6(6) says that 'an act' includes 'a failure to act', which could describe a court's failure to ensure that private law is consistent with Convention rights. The only area in which horizontality has gained any foothold is in the right to a private and family life. As Lester, Pannick, and Herberg observe, the issue has tended to be discussed in cases involving disputes between private individuals and the media, between employers and employees, between members of the same family, or between parties who have been contesting claims over the environment.[270]

In truth, neither the House of Lords prior to 2009 nor the Supreme Court thereafter has squarely confronted the extent to which Convention rights should be applied horizontally. They have not looked for clues within the text of the Convention itself—in Articles 1 and 8 to 11 for example[271]—to support the idea that human rights are not necessarily rights which exist only in relation to states. Nor have they fully exploited the potential for application of the common law presumption—which pre-dates the Human Rights Act 1998—that in cases of doubt English law should be interpreted in a way which conforms with the European Convention's standards.[272] And even when the top court *has* applied Convention standards in a purely private setting—*Ghaidan v Godin-Mendoza* is perhaps the best example, as it dealt with a private tenancy[273]—it has not addressed the significance of so doing. Yet in other situations, such as the right of tenants of social housing not to be evicted, it has gone out of its way to stress that its rulings should not be taken as automatically applying to a purely private setting.[274]

Courts in the United Kingdom and Ireland, especially the Supreme Courts in each country, are in a particularly good position to play a significant role in utilizing the European Convention to re-mould areas of domestic law. This is because, unlike courts which operate in the civil law systems of Europe, common law courts have

[268] Beyleveld and Pattinson (2002). They summarize other views at 623–4. See too Dickson (1999).

[269] Hunt (1997) and (1998); Buxton (2000a). See too, more generally, Hoffman (2011); Lester and Pannick (2000); Phillipson (1999).

[270] Lester et al (2009), para 4.8.3. For a clear account see Beatson et al (2008), paras 4–159 to 4–253.

[271] Article 1 requires the High Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in [Arts 2 to 18] of this Convention'. Articles 8, 9, and 11 all refer in their second paragraphs to qualifications to the rights in the first paragraphs based on 'the protection of the rights and freedoms of others', while Art 10(2) refers to 'the protection of the reputation or rights of others'.

[272] Gardner and Wickremasinghe (1997), 95–109.

[273] [2004] UKHL 30, [2004] 2 AC 557. It was, however, a 'protected' tenancy under the Rent Act 1977.

[274] *Manchester City Council v Pinnock* [2010] UKHL 45, [2011] 2 AC 104.

considerable latitude to *make* law. They can do so not just through interpreting legislation but also through developing judge-derived principles. It remains true that common law Supreme Courts have roles which are defined by their national constitutions, but they have considerably more leeway than top courts in mainland European countries to ensure that Convention values affect private as well as public law. Thus, when the European Court of Human Rights asserts that states have a positive obligation to take particular actions to protect human rights, it is much more likely that a court in a common law country will be able to take those actions, or to ensure that other organs of the state take those actions. Having said that, and despite the relaxation in the rules of precedent set out by the House of Lords in 1966, it would appear that the United Kingdom's top court is increasingly reluctant to make new law. It has said that it can no longer create crimes,[275] it has refused to develop a new cause of action based on the concept of privacy,[276] and in many instances it has maintained the stance that the matters at issue, because they raise controversial social or economic issues, are better left to Parliament to decide.[277] Moreover, one of the consequences of the deletion of Article 13 of the European Convention (the right to an effective remedy) from the list of Convention rights in the Human Rights Act 1998 is that domestic courts do not have to ensure that people whose Convention rights have been breached have an effective remedy within the United Kingdom. By 'incorporating' the Convention through the 1998 Act, Parliament provided a specific UK approach to the question of remedies, and stressed that a court could only 'grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'.[278] For the time being it seems that the Supreme Court is content to take a restricted view of what is 'within its powers' in this context. Judicial restraint is the order of the day.

If the creation of new torts based on Convention values is deemed too contentious, it might be possible for domestic courts to develop other common law remedies in situations where Convention rights have been violated within private law. In doing so they would be interpreting the Human Rights Act itself in a way which is 'possible' under section 3 of that very Act. The position of human rights victims—whether they have suffered at the hands of a public body or a private body—would then be comparable to that of victims of discrimination. Those victims have been given rights to sue by the various anti-discrimination statutes passed since 1974, all of which provide specific remedial regimes (admittedly much more generous than that contained in the Human Rights Act). Victims of discrimination have not been assimilated into the mass of common law tort victims. Such a direct reliance on the Human Rights Act would not only promote the notion of horizontality more generally (thereby inculcating human rights values across the whole of the legal system), but would also help to remove the artificial distinction between public law and private law and avoid judges having to massage existing causes of action—as the House of Lords patently did in *Campbell v MGN Ltd*[279]

[275] *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136.
[276] *Wainwright v Home Office* [2004] UKHL 53, [2004] 2 AC 406.
[277] eg *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.
[278] Section 8(1). See too 91–4 below.
[279] [2004] UKHL 22, [2004] 2 AC 457. Lord Nicholls, at [14], said that the tort of breach of confidence was now better described as the tort of 'misuse of personal information'.

as regards breach of confidence—in order to reconcile the inadequacies of antiquated domestic law with the demands of a modern human rights-based society. On top of all this, a legal system which recognizes that victims of reprehensible behaviour have often had their human rights violated will help to revive the flagging fortunes of the very concept of human rights, a concept which some commentators (particularly in the tabloid press) still see as primarily benefiting people who are undeserving of protection in view of their own previous behaviour towards others.

Limitation periods

The Human Rights Act 1998 provides that, subject to any rule imposing a stricter time limit in relation to the procedure in question, proceedings against a public authority for acting in a way which is incompatible with a Convention right must be brought within a year of the date on which the act complained of took place, or within 'such longer period as the court or tribunal considers equitable having regard to all the circumstances'.[280] While the one-year period is a lot shorter than the period under tort law for personal injury claims (three years) or under contract law or tort law for financial losses (six years), it is a lot longer than the time limits for judicial review applications ('promptly', but no longer than three months), for discrimination claims (three months), or for equal pay claims (six months). Under the Convention itself, applications must be lodged with the Court within six months of the last decision being complained about in the national legal system.[281] On the whole, this provision has not troubled the House of Lords or Supreme Court unduly. It is a reasonable provision which has not evoked much negative criticism. It did, however, give rise to a difficulty in Scotland.

In *Somerville v Scottish Ministers*[282] the question was whether a claim against a member of the Scottish Executive for breach of Convention rights was subject to the one-year time limit. Even though the Lords held unanimously that on the facts of this case, where the actions of a prison governor in removing certain prisoners from association with other prisoners were being challenged, the actions could not be regarded as those of a member of the Scottish Executive, they went on to examine what time limit would have applied if a member of the Executive had been responsible. The Scotland Act 1998 allowed claims for damages to be made if a Scottish minister had acted or failed to act outside devolved competence (eg in breach of Convention rights), but set no limitation period for such claims.[283] The House held by three to two that these claims under the Scotland Act should not be classified as claims under the Human Rights Act, but rather as claims based on the *ultra vires* doctrine, so the one-year limitation period laid down in the Human Rights Act did not apply to them. The fact that this meant that certain types of Convention-based claims were limited by the one-year rule while others were not did not unduly disturb the majority. The two dissenting judges, however, Lord Scott and Lord Mance, were deeply troubled. Lord Scott reminded us that in both

[280] Section 7(5).

[281] Article 35(1), which also imposes a requirement that applicants must have exhausted all domestic remedies.

[282] [2007] UKHL 44, [2007] 1 WLR 2734.

[283] Section 100.

English and Scottish law '[t]here is no general right to recover damages for loss caused by *ultra vires* acts of public authorities'[284] and it seemed to him:

> almost unthinkable that Parliament could have intended to create a new cause of action for damages for a limited class of ultra vires acts by the new Scottish authorities, namely acts that were ultra vires because in breach of Convention rights, a cause of action independent of an action that could be brought under section 7(1) of the Human Rights Act, without saying so expressly.[285]

Lord Mance, likewise, accepted counsel's argument that 'a breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action'.[286] He was reinforced in this view by the fact that 'sections 6 to 8 of the Human Rights Act were deliberately formulated so as *not* to give rise to a common law claim for damages for breach of statutory duty'. Instead, 'these sections give rise to the carefully crafted discretionary power provided by section 8'.[287] Given that Lord Hope and Lord Rodger—the two Scottish judges in the House—were always more likely to see something special in the Scotland Act 1998—the 'swing voter' in *Somerville* was Lord Walker. For the greater part of his short opinion it looked as if he was going to side with Lord Scott and Lord Mance, but in the end he concluded, without giving further reasons, that the position adopted by those two Law Lords presented even greater difficulties than did the views of Lord Hope and Lord Rodger.[288]

The *Somerville* case inevitably provoked a lot of comment within Scotland.[289] It did not excite much interest in Northern Ireland, because there is no equivalent to the statutory provision in question in the Northern Ireland Act 1998. There is an equivalent (with slightly different wording) in the Government of Wales Act 1998,[290] but no challenge has yet been brought (certainly at the level of the House of Lords or Supreme Court) to any act or omission of the Welsh Assembly based on that provision.[291] In reaction to *Somerville* the Scottish Parliament passed the Convention Rights Proceedings (Amendment) (Scotland) Act 2009,[292] which inserts into the Scotland Act 1998 a provision that effectively extends the limitation period in the Human Rights Act to most challenges brought under the Scotland Act relating to conduct of the Scottish Executive.[293]

[284] [2007] 1 WLR 2734, [77].

[285] Ibid.

[286] Ibid, [182].

[287] Ibid, [184].

[288] Ibid, [166].

[289] O'Neill (2009) wrote that the decision 'confirms the radical constitution embodying the principles of judicial supremacy which now governs the Scottish devolved institutions' (at 121); Mac Síthigh (2010) criticizes the way in which legislative reform was introduced so as to ensure that compensation would not have to be paid to many claimants in relation to 'slopping out' in prisons.

[290] Section 107(2).

[291] *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2012] 3 WLR 1294 the Supreme Court did have to consider for the first time a reference made by an Attorney General concerning the compatibility of legislation proposed for a devolved region of the United Kingdom. The Supreme Court held that the Local Government Byelaws (Wales) Bill was within the competence of the Welsh Assembly, largely because the impugned provisions were 'incidental to' or 'consequential on' clearly valid provisions, as allowed by para 6(1)(b) of Pt 3 of Sch 7 to the Government of Wales Act 2006.

[292] This had to be preceded by the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SSI 2009/1380), which authorized the Scottish Parliament to amend the 1998 Act.

[293] Section 1(2) of the 2009 Act inserts subss (3A) to (3E) into s 100 of the Scotland Act 1998.

At the end of the day, therefore, the litigation in *Somerville* turned out not to matter very much.

However, the legislative reform brought about as a result of *Somerville* did come before the Supreme Court in 2011, in *Jude v HM Advocate*.[294] The appellant had been questioned by the police in the absence of a solicitor and was appealing against his conviction based on what he had said to the police. The conviction occurred on 5 June 2008 and on 6 October 2010 he was granted leave to appeal out of time because the decision of the Supreme Court in *Cadder* was still pending.[295] In the Supreme Court the Crown argued that he should not have been granted such leave because, under the 2009 Act introduced in response to *Somerville*, the act that the appellant was relying upon (ie his conviction) had taken place more than a year before he lodged his appeal. But after carefully analysing the wording of the 2009 Act, and comparing it to the wording of section 7 of the Human Rights Act 1998, Lord Hope rejected the Crown's argument. He held that the appellant was not himself 'bringing proceedings' because in a criminal appeal the proceedings 'remain throughout under the ultimate control of [the prosecutor]'.[296]

In the course of its decision in *Somerville* the Law Lords also considered, *obiter*, what the time limit should be for claims brought under the Human Rights Act where there is an allegation of a continuing breach of a Convention right. Unfortunately, the Law Lords could not agree on what the appropriate rule should be. It is submitted here that the preferable position is that adopted by Lord Hope and Lord Walker, who said that the phrase 'the date on which the act complained of took place' in section 7(5) of the Human Rights Act should be taken to mean 'in the case of what may properly be regarded as a continuing act of alleged incompatibility, that time runs from the date when the continuing act ceased, not when it began'.[297] It is also appropriate, as Lord Hope added, that if damages are awarded for the incompatibility, they should cover 'the whole of the period over which the continuing act extends, including any part of it that commenced before the period of one year prior to the date when the proceedings are brought'.[298]

In one case the Supreme Court has exercised its power under section 7(5)(b) of the Human Rights Act 1998 to extend the limitation period because it was equitable to do so having regard to all the circumstances. This was in *Rabone v Pennine Care NHS Trust*,[299] where the parents of a young woman who had committed suicide after being allowed to go home from a mental hospital for a two-day break were suing the hospital Trust for not protecting their daughter's right to life. Even though the claim was launched four months after the one-year limitation period had expired, the Court ruled that it should proceed because the Trust had suffered no prejudice by the delay and the parents' claim was a strong one.

[294] [2011] UKSC 55.

[295] It was issued on 26 October 2010. For earlier mentions of the *Cadder* case, see Ch 1 above at 5, n 24, and also Ch 2 above, at 28, n 83.

[296] [2011] UKSC 55, [17]. The four other Justices all agreed with Lord Hope.

[297] [2007] 1 WLR 2734, [51] (per Lord Hope). Lord Mance thought that time should begin to run from the date on which the continuing act began: [197].

[298] Ibid.

[299] [2012] UKSC 2, [2012] 2 AC 72. See too Ch 4 below, at 125.

Remedies

As with so many other aspects of the Human Rights Act 1998, the approach of the top court to the provision of remedies under the Act has again been restrained.[300] The Act itself is quite explicit in restricting the court's damages-awarding power to situations where the court is satisfied that damages are necessary to afford 'just satisfaction' to the claimant, taking account of, amongst other things, any other relief or remedy granted and the consequences of any court decision in respect of the act in question.[301] The court must also take into account the principles applied by the European Court of Human Rights in relation to awards of compensation under the Convention.[302] As is well known, the European Court has not been particularly keen to award compensation, and the sums it does award are usually quite small compared with those awarded within many national legal systems.[303]

In *R (Greenfield) v Secretary of State for the Home Department*[304] a prisoner claimed damages for being denied legal representation of his own choosing at an adjudication in prison relating to an alleged drugs offence, and also for the fact that the adjudication was heard by the deputy governor of the prison. In the light of a recent decision of the European Court of Human Rights,[305] the Secretary of State admitted that there had been violations of Article 6 of the European Convention. But the House of Lords refused to award any damages, noting that the European Court rarely makes awards for anxiety or frustration and that judges in the United Kingdom should not be significantly more or less generous than the European Court. Lord Bingham gave two main reasons for rejecting counsel's argument that the scale of damages awarded by English courts in discrimination cases provided an appropriate comparison.[306] Firstly, 'the Act is not a tort statute. Its objects are different and broader'.[307] A finding that an applicant's human rights have been violated 'will be an important part of his remedy and an important vindication of the right he has asserted'.[308] Secondly, the Act's purpose was to give victims the same remedies they would have otherwise had to go to Strasbourg to recover.

Greenfield therefore represents a remedial pendant to the substantive 'mirror' principle enunciated in *Ullah* just eight months previously.[309] Sir Robert Carnwath, as he then was, writing extra-judicially, did not seem to think this was the best approach, and the

[300] See generally Clayton and Tomlinson (2009a), 659–709.

[301] Human Rights Act 1998, s 8(3).

[302] Ibid, s 8(4). All that the Convention itself says about compensation is in Art 41: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

[303] Leach (2011), Ch 8.

[304] [2005] UKHL 14, [2005] 1 WLR 673.

[305] *Ezeh and Connors v UK* (2003) 39 EHRR 1.

[306] The applicant's leading counsel was Richard Clayton QC, co-editor of Clayton and Tomlinson (2009a).

[307] [2005] 1 WLR 673, [19].

[308] Ibid. The other four judges in the case, Lord Rodger, Baroness Hale, Lord Carswell, and Lord Brown, all concurred with Lord Bingham.

[309] See Ch 2 above, at 39–43.

Law Commission, in its report published to coincide with the coming into force of the 1998 Act in 2000, concluded that 'in most areas the approach of the Strasbourg Court is not significantly different to the rules currently applied by courts in this country to the award of damages'[310] and added that judges applying section 8 of the Human Rights Act should look first to domestic tort law for guidance. Clayton continues to argue that the House took 'a wrong turn' in *Greenfield*,[311] and Steele believes that courts are exaggerating the differences between tort law and human rights law, partly due to their artificially narrow understanding of the functions of the two areas of law.[312]

There appears to be only one case since *Greenfield* in which the House of Lords or Supreme Court has endorsed a damages award to the victim of a breach of the Human Rights Act. This was in *Rabone v Pennine Care NHS Trust*,[313] where a young woman had hanged herself while released temporarily from hospital on home leave. The Supreme Court unanimously allowed her parents' appeal based on Article 2 of the European Convention and confirmed the Court of Appeal's proposed award of £10,000 (the administrator of the daughter's estate had already settled a separate claim).[314] In another right to life case, *Van Colle v Chief Constable of Hertfordshire Police*, where the trial judge had awarded a total of £50,000 for the breach of Articles 2 and 3 of the Convention and the Court of Appeal had reduced that total to £25,000, the House of Lords avoided having to express any view by ruling that on the facts there was no breach of Articles 2 or 3 at all.[315]

There are many examples of applicants winning damages in Strasbourg after failing to do so in the House of Lords. In *R (Al-Jedda) v Secretary of State*,[316] for instance, the Lords held that Mr Al-Jedda was not entitled to damages for his detention in Iraq, primarily because the obligations imposed by Article 5 of the European Convention had been displaced by obligations imposed by a UN Security Resolution. When the case was dealt with by the Grand Chamber of the European Court, as we shall see in the next section of this chapter, it awarded him €25,000 by way of compensation.[317] In *R (Walker) v Secretary of State for Justice*,[318] a test case on whether the Secretary of State's admitted failure to give persons who had been given indeterminate sentences for the protection of the public every opportunity to demonstrate that they were safe to be released once their tariff had expired, the Lords held that there had been no breach of Article 5 of the Convention or of the common law. The failure to comply with a public law duty was remedial only through a declaration, not damages. In Strasbourg some of the applicants from the *Walker* case later won compensation.[319]

The Law Commission has since issued another report on remedies against public bodies. As it was unable to gain significant support for its provisional recommendations

[310] Law Commission (2000), iii; Carnwath (2000). He was Chairman of the Law Commission at the time.
[311] Clayton and Tomlinson (2009a), para 21.40; see too Clayton (2005).
[312] Steele (2008). See too Varuhas (2009).
[313] [2012] UKSC 12, [2012] 2 AC 72. See Andenas (2012); Tettenborn (2012).
[314] The Court of Appeal had doubled the award made by the trial judge.
[315] [2008] UKHL 50, [2009] 1 AC 225. An application to Strasbourg also failed: *Van Colle v UK*, App No 7678/09, decision of 13 November 2012.
[316] [2007] UKHL 58, [2008] 1 AC 332. See Smyth (2008).
[317] *Al-Jedda v UK* (2011) 53 EHRR 23.
[318] [2010] UKHL 22, [2010] 1 AC 553.
[319] *James, Well and Lee v UK*, n 254 above.

that damages be more easily obtainable through judicial review applications, and that a right of action in private law be created for cases in which administrative bodies are at 'serious fault', it has decided not to pursue these reform proposals any further.[320] It is therefore unlikely that Parliament will step in to direct the courts to be more generous regarding remedies under the Human Rights Act. But, as mentioned in the previous section of this chapter, the courts themselves have a certain latitude to develop remedies under the common law, notwithstanding the constraints imposed by the Human Rights Act.

Unfair trials

One other context in which the remedial approach of the top court has been called into play is that of unfair trials: how should courts react if it comes to light during a trial that there has been some unfairness amounting to a breach of Article 6 of the Convention? The House of Lords examined this issue in *Attorney General's Reference No 2 of 2001*.[321] For the first time the House chose to sit as a bench of nine judges, which indicates how important the matter was deemed to be. It was particularly significant because there was a difference between prevailing English and Scottish practice in this field. In a devolution case referred by a Scottish court, the Judicial Committee of the Privy Council had decided in 2002 that the appropriate remedy would be a stay of the proceedings.[322] But that was a decision in which the three judges in the majority were all Scottish, while the two who dissented were English.[323] In the *Attorney General's Reference* a less strict approach was taken, albeit with the continuing dissent of the two Scottish judges amongst the nine. All agreed that a certain degree of flexibility had to be maintained as regards the appropriate remedy: it would depend on the nature of the breach and all the circumstances. But the majority stressed that a stay of proceedings should not be the default position in cases where the breach of Article 6 consists of undue delay in the conduct of the proceedings: a stay should be granted only if it would no longer be possible to ensure a fair hearing for the defendant.

With all due respect, this qualification seems to eat up most of the general principle, or at the very least is question-begging because the very matter at issue is what 'fairness' means in this context. The majority tried to explain its approach by suggesting that the sorts of bad practice which might result in unfairness justifying a stay included bad faith, illegality, and executive manipulation,[324] but that is tantamount to saying, somewhat unhelpfully in the absence of further explanation, that there are cases of fairness and there are cases of serious unfairness. As Lord Bingham put it, 'the Convention is directed not to departures from the ideal but to infringements of basic human rights … Judges should not be vexed with applications based on lapses of time which, even if they should not have occurred, arouse no serious concern'.[325] Lord Hope, who

[320] Law Commission (2010).
[321] [2003] UKHL 68, [2004] 2 AC 72.
[322] *HM Advocate v R* [2002] UKPC D3, [2004] 1 AC 462.
[323] Lords Hope, Clyde, and Rodger were in the majority. Lords Steyn and Walker dissented.
[324] [2004] 2 AC 72, [25] (per Lord Bingham).
[325] Ibid, [22].

eloquently defended the position he had adopted when sitting in the Privy Council in *HM Advocate v R*,[326] stressed that the majority's ruling would not affect Scotland's constitutional right to go down a different legal path if it so wished.[327] Lord Rodger made the same point,[328] although immediately before that part of his opinion he seemed to be approving of Lord Bingham's overall approach, only at the next moment to be dissenting from it.[329]

It has to be admitted that the Supreme Court has more work to do to clarify the law on this issue throughout the United Kingdom. While it is clear, as Beatson and others have indicated, that UK courts try to find a remedy which 'balances the interest of the community in the prosecution of offenders with that of the individual in having his rights recognised',[330] there needs to be more authoritative guidance as to what kind of delay (in terms of its length and the reasons for it) should lead to a stay of proceedings.

The application of Convention rights abroad

The United Kingdom's top court has not been assiduous in extending the application of the European Convention in so-called 'foreign cases', ie cases where the alleged violation has taken place outside the United Kingdom.[331] In two recent cases—*Al-Skeini* and *Al-Jedda*—it suffered humiliating rejections of its views by the European Court of Human Rights.

In *R (Al-Skeini) v Secretary of State for Defence*[332] the House had to decide whether the Human Rights Act applied to acts of the United Kingdom's armed forces when they were operating in Iraq following the 2003 invasion by 'coalition forces' and before the Iraqi Interim Government assumed responsibility for running the country in 2004. All but one of the five Law Lords in the case—Lord Bingham was the surprising dissenter—held that in principle the Act did apply, just as the European Court had considered the European Convention to apply outside the territory of Member States in *Bankovic v Belgium*,[333] which concerned the bombing of Serbia in 1999 at a time when President Milosevic was bent on genocide against the Albanian minority in that country. On the facts of *Al-Skeini*, however, the appeals by five of the applicants were dismissed and only the sixth appeal (by Mr Mousa) was remitted to the Divisional Court for reconsideration. The majority tried faithfully to apply the 'mirror' principle asserted in *Ullah*,[334] closely following the guidance it thought had been provided in *Bankovic*. There the Grand Chamber had said that the Convention should apply in territories over which a Member State had 'effective control'.[335] The Lords took this to mean that it should apply

[326] See n 322 above.
[327] [2004] 2 AC 72, [105]–[108].
[328] Ibid, [179].
[329] Ibid, [177]–[178].
[330] Beatson et al (2008), para 7–118.
[331] The term was coined by Lord Bingham in *R (Ullah) v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 2 AC 323, [8]–[9]. See further Ch 2 above, at 39, and Ch 9 below, at 263–5.
[332] [2007] UKHL 26, [2008] AC 153.
[333] (2007) 44 EHRR SE5.
[334] See n 331 above.
[335] For a trenchant critique of the *Bankovic* decision see Roxstrom et al (2005).

only in those areas where the extent of the control was such that the Member State could protect *all* of the rights in the European Convention, although it was prepared to make an exception for military bases (by analogy with embassies and consulates) so that at least some of the Convention's rights should apply there. Hence Mr Mousa, whose son had died while in custody in a UK military base, could rely upon the Human Rights Act, but the relatives of the other five men, who had died outside of custody on the streets of Basra, could not.

The fact that Lord Bingham chose to dissent in *Al-Skeini* is of some interest, given that he is often portrayed as a senior judge who was in favour of an expansive approach to human rights. In fact he was often quite deferential in his stance, believing, in effect, that some issues were better left for politicians to decide or for international treaties to regulate. In *Al-Skeini* he preferred the view that the Human Rights Act had no extra-territorial application, but he stressed that this did not mean that British armed forces serving abroad were legally unaccountable for their actions: he pointed to the criminal liability which could be imposed under the Army and Air Force Acts 1955; to the jurisdiction of the International Criminal Court; to the duty imposed on states to pay compensation if they breach the Hague Convention on the Laws and Customs of War 1907; to the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War 1949 and Protocol No 1 to that Convention; and to the possibility of bringing tort actions against the government for acts committed abroad.[336] Lord Bingham was reluctant to speculate on the extra-territorial scope of the European Convention on Human Rights (as opposed to the 1998 Act) because he thought that that was par excellence a question for the European Court itself to decide.[337]

To many, the majority's position in *Al-Skeini* might have seemed a reasonable interpretation of the *Bankovic* principle, and an acceptable compromise between two radically opposed positions (either no application or full application of the Convention),[338] but when the *Al-Skeini* case was decided by the Grand Chamber four years later a different view was taken. The judges held by 17 to none that all six applicants had been within the United Kingdom's jurisdiction at the time of their deaths.[339] Through the security operations conducted by British soldiers in that part of Iraq, the United Kingdom had 'exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention'.[340] Thus, Article 2 of the Convention had been violated because there had been no *independent* investigation into these particular killings.[341] The European Court did not criticize anything specific in the Lords' opinions, even though Lord Rodger had said that 'the idea that the UK was obliged to secure observance of [all Convention rights] in the utterly different society of southern Iraq is manifestly absurd'[342] and Lord Brown

[336] [2008] AC 153, [26].
[337] Ibid, [28].
[338] See eg Feldman (2008b), who referred to the House's decision as 'a well-balanced approach'.
[339] *Al-Skeini v UK* (2011) 53 EHRR 18.
[340] For the text of Art 1, see n 271 above.
[341] See n 339 above, paras 171–7.
[342] [2008] AC 153, [78].

had suggested that extending the reach of the Convention on the basis of a principle of 'authority and control' would 'prove altogether too much' and 'make a nonsense of what was said in *Bankovic*'.[343] The Grand Chamber's decision was indeed a surprising one, although not unwelcome, but it left a number of questions unanswered,[344] not the least of which was whether all or only some of the Convention rights could be claimed by residents in this area of Iraq.

In *R (Al-Jedda) v Secretary of State for Defence*[345] the issue was whether Al-Jedda, a national both of the United Kingdom and Iraq, was entitled to claim damages for his indefinite detention without trial in Iraq under Article 5 of the European Convention and under English common law. This time the Lords held that the obligations imposed by Article 5 had been displaced by the obligations imposed by UN Security Resolution 1546 and later Resolutions, which, because of the wording of Article 103 of the UN Charter, took priority over other treaty commitments, including those in human rights treaties.[346] In Strasbourg the Grand Chamber distinguished the Court's previous decision relating to the situation in Kosovo in 2000–01,[347] and then held by 16 to one that the House of Lords had been wrong to assume that in this case a Security Council Resolution had required the use of indefinite detention without trial.[348] It said that a Security Council Resolution should be interpreted in light of the context in which it was adopted,[349] and that 'there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'.[350] This was an approach to Article 103 which the House of Lords had rejected, mainly on the unconvincing basis that the term 'obligations' in Article 103 should not be given 'a narrow, contract-based, meaning'.[351] The European Court proved itself to be more imaginative and progressive than the Law Lords and, on this occasion at least, more adept at reconciling apparently contradictory norms in international law.

Strasbourg's decisions in *Al-Skeini* and *Al-Jedda*, which relate to the conduct of members of the armed forces towards local people in foreign territories, inevitably cast doubt on the decision of the UK Supreme Court in *R (Smith) v Oxfordshire Assistant Deputy Coroner*,[352] which was about the rights of members of the United Kingdom's armed forces when serving abroad. The case had been brought by the mother of a young soldier who had died of heatstroke while serving at a British military base in Iraq. She wanted a full Article 2 compliant investigation into his death, one that might bring to light alleged systemic failures to provide soldiers with the right equipment for the conditions they would have to face in Iraq. The Justices held (by 6 v 3) that British soldiers on active service abroad are *not* within the jurisdiction of the United

[343] Ibid, [127].
[344] See Schaefer (2011).
[345] [2007] UKHL 58, [2008] AC 332.
[346] For the text of Art 103, see n 151 above.
[347] *Behrami v France* (2007) 45 EHRR SE10.
[348] *Al-Jedda v UK* (2011) 53 EHRR 23. The judge from Moldova dissented.
[349] Ibid, para 77.
[350] Ibid, para 102.
[351] [2008] 1 AC 332, [32]–[39] (per Lord Bingham).
[352] [2010] UKSC 29, [2011] 1 AC 1. See Silverstone (2010).

Kingdom as regards Article 1 of the European Convention and so are not protected by the Convention rights scheduled to the Human Rights Act 1998.[353] They went on to hold that, even if the Convention did protect soldiers abroad, an inquest complying with the procedural obligation in Article 2 was not automatically required whenever a soldier died on active service. Milanovic is right to see this decision as consistent with what the House of Lords had ruled in *Al-Skeini*, but that means that it is not consistent with what the Grand Chamber later ruled in the same case.[354] Unfortunately, it appears that the House's decision in *Smith* is not to be directly considered by the European Court because Mrs Smith did not subsequently lodge an application in Strasbourg.

The House of Lords also refused to apply Convention rights in *R (Gentle) v The Prime Minister*,[355] where again the mothers of British soldiers killed in Iraq were claiming an Article 2 compliant inquiry, not focusing this time on acts of the Ministry of Defence abroad but on whether, within the United Kingdom, the government had taken proper advice before considering whether it was lawful under international law to send troops to Iraq in the first place.[356] The Lords, affirming a very strong Court of Appeal,[357] held unanimously that Article 2 could not be interpreted as having the scope claimed for it. This was because the investigative duty imposed by Article 2 applied only if there was a substantive duty to protect life, and there was no such substantive duty when a country decides to send its troops to war, whether or not in compliance with the UN Charter.[358] Moreover, and again Lord Bingham went along with this,[359] at the time of their deaths the mothers' sons were not 'within the jurisdiction' of the United Kingdom for the purposes of Article 1 of the European Convention. If they were within that jurisdiction, the mothers' complaints were still too 'remote' from 'the true purview of Article 2'.[360]

It is respectfully submitted that, while the top court was correct to hold that no Article 2 compliant investigation was necessary on the facts of this case, the reasons given and some of the *obiter dicta* leave something to be desired. It is perfectly reasonable to argue that soldiers sent abroad should have their own human rights protected by the Ministry of Defence, without this meaning that the essentially political question of whether the decision to send the troops abroad was a proper one to take should be subjected to adjudication. Whether it is lawful for a nation to go to war is par excellence an issue which national courts—certainly those operating under the doctrine of parliamentary sovereignty—are not equipped to decide.[361] By definition, war is a matter for regulation by international law. In the present state of international law only the International

[353] The majority comprised Lords Phillips, Hope, Rodger, Walker, Brown, and Collins. The dissenters were Baroness Hale, Lord Mance, and Lord Kerr.

[354] Milanovic (2011), who, writing before the Grand Chamber's decision, was already of the view that the House had made a wrong decision in *Al-Skeini*.

[355] [2008] UKHL 20, [2008] AC 1356. See Palmer (2009b).

[356] In Lord Steyn's view, expressed extra-judicially, the war was illegal: Steyn (2010). See also Steyn (2007).

[357] [2006] EWCA Civ 1689, [2007] QB 689 (Sir Anthony Clarke MR, Sir Igor Judge P, and Dyson LJ).

[358] For more on this aspect of the right to life, see Ch 4 below, at 118–25.

[359] [2008] AC 1356, [8(3)], citing the views of Lord Rodger and Lord Brown in *Al-Skeini*. But Baroness Hale dissented on this point, also citing *Al-Skeini*, although no particular paragraph from the opinions delivered there: [60].

[360] Ibid, [8(3)] (per Lord Bingham) and [66] (per Lord Carswell).

[361] Jowell (2009).

Court of Justice is able to determine the legitimacy of war. The International Criminal Court, other temporary criminal courts, and international human rights courts, can then determine whether actions perpetrated during the course of a war are lawful and/or in breach of human rights. In recent times the United Kingdom's top court has contributed positively to the development of international law.[362] It is to be hoped that in due course the new Supreme Court will also play a significant role in that regard.

Conclusion

This chapter has sought to demonstrate that, while the United Kingdom's top court has been extensively engaged in applying the Human Rights Act 1998, it has mostly adopted a restrained and tentative approach. It has been reluctant to apply the Act retrospectively; it has enthusiastically considered Strasbourg jurisprudence but has tended to treat it as a ceiling rather than a floor; it has refused to think of 'public authorities' in an expansive way; with a couple of notable exceptions it has not extended the range of what is 'possible' under section 3 of the Act; and it has fulfilled the government's prophecy (and wish) that declarations of incompatibility under section 4 be kept to a minimum. There remains confusion over the extent to which a public authority can rely on the 'primary legislation' defence and there has been a marked lack of top judicial activism in respect of the horizontal application of the Act, all the more surprising given the law-making powers which common law supreme courts traditionally possess.[363] This conservatism has been particularly evident in the contexts of remedies and the application of the European Convention abroad. All in all, the Supreme Court, and the House of Lords before it, have maintained an unduly cautious attitude towards the Act's 'procedural' dimensions. As subsequent chapters will show, this approach has often spilled over into a comparable caution in the way the top domestic judges have interpreted the substance of the Convention rights which the 1998 Act 'brought home'.

[362] Higgins (2009).
[363] For a survey, see Dickson (2007b).

4

The Right to Life

Introduction

It is often said that the first duty of every government is to protect the lives of its people. Apart from establishing a military capability to ward off invaders, the government has traditionally fulfilled this protective function by ensuring that the laws of the land punish people who take away the lives of others. In the United Kingdom, accordingly, there are criminal offences such as murder, manslaughter, infanticide, assisted suicide, and causing death by dangerous driving. The personal representatives, on behalf of the deceased's estate, can sue the perpetrator for trespass to the person, breach of statutory duty, or negligence.[1] The law also allows the dependants of victims of fatal attacks or accidents to sue the perpetrator for compensation under the Fatal Accidents Act 1976 for the loss of their dependency. Throughout the development of these criminal and civil laws, however, there was no express suggestion that the underlying principle was the deceased's right to life. The focus was rather on the wrongful conduct of the person responsible for the death. Even if that person was a representative of the state, such as a police officer, his or her liability under the law was not rationalized as an outworking of the victim's right to life.

The right to life as a human right was not prominent in any of the early national documents on rights. As far as the United Kingdom is concerned, it is only obliquely mentioned in Magna Carta of 1215:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[2]

The Bill of Rights of 1689 and the French Declaration of 1789 are silent on the matter too. The omission is possibly due to the fact that death was one of the punishments which societies at that time were quite prepared to inflict upon convicted criminals and, even though many extra-judicial executions also took place, it was felt that it was enough for national rights documents to ensure that persons accused of crimes were tried and punished in accordance with law. However, Article 5 of the US Bill of Rights of 1791 does protect life by providing: 'nor shall any person . . . be deprived of life, liberty, or property, without due process of law'.

At the global level, the first attempts to protect life took the form of prohibitions on the use of particularly random weapons during times of war, such as dumdum bullets or

[1] Law Reform (Miscellaneous Provisions) Act 1934.
[2] This is now labelled as clause 39, and is still in force.

projectiles diffusing poisonous gases.[3] In the aftermath of the Second World War there was a further flurry of standard setting. The Universal Declaration of Human Rights of 1948, in Article 3, states that 'Everyone has the right to life, liberty and security of person', and genocide was made an international crime by the Genocide Convention of 1948. A year later, four further Conventions on the laws of war were agreed at Geneva. These confirmed that non-combatant civilians were deserving of special protection during wars, with each of the Conventions containing a common Article 3 which prohibited—as regards persons taking no active part in hostilities, including members of armed forces who were *hors de combat*—'violence to life and person, in particular murder of all kinds'.[4] In 1951 the Convention relating to the Status of Refugees of 1951 stipulated that:

> No Contracting State shall expel or return ('refouler') a refugee in any circumstances whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[5]

At the European level, the right to life was guaranteed by Article 2 of the European Convention on Human Rights of 1950, which reads as follows:

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

At the national level, the phrase 'right to life' does not seem to have been mentioned in any judgment of the House of Lords until 1987 when, in *Bugdaycay v Secretary of State for the Home Department*, a case where the Home Secretary's refusal to grant refugee status to a number of applicants was being judicially reviewed, Lord Bridge stated that:

> The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's right to life at risk, the basis of the decision must surely call for the most anxious scrutiny.[6]

[3] See the Hague Declarations of 1899 and Hague Conventions of 1907 and, generally, Green (2008), 40–4.

[4] Green (2008), 52–7 and 61–4; Doswald-Beck (2011), Ch 6.

[5] Article 33(1), enshrining what has become known as the principle of *non-refoulement*.

[6] [1987] 1 All ER 940, 952c. As far back as 1975, in *De Freitas v Benny* [1976] AC 239, an appeal from Trinidad and Tobago, the Judicial Committee of the Privy Council refused to accept that either the death penalty itself or a delay of two or three years between its pronouncement and implementation was cruel and unusual punishment and therefore banned by the Bill of Rights 1689.

On the basis of that standard, with which Lord Bridge's colleagues agreed,[7] the appeal by one of the appellants was allowed: the Home Secretary had not taken into account the fact that Kenya, to which the appellant was to be deported, was alleged to have a poor record of compliance with its Geneva Convention obligation not to return asylum applicants to Uganda, where their lives would be in danger. In 1996, however, this ruling did not prevent the House from holding, with one Law Lord dissenting, that the Home Secretary was not obliged to reveal to a special immigration adjudicator the material on which he had based his decision that Spain was a 'safe' country to which an applicant for asylum could be returned.[8]

Article 2 of the European Convention does not seem to have been referred to in a judgment of the House of Lords until as late as 1997, in *R v Secretary of State for the Home Department, ex parte Launder*.[9] That too was a case about removing someone from the United Kingdom, this time in response to an extradition request made by the government of Hong Kong. The potential extraditee argued that, given the imminent handover of Hong Kong to China, there was a danger that he would be tried for economic crimes under Chinese national law and perhaps sentenced to death, in violation of his Convention rights. Lord Hope, for the House, was able to defeat that argument by showing that on the evidence presented the Home Secretary had not just acted on the basis of a political policy but had given detailed consideration to the allegations made by the respondent. Applying the 'most anxious scrutiny' test required by *Bugdaycay*, 'it was not irrational for the Home Secretary to say that he was not persuaded that there was a case on human rights grounds for refusing extradition to Hong Kong'.[10]

The history of the UK's top judges' engagement with the right to life is therefore a short one. In the remainder of this chapter the nature of that engagement will be analysed in relation to three different aspects of the right to life—the right not to be killed, the right to be protected against risks to life, and the right to have deaths thoroughly investigated. The prevailing impression which emerges is that the top judges have been reluctant to re-frame English common law around the concept of the right to life. They have preferred to work with traditional legal categories and to allow the European Court of Human Rights to take the lead on the right to life per se.[11]

The right not to be killed

Security force cases

The context within which the right not to be killed most frequently arose before the commencement of the Human Rights Act 1998 was where a person was charged with murder or manslaughter and then raised the defences of self-defence, the defence of others, the prevention of crime, or the effecting of a lawful arrest. All four of these were

[7] Lord Templeman said: 'In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process': ibid, 956j.

[8] *Abdi v Secretary of State for the Home Dept* [1996] 1 All ER 641. Lord Lloyd gave the leading judgment; Lord Slynn dissented.

[9] [1997] 1 WLR 839.

[10] Ibid, 869B.

[11] For the current English law, see Clayton and Tomlinson (2009a), 409–28; Feldman (2009a).

defences recognized by the common law, but the third and fourth were later enshrined in statute. Section 3(1) of the Criminal Law Act 1967 provided:

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

Section 3(2) made it clear that section 3(1) was intended to replace the rules of the common law on when force used for a purpose mentioned in that subsection was justified.

The first occasion on which the House of Lords had to consider the application of section 3 was in a case arising out of the troubles in Northern Ireland, the *McElhone* case.[12] A British soldier, when operating as a member of an army foot patrol in an area where the Provisional IRA were believed to be active, was apparently trying to detain 22-year-old Patrick McElhone near his parents' farmhouse when McElhone ran off. The soldier then raised his rifle and shot him in the back, killing him. The soldier, Lance-Corporal Jones, was tried before a juryless court and acquitted, the judge finding that it had not been his intention to kill or seriously wound Mr McElhone.[13] The Attorney General for Northern Ireland (Sam Silkin QC, who was also the Attorney General for England and Wales at the time) referred the point of law in the case to the Court of Criminal Appeal in Northern Ireland, which in turn, after giving its opinion,[14] referred it to the House of Lords. The House's consideration of the matter was made more complicated by doubts over whether the Attorney General had the legal power to make this kind of reference and over the nature of the point of law set out in the reference, but the clear outcome of the House's deliberations following a six-day hearing was a unanimous ruling that the law had been properly applied by the trial judge. If the soldier honestly and reasonably believed that the person he ordered to stop was a potential terrorist whom he wanted to question,[15] the trial judge (or the jury, if there had been one) was entitled to decide that in shooting him the solider had used force which was reasonable in the circumstances because, if the person got away he could kill or wound members of the army foot patrol, thereby encouraging the Provisional IRA to continue their armed insurrection.[16]

The judgments in the *McElhone* case are hardly a ringing endorsement of the right to life and have been widely criticized.[17] But it is probably fairer to criticize the trial judge and the Attorney General. The way in which the reference was made to the Court of Criminal Appeal and the House of Lords made it impossible for the judges to give clear rulings on the applicable law. The reference, for example, asked the higher courts to assume that the accused 'tried to kill or seriously wound' the deceased, whereas the trial judge had specifically found (rather oddly it might be said) that the accused had no such intention. What was at issue here was primarily a question of fact, not a question of law, and so no reference should have been made at all.[18]

[12] Formally entitled *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105.
[13] *R v Jones* [1975] 2 NIJB.
[14] [1976] NI 169.
[15] Under a power conferred by the Northern Ireland (Emergency Provisions) Act 1973, s 16.
[16] [1977] AC 105, 138F (per Lord Diplock).
[17] eg Dickson (2010), 250–4; Livingstone (1994), 338; Jennings (1988), 109; Doran (1987), 295.
[18] This was the clear view of Lords Edmund-Davies and Russell.

No mention was made of Article 2 of the European Convention on Human Rights in the *McElhone* case. It was not, of course, a claim made against the state in respect of a violation of that provision. Yet it is still surprising that none of the judges pointed out that, whereas section 3(1) of the Criminal Law Act 1967[19] authorized the use of 'such force as is reasonable in the circumstances', Article 2 permitted only 'the use of force which is no more than absolutely necessary'. On any reading of the latter provision the use of force in the *McElhone* case was surely unjustified. However, in settlement of a civil case brought against the army, the parents of Patrick McElhone accepted an *ex gratia* payment of £3,000 from the UK government, with no admission of liability.[20] That effectively prevented any application being made to the European Commission of Human Rights. The illustrious criminal law professor, John Smith, defended the House's decision in *McElhone*, laying emphasis on the fact that Lord Diplock believed that shooting at Patrick McElhone may have appeared to the Lance-Corporal to be necessary in order to prevent *imminent danger* to the lives of himself and his comrades.[21] But when we consider the facts of the case in detail, that danger seems rather implausible.

The application of section 3(1) of the Criminal Law Act 1967 was again considered by the Law Lords in another case from Northern Ireland in 1980, *Farrell v Secretary of State for Defence*.[22] This involved the killing of three men by British soldiers in 1971. The widow of one of them sued the Ministry of Defence in the High Court in Northern Ireland for the soldiers' negligence, but lost. The Court of Appeal in Northern Ireland, however, ruled that there should be a new trial because the judge should have asked the civil jury involved whether the army operation had been negligently planned (juries had been withdrawn for troubles-related criminal cases in Northern Ireland, but were still in use for civil cases even though they had ceased to be used in England). The Ministry of Defence appealed further to the House of Lords, which held that the pleadings could not be changed so as to embrace the alleged negligence of the commanding officers. The House again seems to have focused on legal formalities rather than adopt a broader perspective on the issues at stake and, as in *McElhone*, its decision was justifiably criticized as a result.[23] On this occasion an application was lodged at the European Commission of Human Rights, where it was declared admissible on Article 2 grounds.[24] But the UK government agreed a friendly settlement with Mrs Farrell, paying her £37,500 in compensation and defraying part of her legal costs.[25]

In a third case from Northern Ireland, *R v Clegg*,[26] the Law Lords rejected the argument, touched upon in *McElhone* but not decided, that a charge of murder should be reduced to one of manslaughter if the defendant's defence of self-defence or prevention of crime failed on the basis that the force used was more than reasonable in the circumstances. On this occasion the result was to uphold the conviction of a British

[19] The equivalent provision in the law of Northern Ireland is the Criminal Law Act (NI) 1967, s 3(1).
[20] McKittrick et al (2004), 470–1.
[21] Smith (1989), 99–101.
[22] [1980] NI 55, [1980] 1 WLR 172.
[23] Greer (1980), 159; Walker (1980).
[24] (1983) 5 EHRR 466.
[25] Application No 99013/80, Commission decision of 2 October 1984.
[26] [1995] 1 AC 482.

private for the murder of a passenger in a car driven by a joyrider who had failed to stop at an army checkpoint. The House of Lords' timidity was a consequence not of flawed question-setting by the Attorney General, nor of faulty pleading by the barristers, but by the Law Lords' own reluctance to develop the criminal law on an issue which they thought was better dealt with by Parliament. Lord Lloyd, who gave the only speech, cited the support for the proposed change in the law already indicated by the Law Commission for England and Wales in 1989, a House of Lords Select Committee also in 1989, and the Criminal Law Revision Committee in 1980. He also referred to the fact that in 1991 the House of Lords had affirmed that a man could be guilty of raping his wife[27] and that in 1975 it had extended the defence of duress to persons charged with aiding and abetting murder.[28] In that latter case Lord Wilberforce had directly addressed the issue of whether it was appropriate for the House of Lords to be taking such a step:

> I have no doubt that it is open to us, on normal judicial principles, to hold the defence admissible. We are here in the domain of the common law; our task is to fit what we can see as principle and authority to the facts before us, and it is no obstacle that these facts are new. The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt and particularly for setting the standards by which the law expects normal men to act.[29]

But in *Clegg* Lord Lloyd preferred the more cautious approach of Lord Simon who, dissenting in *Lynch*, avowed that he could hardly conceive of circumstances less suitable for five members of the Appellate Committee to arrogate to themselves 'so momentous a law-making initiative'.[30] Lord Lloyd was reluctant to be activist because Parliament had already legislated in the specific field now in dispute (through the Criminal Law Act 1967), and '[t]he reduction of what would otherwise be murder to manslaughter in a particular class of case… is, in truth, part of the wider issue whether the mandatory life sentence for murder should still be maintained',[31] an issue which could only be decided by Parliament.[32]

So, by 1995 the House of Lords had still not directly discussed the extent to which English law protected the right to life, and in three cases from Northern Ireland it had refused to clarify the precise criminal or civil liability of soldiers who had killed members of the public. No other cases in which members of the public had been killed by police officers in England and Wales had reached the House of Lords. In the trial of two police officers who in 1981 had shot and seriously wounded Stephen Waldorf in the mistaken impression that he was a dangerous escaped criminal, the jury found the officers not guilty of attempted murder and of wounding with intent to cause grievous bodily harm. Professor Smith again thought the verdict was perfectly understandable on the evidence and the law.[33] The killing of Michael Fitzgerald by Bedfordshire police

[27] *R v R* [1992] 1 AC 599.
[28] *DPP for Northern Ireland v Lynch* [1975] AC 653.
[29] Ibid, 684G–685A.
[30] Ibid, 696A.
[31] Ibid, 500G.
[32] See, generally, Hadden (1993).
[33] Smith (1989), 21.

in 1998 bypassed the Lords but led to an application to Strasbourg, where the European Court found no violation of Article 2.[34] In another notorious case in 1999, where two Metropolitan Police officers shot dead Harry Stanley, whom they believed to be carrying a firearm in a plastic bag (when in fact it was a chair leg), an inquest jury issued a verdict of unlawful killing but the Crown Prosecution Service did not proceed with a prosecution because it did not think it would be able to rebut the officers' apparent belief that they thought they were acting in self-defence.

Most notable of all, perhaps, is the case of Jean Charles de Menezes, whom police officers shot seven times in the head at a London tube station in 2005 because they believed him to be a terrorist who had been involved in the previous day's attempts to plant bombs in the capital. Again the Crown Prosecution Service thought that there was insufficient evidence to prosecute any of the police officers involved, although it did recommend a prosecution of the Metropolitan Police for breach of its duty of care under the Health and Safety at Work etc Act 1974. In 2007 the force was convicted of this crime and fined £175,000. A cousin of Mr de Menezes lodged an application with the European Court of Human Rights in Strasbourg in 2008.[35] In the following year the family reportedly settled a civil claim against the Metropolitan Police for a sum of over £100,000[36] and it remains to be seen whether that payment will make it more difficult for the related case to proceed at Strasbourg, where often a legal settlement is considered to have provided 'just satisfaction' for whatever violation of the European Convention may have occurred.[37] At the time of the killing the Metropolitan Police were applying unpublished guidelines code-named 'Operation Kratos', which supposedly recommended that the police should fire at the head or lower limbs of a suspected suicide bomber because firing at the torso may detonate explosives worn round the suspect's waist. It is regrettable that neither the top domestic court nor the court in Strasbourg has yet had a chance to judge the compatibility of such a recommendation with Article 2 of the Convention.

It is also remarkable that, to date, the United Kingdom's top judges have not had the opportunity to rule on whether a security force operation was planned in such a way as to violate an eventual victim's right to life. That was the Achilles' heel of the Ministry of Defence's position in *McCann v United Kingdom*, which arose out of the killing by undercover soldiers of three members of the IRA in Gibraltar in 1988. The European Court did not hold that any of the soldiers who shot the victims had violated their right to life, but it did conclude, albeit by the narrowest of majorities (10 to nine), that the officers who had controlled and organized the whole operation had violated Article 2 by not ensuring that alternatives to shooting the victims were properly considered first. Unless such factors are explicitly considered during the planning of an operation it is very difficult for those in control to demonstrate that the force eventually used was 'absolutely necessary' as required by Article 2. Having said that, in *McCann* the

[34] *Bubbins v UK* (2005) 41 EHRR 24. But the Court did find a violation of Art 13 (the right to an effective remedy).

[35] *Armani da Silva v UK* App No 5878/08; Council of Europe Press Release, 27 October 2010.

[36] <http://www.guardian.co.uk/uk/2009/nov/23/jean-charles-de-menezes-settlement> (last accessed 4 December 2012).

[37] For a discussion of the European Court's rather unclear approach, see Reid (2012), 738–40.

European Court unanimously held that the test for the lawful use of force in domestic Gibraltarian law (which mirrored England's 'reasonably necessary' test in the Criminal Law Act 1967) was not so different from that laid down in Article 2 as to mean that there was a violation of Article 2 on that basis too. Given the interpretation placed upon that test by the House of Lords in the *McElhone* and *Clegg* cases, it is disappointing that the European Court did not adopt a stricter line.[38]

The domestic criminal law in this area has recently been amended through the Corporate Manslaughter and Corporate Homicide Act 2007. This permits organizations to be found guilty of manslaughter if a serious management failure results in a gross breach of a duty of care.[39] The organizations in question include government departments and police forces, but the Act exempts military and police operations which are dealing with terrorism, civil unrest, or serious public disorder and in the course of which soldiers or police officers come under attack or face the threat of attack or violent resistance.[40] This suggests that the cases which came to the Lords from Northern Ireland might still be decided today in the same way as they were at the time.

As regards civil liability, legislation has been enacted for the whole of the United Kingdom to ensure that, when someone acting in the course of a business is sued for negligently causing another's death, the person sued cannot, 'by reference to any contract term or to a notice given to persons generally or to particular persons', restrict his or her liability for death (or indeed personal injury).[41] Moreover, the same provision makes it clear that, just because a claimant agreed to or was aware of the contract term or notice, this does not mean that he or she has voluntarily accepted the risk of death or personal injury. That is a significant limitation on the operation of the defence of *volenti non fit iniuria*, which otherwise still exists in the English law of torts.

Duress and necessity cases

The right to life has also been in play, though once more *sub silentio*, in cases where persons accused of murder or attempted murder have argued that they were acting under duress or out of necessity. The most famous of these cases is the Victorian saga of *R v Dudley and Stephens*, where two men who had been shipwrecked were accused of murdering and eating a cabin boy who was with them at the time.[42] They were convicted (although their death sentences were commuted to six months' imprisonment) and the case is therefore taken as authority for the proposition that it is never lawful to kill a non-threatening person in order to save one's own life, even if the other person was certain to die anyway. A purist human rights lawyer might argue that by criminalizing such conduct the state is acknowledging the right to life of the victim, but that is not how the legal position has been rationalized by the senior judges, nor indeed by the writers of criminal law textbooks. They have preferred to justify it on the basis of the moral injunction 'thou shalt not kill'.

[38] See the dispute between Leverick (2002a), (2002b) and Smith (2002).
[39] The term 'corporate homicide' is reserved for use in Scotland.
[40] Sections 4(2) and 5(2). The military are also exempt if they are conducting 'peacekeeping operations'.
[41] Unfair Contract Terms Act 1977, s 2(1).
[42] (1884) 14 QBD 273.

In the context of duress the House of Lords held in *DPP for Northern Ireland v Lynch*, albeit by the slender majority of three to two, that duress could be a defence to someone who, as in that case, was ordered by the IRA to help kill a person and told that if he did not do so he would himself be killed.[43] The House's decision was taken at a time when the IRA was at its most ruthless, and it is very easy to believe that the defendant would indeed have been killed if he had not complied with his orders. As it turned out, when Lynch was re-tried and given permission to raise the defence of duress, his account of what had occurred was not believed by the court and he was convicted of murder in any event. Just over 10 years later the House decided not to follow its earlier decision in *Lynch* and instead ruled by a majority of five to none, in *R v Howe*, that duress is never available as a defence to murder.[44] A few years after that, but again by a majority of three to two, their Lordships in *R v Gotts* extended the exclusion of the defence to situations where the accused is charged with attempted murder.[45]

Again, while it may be tempting to characterize the rulings in *Howe* and *Gotts* as indicative of a desire on the part of the top court to protect the right to life of victims, no such thinking is anywhere evident in the judgments. Even if it were, a comparable argument could be raised in relation to the life of the person who was placed under duress: if that person were to defy the duress and were killed as promised, his or her family might in theory suggest that the state had failed to protect their relative's right to life by not having laws in place which grant greater freedom of action to the victims of such oppressive conduct. In any event, in order to acknowledge the right to life of a crime victim, it is not necessary to convict the killer of murder: prosecution for some lesser crime could be enough. The European Court has never indicated that a state must impose a certain level of punishment on an offender in order to satisfy the requirements of Article 2.

Medical cases

In the three Northern Ireland cases on security forces examined above,[46] it was the individual soldiers who were in court: their commanding officers and officials in the Ministry of Defence were not called to account. Part of the purpose of human rights law is to fill that accountability gap. The Human Rights Act 1998, fully in force from 2 October 2000, made it possible for the first time for the relatives of those killed by agents of the state to sue the public authority concerned for violating the deceased's right to life. There has not been much litigation of this kind to date, except for a few cases brought against medical authorities (not necessarily for negligence). What can be deduced from this litigation regarding the current stance of the UK Supreme Court on this important right?

[43] [1975] AC 653. The majority comprised Lords Morris, Wilberforce, and Edmund-Davies. Lords Simon and Kilbrandon dissented.

[44] [1987] 1 AC 417 (Lords Hailsham LC, Bridge, Brandon, Griffiths, and Mackay).

[45] [1992] 2 AC 412. The majority comprised Lords Templeman, Jauncey, and Browne-Wilkinson. Lords Keith and Lowry dissented.

[46] See 102–4.

The starting point has to be the much publicized decision in the *Bland* case,[47] where the health authority responsible for the care of a victim of the 1989 Hillsborough football stadium disaster, who was in a persistent vegetative state, applied to the courts, with the support of his family, for a declaration that the physicians involved could lawfully discontinue his life-saving treatment as well as the supply of ventilation, nutrition, and hydration. All nine judges who looked at this issue, across three courts, agreed that withdrawal of such treatment and care from Tony Bland would *not* breach either the criminal law or the civil law. Even though this was just five years before the enactment of the Human Rights Act, no reference was made in any of the judgments to the human right to life, except for a passing glance cast by Lord Goff at the European Convention and the International Covenant.[48] Even Anthony Lester QC, one of the country's greatest human rights lawyers who appeared as *amicus curiae*, did not construct an argument around the European Convention. In the Court of Appeal, the judgment of Hoffmann LJ, as he was then, contains an interesting analysis of the relevant (and conflicting) ethical principles at stake,[49] but like the other judges he focuses on the moral principle of the sanctity of life rather than on the legal concept of the right to life. The House of Lords held, as did the lower courts, that the question to be asked in this kind of case was, is it in the best interests of the patient that treatment which has the effect of artificially prolonging his or her life should be continued?

In a post-Human Rights Act context the ruling in *Bland* can be justified on the basis that withdrawing artificial treatment does not amount to the 'deprivation of life' within Article 2. This was the clear ruling of Butler-Sloss P in *NHS Trust A v M*,[50] a decision that was not appealed. The learned judge said that she found no inconsistency between the principles enunciated in *Bland* and the Human Rights Act. She held that 'deprivation of life' required a deliberate act, and that an omission would qualify as a deliberate act only if it was in breach of a positive obligation on the state to ensure that a person's life was continued. Here, there was no such positive obligation or, rather, there was such an obligation but it had been fulfilled. As Dame Elizabeth put it:

> Article 2 therefore imposes a positive obligation to give life sustaining treatment in circumstances where, according to responsible medical opinion,[51] such treatment is in the best interests of the patient, but it does not impose an absolute obligation to treat if such treatment would be futile.[52]

There is, with respect, an element of question-begging in this statement, in that it assumes that keeping a person in a permanent vegetative state alive would be futile. The learned judge also ruled that, even though it would inevitably lead in the case before her to the two patients' deaths, the withdrawal of treatment and nutrition was

[47] *Airedale NHS Trust v Bland* [1993] AC 789.

[48] Ibid, 864A.

[49] And he acknowledges the assistance he received from talking to Ronald Dworkin and reading a manuscript version of his book *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York, Vintage Books, 1994).

[50] [2001] Fam 348.

[51] This is the phrase used in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 in relation to medical negligence claims.

[52] [2001] Fam 348, [37].

'for a benign purpose',[53] and that, since the patients had not experienced physical or mental suffering (although how this was known was not made clear), Article 3 of the Convention—the right not to be ill-treated—had no application either.

Just a month earlier—and 10 days before the Human Rights Act 1998 was to come into force—the Court of Appeal issued its judgment on the role of Article 2 in the different context of an operation to separate conjoined twins. The medical experts agreed that if no operation was conducted both young babies would die within three to six months; if the operation went ahead one of the babies, 'Jodie', might survive, but the other, 'Mary',[54] would certainly be killed through having her blood supply cut off. The parents did not want the operation to take place but the doctors went to court seeking a declaration that the operation would be lawful despite the parents' objection. At first instance the judge granted the declaration. On appeal the Court of Appeal upheld the result but on different reasoning.[55] For a start, two of their Lordships[56] disagreed with the High Court judge's conclusion that the operation would be in Mary's best interests: he had been wrong to say that a few more months of life would be worth nothing to Mary and it was 'utterly fanciful' to describe the operation as an 'omission' rather than an 'act'.[57] The Court of Appeal's preferred approach was to choose the lesser of two evils, namely to kill one child so that the other could survive, rather than to leave both children to die. The way it justified this conclusion was at times rather brutal: the twins were described as sucking the lifeblood out of each other and the doctors were said to be justified in defending the stronger of the children whose life was thus being attacked.[58] Nothing in Article 2 altered this common law conclusion, because in imposing an obligation on the state not to intentionally deprive someone of their life the Article 'does not import any prohibition of the proposed operation other than those which are to be found in the common law of England'.[59] Brooke LJ expressed particular satisfaction with the current state of English law:

> The fundamental importance of the right to protection of life is so ingrained in the English common law that I do not consider that any different solution to the dilemma we face can be found in the language of the Convention on which we received helpful oral submissions…[60]

Ward LJ even suggested that if the doctors did not intervene to save Jodie's life they might be legally responsible for her death.[61]

The parents of these twins decided not to apply for leave to appeal to the House of Lords, presumably because their lawyers advised them that the outcome was unlikely to be different, whatever the reasoning adopted. Most academic commentators have been

[53] Ibid, [49].
[54] The babies' real names were later revealed as Gracie and Rosie Attard.
[55] [2001] Fam 147.
[56] Ward and Brooke LJJ; Robert Walker LJ (later Lord Walker) dissented on this point.
[57] [2001] Fam 147, at 188C and 189G.
[58] Ibid, at 197D–E.
[59] Ibid, 256H–257A, per Robert Walker LJ.
[60] Ibid, 238D. These submissions included one on behalf of the Pro-Life Alliance. Brooke LJ did not provide sources for his claim that the right to protection of life is ingrained in English common law.
[61] Ibid, 200B–C.

supportive of the Court of Appeal's approach, but there have also been critics. Bainham implies that the state would have been failing in its duties if it had not intervened to protect Jodie.[62] Harris argues that the decision to proceed with the operation was ethical, but so would have been a decision not to proceed; in such a situation he thinks the courts should not have overridden the wishes of the parents.[63] Vanessa Munro seems to approve of the decision but thinks it shows the inadequacies of a rights-based approach to problems: she prefers the 'relational' approach advocated by theorists such as MacKenzie and Stoljar:[64]

> By affording credence within the legal arena to narratives of connection and co-operation alongside narratives of separation and conflict, this relational approach recognizes the extent to which rights-based claims are embedded within, and can scarcely be abstracted from, the contexts and relationships within which they arise.[65]

Sabine Michalowski, on the other hand, thinks the decision was flawed on both legal and moral grounds.[66] She cannot see any valid defence against the charge that Mary was murdered: in her view the doctrines of necessity, self-defence, and conflicting duties were all inapplicable. She thinks the Court of Appeal 'twisted legal principles in order to find a legal basis for its view that it was better to save one twin than let the lives of both of them come to an early end'.[67] Morally, the court seems to have valued Jodie's life more highly than that of Mary, the very kind of judgment which Lord Mustill, in the *Bland* case, had warned against making.[68]

Whatever one thinks of the decisions in the medical cases, they do appear to show that the Supreme Court will not be unwilling, in appropriate circumstances, to accept that some lives can lawfully be 'sacrificed'. The fact that Parliament de-criminalized attempted suicide in 1961 is early evidence that there is no absolute policy requiring the criminal law always to accept that the intentional taking of life is unlawful.[69] It can sometimes be lawful to destroy one life in order to save another's but, as we have seen from the cases on duress, those occasions are very few and far between.

The position of foetuses

One of those occasions is when a mother seeks an abortion. This is a field of law, however, where developments have occurred without much input from the United Kingdom's top court. Strange as it may seem, the right to life has hardly featured at all in such litigation as has occurred.

[62] Bainham (2001).
[63] Harris (2001). Harris's analysis depends on his controversial distinction between humans and persons. Persons appear to be humans who do not have a 'biographical life'.
[64] MacKenzie and Stoljar (2000).
[65] Munro (2001), 476.
[66] Michalowski (2002).
[67] Ibid, 397.
[68] 'The proposition that because of incapacity or infirmity one life is intrinsically worth less than another is the first step on a very dangerous road indeed, and one which I am not prepared to take': [1993] AC 789, 894D.
[69] Suicide Act 1961, s 1: 'The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated'.

Procuring a miscarriage was expressly criminalized by the Offences against the Person Act 1861,[70] but the House of Lords was never called upon to interpret those provisions. In *R v Bourne,* in 1939, a gynaecologist who performed an abortion on a 14-year-old victim of rape was acquitted by a jury after it was directed by the trial judge, Macnaghten J, that the defendant could not be said to be acting 'unlawfully' (a requirement under section 58 of the 1861 Act) if he had done what he did in good faith and in the exercise of his clinical judgment. At that time, the case could not go to a higher court, whether on appeal or by way of a reference. It was not until Parliament passed the Abortion Act 1967 that radical reform to the 1861 Act was achieved. Section 1(1) of the 1967 Act now provides that a person is not guilty of an offence under the 1861 Act if a pregnancy is terminated by a registered medical practitioner and if two such practitioners are of the opinion, formed in good faith:

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

It is worth stressing that it is only in relation to situations mentioned in paragraph (a) that an abortion is limited to the first 24 weeks of pregnancy, and it is only in relation to situations mentioned in paragraphs (a), (b), and (c) that the decision to abort must be based on balancing the life of the foetus against the health or life of the mother or the health of the mother's other children. In relation to situations mentioned in paragraph (d), the abortion can be conducted right up until birth is due to occur, and there is no balancing exercise to conduct: what is at issue is simply whether there is a substantial risk that the baby, if born, would suffer from abnormalities that would seriously handicap it. It is clear that Parliament believed that the life of such babies could indeed be 'sacrificed'. No guidance is given as to what amounts to a serious handicap in this context, although it seems to be assumed that it entails suffering. In recent years there have been cases where foetuses with a cleft lip or palate have been aborted, even though these abnormalities are correctable by fairly straightforward surgery, but the doctors involved have not been prosecuted under the 1861 Act because they were deemed to have acted 'in good faith', as Dr Bourne was in 1939. It is entirely foreseeable that the interpretation of paragraph (d) will come before the justices of the Supreme Court sooner rather than later, especially in view of the developing law which protects people with disabilities against discrimination.[71] When that occurs their Lordships will,

[70] Sections 58 and 59.

[71] This is now mostly contained in the Equality Act 2020. See Wadham et al (2012).

in effect, have to undertake the very task which Lord Mustill in *Bland* and the three Court of Appeal judges in the conjoined twins case all said was otiose (ie purposeless), namely, when is a life worth living?

As it is, the House of Lords has had to interpret the Abortion Act 1967 on only two occasions, neither of which required it to directly consider the right to life. In *Royal College of Nursing v Department of Health and Social Security* the question was whether nurses, as well as doctors, had a defence against a charge that they had unlawfully procured a miscarriage in breach of section 58 of the 1861 Act.[72] Woolf J, as he then was, supported the Department's argument that such a defence *was* available, a strong Court of Appeal held for the RCN,[73] and then three of the five Law Lords held again for the Department. Lord Diplock, leading the majority, ruled that the 1967 Act envisaged abortions being conducted by a team of people in an NHS hospital or approved private clinic and that its policy was to broaden the grounds on which abortions could be lawfully obtained. Lord Keith was relieved to be able to come to the same conclusion because otherwise there would probably have had to be emergency legislation exonerating the very large number of people who, by helping doctors over the years since 1967, would have been guilty of a criminal offence. Lord Wilberforce and Lord Edmund-Davies, in the minority, believed that the new methods now available for securing an abortion meant that the 1967 Act required to be amended: for it to be interpreted in the way preferred by the majority was 'a radical reconstruction of the Act'[74] or 'redrafting with a vengeance'.[75] Both judges pointed out, as Lord Denning MR had done in the Court of Appeal, that prior to the 1967 Act Parliament had on at least three occasions chosen specific wording when wanting to authorize something being done by doctors with nurse participation.[76] Neither judge, unsurprisingly, relied upon the concept of the right to life, but it is clear that they thought the very sensitivity of the subject-matter of the Act required it to be interpreted with caution.[77]

The second of the two House of Lords' decisions was a case which had first been referred to the Court of Appeal by the Attorney General[78] after a defendant had been acquitted of a criminal charge on the direction of the trial judge, the sort of procedure which was not in place at the time of the acquittal in *R v Bourne*. The defendant had stabbed a woman whom he knew at the time to be pregnant. A few weeks later the woman gave birth to a very premature baby and it became clear that the knife used to stab the mother had penetrated the foetus too. Four months later the baby died of a lung condition not connected to the stabbing injury. The defendant was charged with murder but the judge ordered his acquittal on the basis that, in law, he could not be convicted of either murder or manslaughter. The House of Lords held unanimously that on these facts there could be no murder but there could be manslaughter.[79] In a judgment which

[72] [1981] AC 800.

[73] Ibid, (Lord Denning MR, Brightman LJ, and Sir George Baker, a retired President of the Family Division).

[74] [1981] AC 800, 823H. [75] Ibid, 831H.

[76] eg the Drugs (Prevention of Misuse) Act 1964, s 1(2)(g); the phrase used was 'by a registered medical practitioner or by a person acting in accordance with the directions of any such practitioner'.

[77] [1981] AC 800, 565d (per Lord Wilberforce). See too 570d and 572f (per Lord Edmund-Davies).

[78] Under the Criminal Justice Act 1972, s 36(1). The Court of Appeal had then referred the issue, on the application of the defendant, to the House of Lords under s 36(3).

[79] *Attorney General's Reference (No 3 of 1994)* [1998] AC 245.

is notorious for the opprobrium it casts on the current state of the English common law on murder, Lord Mustill emphasized that a foetus cannot be the victim of murder. He could see no point in explaining the medieval origins of the rule:

> It is sufficient to say that [it] is established beyond doubt for the criminal law, as for the civil law,[80] that the child en ventre sa mère does not have a distinct personality, whose extinguishment gives rise to any penalties or liabilities at common law.[81]

In acknowledging, albeit reluctantly, that the crime of manslaughter could be committed, Lord Mustill accepted the anomaly that, in effect, an unborn child had no personality for the purposes of one crime (murder) but did have one for the purposes of another (manslaughter): 'to look for consistency between and within the very different crimes of murder and manslaughter is, I believe, hoping for too much'.[82] Lord Hope, who gave the other substantive judgment in the case, said that, as far as the law on manslaughter is concerned, it is not sensible to say that a foetus can never be harmed or that nothing can be done to it which could ever be dangerous: 'It would seem not to be unreasonable therefore, on public policy grounds, to regard the child in this case, when she became a living person, as within the scope of the mens rea which [the defendant] had when he stabbed her mother before she was born'.[83]

Once again we see equivocation on the part of the top court. It is prepared to recognize that children, once born, can be protected by one arm of the criminal law dealing with offences against the person, but not by another arm. And, when protection is provided, it is not on the basis of the right to life as such but because of some unspecified public policy, the limits of which are not made clear. At present English law seems to consider foetuses not to be 'human beings with a life'; they only acquire that status once they are born. There is surely a case to be made for extending that category to at least some unborn babies, perhaps those who are in the last third of their mother's pregnancy.

Mercy killings

The common law on mercy killings was brought sharply into focus early in 2010 when, within the space of a few days, two contrasting conclusions were reached in cases where the facts seemed, on the surface at least, to be very similar. In the first of these, Frances Inglis was convicted of murder for injecting a lethal dose of heroin into her brain-damaged son, who was in a permanent vegetative state. She was given a minimum sentence of nine years' imprisonment by the trial judge, but the Court of Appeal reduced that to five years, while making it abundantly clear that, however compassionate Mrs Inglis's motivation may have been, she was still guilty of murder.[84] There was no evidence to support the view that her son had wanted to commit suicide. In the second case, Kay Gilderdale was acquitted of attempted murder, though convicted of assisting

[80] Here he cited *Burton v Islington Health Authority* [1992] QB 204, where the Court of Appeal held that persons born with disabilities caused as a result of medical negligence before birth could sue for negligence in respect of a breach of duty of care.

[81] [1998] AC 245, 261F. [82] Ibid, 264B. [83] Ibid, 271E.

[84] *R v Inglis* [2010] EWCA Crim 2637, [2011] 1 WLR 1110.

suicide, when she administered lethal drugs to her daughter, who had been suffering from chronic fatigue syndrome for 17 years and had asked her mother to help her die. She was given a 12-month conditional discharge.[85] In the *Inglis* case Lord Chief Justice Judge comes close to recognizing that the basis for the law's approach in instances of so-called mercy killings is the victim's right to life:

> We must also emphasise that the law does not recognise the concept implicit in the defence statement that Thomas Inglis was 'already dead in all but a small physical degree'. The fact is that he was alive, a person in being. However brief the time left for him, that life could not lawfully be extinguished. Similarly, however disabled Thomas might have been, a disabled life, even a life lived at the extremes of disability, is not one jot less precious than the life of an able-bodied person. Thomas's condition made him especially vulnerable, and for that among other reasons, whether or not he might have died within a few months anyway, his life was protected by the law, and no one, not even his mother, could lawfully step in and bring it to a premature conclusion. Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which, subject to stringent conditions, may be lawful, and the active termination of life, which is unlawful.[86]

Most people who acquaint themselves with the details of these two cases would probably agree that the courts were correct to differentiate between them. And while paying lip service to the Lord Chief Justice's insistence that all lives have equal value they would probably approve of the fact that, when setting the minimum term of imprisonment in murder cases, courts are required by the Criminal Justice Act 2003 to have regard, as a mitigating factor, to 'a belief by the offender that the murder was an act of mercy'.[87]

If and when the Supreme Court is faced with an appeal in a mercy killing case, it is unlikely to take as its starting point the concept of the right to life. This is because English criminal law has not been constructed around the rights of victims of crime but instead around the need of the state to preserve law and order. The main function of the criminal law, in any society, is to punish people for breaking society's rules; if the rights of victims are acknowledged in some way, it is an incidental by-product of the criminal justice process. Nevertheless, one would like to think that the rules of criminal law are at the very least consistent with the requirements of a human rights-based approach to law-making. One small way in which this consistency could be emphasized would be by Supreme Court Justices talking not so much of all lives being equally precious but of all human beings having an equal *right* to life.

Assisted suicides

Towards the end of its own life, the Appellate Committee of the House of Lords had two opportunities to consider the extent to which English law should protect the right of individuals to end their lives. As already indicated, in 1961 Parliament had

[85] Unreported, but see <http://news.bbc.co.uk/1/hi/england/sussex/8479211.stm>.
[86] [2011] 1 WLR 1110, [38].
[87] Section 269(5) and Sch 21, para 11(f).

de-criminalized suicide, but left in place the crime of assisting suicide.[88] The two cases which reached their Lordships involved appellants who wanted to be able to kill themselves but knew that, because of their physical disabilities, they would need assistance in doing so. The cases were brought with specific reference to the right to life conferred on people in the United Kingdom by the Human Rights Act 1998. Hence there was no convenient way in which the Law Lords could avoid the human rights debate.

In *R (Pretty) v DPP*[89] the appellant suffered from motor neurone disease and wanted an assurance that, if her husband helped her to kill herself, he would not be prosecuted for the crime of assisting suicide. The Suicide Act 1961 made the consent of the Director of Public Prosecutions a prerequisite to prosecution in such cases and Mrs Diane Pretty sought a declaration that no such consent would be granted. It is unfortunate that the remedy was pursued in this way, because it was always unlikely that a court would lend its name to a promise not to prosecute whenever the precise circumstances of the assisted suicide were not yet known. It might have been better if the remedy sought had been a declaration that if Mrs Pretty husband were, in the presence of a witness, to follow her explicit instructions regarding her suicide, this would not be regarded as 'an act…assisting the suicide'. But it has to be admitted that, even then, the wording of the relevant statutory provision leaves very little room for arguing that a particular action would not be an 'assisting' act.[90] In any event, the House of Lords ruled that it would not be lawful for the DPP to state in advance of an action that he would not consent to a prosecution under section 2(1). As Lord Bingham appropriately observed: 'The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the Crown and its servants by the Bill of Rights 1688'.[91] But he and three other Law Lords did say that it would be lawful for the DPP to issue guidance as to how he would exercise his discretion in relation to consenting to prosecutions for particular offences.[92]

On the more substantive issue—is there a right to kill oneself?—the House was content to conclude that nothing in the European Convention required a state to legalize assisted suicide, not Article 2, 3, 8, 9, or 14. Article 8 had not been interfered with at all, because it related to how a person led his or her life, not to how he or she wished to die.[93] Lord Bingham stressed that the function of the House was to resolve the issues of law properly brought before it: the Appellate Committee was not a legislative body, nor a moral or ethical arbiter; its task was not to weigh or evaluate different beliefs or to give effect to its own, 'but to ascertain and apply the law of the land as it is

[88] A separate legislative provision states that if one person kills another as part of a suicide pact this is manslaughter and not murder: Homicide Act 1957, s 4(1).

[89] [2001] UKHL 61, [2002] 1 AC 800. See Tur (2003).

[90] Section 2(1) reads: 'A person (D) commits an offence if (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide'.

[91] [2002] 1 AC 800, [39]. The Bill of Rights is sometimes dated 1688 because prior to 1752 years were considered to begin on 25 March, and the Bill of Rights was first presented by Parliament to King William III and Queen Mary in early March, before the year 1689 had begun at that time.

[92] Ibid. Calvert-Smith and O'Doherty (2003) were of the view that it would be misconceived and impossible for the DPP to give such guidance.

[93] Lord Hope, however, thought that Art 8 *was* engaged: ibid, [100].

now understood to be'.[94] This is a standard attempt on the part of a senior (and highly respected) judge to assert the court's objectivity and impartiality, but it does not change the reality that, when this case reached the House, the law as it stood was *ex hypothesi* uncertain and that in deciding how to make it more certain their Lordships had to make policy choices.

Here the two big policy choices made by their Lordships were (1) to confine their attention to what the European Convention required, leaving almost entirely out of account the possibility that domestic English law could legitimately go further than the European Convention in protecting human rights, and (2) to defer entirely to Parliament as to how, if at all, this area of law should be reformed. The first policy choice is a clear precursor of the so-called 'mirror principle', the 'no more, no less' approach to the protection of human rights which Lord Bingham was later to expressly posit in *Ullah*[95] and which has since been endorsed by several other Law Lords and Supreme Court Justices.[96] In *Pretty*, virtually no consideration was given to English law protecting the right to die, even though Strasbourg did not require such abstinence; nor were other national laws referred to, such as those which allow for assisted suicide in Belgium, the Netherlands, and Switzerland. The deference to Parliament is more understandable. For a start, the wording of section 2(1) of the Suicide Act 1961 (if not held to be incompatible with a Convention right) was probably too explicit to admit of any 'reading down' under section 3 of the Human Rights Act 1998. More significantly, the issue is so sensitive that it deserves to be regulated by laws issued by democratically elected politicians. As Lord Steyn put it:

> In our parliamentary democracy, and I apprehend in many Member States of the Council of Europe, such a fundamental change cannot be brought about by judicial creativity. If it is to be considered at all, it requires a detailed and effective regulatory proposal. In these circumstances it is difficult to see how a process of interpretation of Convention rights can yield a result with all the necessary in-built protections. Essentially, it must be a matter for democratic debate and decision making by legislatures.[97]

Nevertheless, the position adopted by the House of Lords was, to this author at least, disappointing on at least three levels. Firstly, it did not take full account of the reach of Article 8 of the Convention (in particular as far as the right to a private life is concerned). Secondly, it did not adequately square the denial of a right to assisted suicide with the acceptance of a right of persons with disabilities not to be discriminated against in the exercise of their rights. Thirdly, it did not display sufficient imagination in terms of suggesting how Parliament, if it were to address the issue, might preserve the policy against de-criminalizing assisted suicide (to protect the vulnerable) while at the same time recognizing the need to accept assisted suicide in exceptional cases (such as where a fully competent adult who is suffering from a terminal illness wishes to make plans for how to end his or her life in dignity and without an assistant running the

[94] Ibid, [2]. See too Lord Hope at [72].
[95] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.
[96] See Ch 2 above, at 39–43.
[97] [2002] 1 AC 800, [57].

risk of being prosecuted and punished).[98] Simply suggesting that the DPP might issue guidance to prosecutors was not acceptable. It was passing the buck without providing any criteria or sense of direction.

Mrs Pretty, having lost in the Lords, lodged an application at the European Court of Human Rights and the judges there agreed to expedite their consideration of the application so that an outcome would be known before Mrs Pretty died.[99] It is not at all surprising that the judges in Strasbourg agreed with their Lordships that nothing in the Convention required a state to de-criminalize assisted suicide, but at least the Court did say that the Law Lords ought to have accepted that Mrs Pretty's right to a private and family life had been interfered with under Article 8(1), even if it then concluded that the interference with that right was justifiable under Article 8(2) because it was for the protection of the rights of others.[100] The Court was less respectful, it is submitted, of the perspective of persons with disabilities for, in relation to the claim under Article 14, it ruled that there *was* 'an objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide', namely the need to safeguard people against the risk of abuse.[101] The Court could surely have laid down criteria for carving out of the category of disabled people those individuals who are *not* at any appreciable risk of being abused.

Not long after the European Court's ruling, another woman with disabilities, Debbie Purdy, sought an order from an English court requiring the DPP to publish details of his policy relating to when a prosecution would be brought for assisting a suicide. She wanted reassurance that, if she were to travel to a country where assisted suicide is lawful, her husband would not be prosecuted for helping her to make that journey.[102] To the surprise of many, and in the last set of speeches ever issued by the Appellate Committee, the Law Lords granted such an order requiring the DPP to promulgate his policy in more detail.[103] In a way, the speeches represent a fundamental shift in the manner in which the top UK court was prepared to approach its obligation to ensure compatibility between UK law and Convention rights, for they are based on the need to ensure that domestic law is sufficiently clear and precise to allow people to regulate their conduct accordingly. Although Article 8(2) allows interferences with Article 8(1) provided they are 'in accordance with the law', the 'law' in question has to be accessible and foreseeable. Hence, having emphasized in *Pretty* that the DPP could not be obliged to issue guidance on how he would exercise his discretion, in *Purdy* the Law Lords held that such an obligation did exist. The only Law Lord to sit in both appeals was

[98] Such an exceptional case was surely that of Tony Nicklinson, a victim of locked-in syndrome, who in 2012 was denied the right to have someone assist him in ending his life: *R (Nicklinson) v Ministry of Justice* [2010] EWHC 2381 (Admin).

[99] The Lords issued their opinions on 29 November 2001; the application was lodged in Strasbourg on 21 December 2001; the European Court issued its judgment on 29 April 2002; Mrs Pretty died on 11 May 2002. See Morris (2003).

[100] (2002) 35 EHRR 1, paras 68–78. The European Court of Human Rights has since acknowledged that Member States have a wide margin of appreciation as to whether and how they should protect the right to die: *Haas v Switzerland* (2011) 53 EHRR 33.

[101] Ibid, para 89.

[102] The question whether it would be an offence under s 1(1) of the 1961 Act to assist a suicide that occurs abroad was left open by the House.

[103] *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345. See Nobles and Schiff (2010).

Lord Hope, but even he did not openly admit to the change of heart which the House was now professing. In *Pretty* he had expressly said that he did not see how the DPP could be compelled to issue a statement of policy,[104] yet in *Purdy* he concluded that the DPP did have a duty to promulgate an offence-specific policy.[105] Lord Hope noted that 'accessible law' means that 'an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omission will make him criminally liable'.[106] 'Foreseeability' means that 'the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail'.[107] He added that '[a] law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary'.[108]

While it is highly commendable that his Lordship sought to justify his decision in Convention terms, it is important to realize that it was not necessary for him to do so. The same conclusion could have been reached on common law principles, including the principles of legality, procedural fairness, and legitimate expectations. By holding that the Convention required further guidance from the DPP[109] the House was actually going beyond what the European Court itself had required in *Pretty*, where it said that it was not arbitrary for the law to prohibit assisted suicide 'while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution'.[110] While it is true that the meaning of 'in accordance with the law' was not expressly raised by either side in *Pretty v UK*, the European Court could have expressed its unhappiness with section 2(4) if it had wanted to. It saw no inaccessibility, unforeseeability, or arbitrariness in the provision. What the House did in *Purdy*, therefore, in defiance of its favoured mirror principle, was to protect the right to a private life to a greater extent than the European Court currently demanded. In this unexpected way it indirectly enhanced the protection of one particular dimension of the right to life. One can hope that a similar flexibility of approach might be adopted in other right to life contexts when they come before the Supreme Court in the future.

The right to be protected against risks to life

We have seen how the House of Lords was not at all pro-active in developing the common law in a way which would vindicate the core of the right to life as recognized under international human rights law—the right not to be killed. Not only was the

[104] Ibid, [82].
[105] Ibid, [56].
[106] Ibid, [41], citing *Gülmez v Turkey* App No 16330/02, judgment of 20 May 2008, para 49.
[107] Ibid, [41].
[108] Ibid, citing *Goodwin v UK* (1996) 22 EHRR 123, para 31, and *Sorvisto v Finland* App No 1934/04, judgment of 13 January 2009, para 112.
[109] The DPP, Keir Starmer QC, did later consult on guidance and issued the final version in February 2010: *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*, available on the website of the Crown Prosecution Service.
[110] (2002) 35 EHRR 1, para 76.

language of human rights not employed, but the liability under both criminal law and civil law was kept tightly constrained. The phrase 'reasonable force' tended to be interpreted in a way that was favourable to state agents, the principles of criminal law were developed with little regard to victims' right to life, and the rules of civil procedure were not interpreted so as to make it easier for claimants to bring to book the people who may have facilitated killings through negligent training or planning.

When it comes to considering the attitude of the United Kingdom's top court to another aspect of the right to life—the right to be protected against risks to life—the record is not significantly better. Bearing in mind that this is an aspect of the right to life which even in international human rights law was recognized relatively late in the day, there is perhaps some excuse for the indifference of national courts, but the House of Lords maintained its caution in this field even after international law had explicitly moved on, and the Supreme Court has only very recently begun to shift from the position arrived at by the House.

In this context we are considering cases where attempts are made to make the state answerable not for its direct actions in killing the victim but for its indirect actions or omissions in not preventing a non-state actor from killing the victim. In cases where a defendant's indirect actions resulted only in property damage, it was not until 1970 that, in *Dorset Yacht Co Ltd v Home Office*,[111] the House first accepted the possibility of liability existing under the law of negligence. That was where the Home Office was held liable to property owners whose boats and other property had been damaged by young men who had escaped from a borstal run by the Home Office. The main rationale for the decision was that the Home Office was in a special relationship with the borstal boys, which made it responsible for controlling their behaviour. The House tried to clarify the rationale in 1987, in *Smith v Littlewoods Organisation Ltd*,[112] where property owners were suing their neighbouring owners for not ensuring that a derelict building was vandal-proof, but their Lordships were not any more precise than in *Dorset Yacht* and, three years later, in *Caparo Industries plc v Dickman*,[113] where shareholders in a company sued auditors for their alleged negligence in relation to the auditing of the company's accounts, the House decided to lay down a more generic three-fold test for the existence of negligence liability: there must be a relationship of 'sufficient proximity' between the claimant and the defendant, the harm caused must have been reasonably foreseeable, and the imposition of a duty of care on the defendant must, in all the circumstances be fair, just, and reasonable. In situations where the law imposes a duty of care on (A) to ensure that (B) does not end the life of (C), the duty-bearer (A) must take reasonable steps to ensure (C)'s safety. But of course this is an obligation of means, not of ends, that is, (A) is liable not in all situations where (C) dies but only in those in which the failure of (A) to take reasonable steps to ensure that (C)'s death does not occur has in fact caused that death.

[111] [1970] AC 1004.
[112] [1987] AC 241.
[113] [1990] 2 AC 605.

Policing cases

The context within which this duty to protect has most frequently arisen, along with the correlative right to protection, is that of policing. It first came before the House of Lords in 1988, in *Hill v Chief Constable of West Yorkshire*.[114] The mother of the last victim of the so-called Yorkshire Ripper, who between 1969 and 1980 killed 13 young women and attempted to kill eight others, sued her local police force for their alleged negligence in failing to detect the perpetrator, Peter Sutcliffe, before he murdered her daughter. The question was whether, even assuming that the police had been negligent, there was a duty of care owed in the first place. Most people thought at the time that to impose a duty of care in these circumstances would risk diverting the police from their overriding task of preventing and detecting crimes as they saw best. That is indeed how the High Court, the Court of Appeal, and the House of Lords all decided the case. Lord Keith, giving the main speech in the Lords, distinguished the facts from those in the *Dorset Yacht* case, but even if they could not have distinguished the earlier House of Lords authority, Lord Keith and his fellow Law Lords would have held that, on public policy grounds, no duty of care should be imposed on the police in these circumstances. Lord Keith thought that '[i]n some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind'.[115] Lord Templeman added that '[t]he efficiency of a force can only be investigated by an inquiry instituted by the national or local authorities which are responsible to the electorate for that efficiency'.[116]

Needless to say, the right to life of Miss Hill was given no consideration in this litigation. It was not yet a concept that merited any serious attention in domestic law. Nor did Mrs Hill lodge an application with the European Commission of Human Rights. To a large extent the decision is still authoritative, as neither the House of Lords nor the Supreme Court has overruled it. But, as we shall see, the Human Rights Act 1998 has made a difference.

The *Hill* case was followed by the Court of Appeal when it was considering a claim by members of the Osman family against the Metropolitan Police.[117] They argued that the police should have done more to protect their relatives against an attack by a crazed stalker, who eventually shot dead Mr Osman and severely injured his son. While two members of the Court of Appeal seemed prepared to hold that there was the requisite degree of proximity to make the case more like *Dorset Yacht* than *Hill*, they unanimously ruled that for public policy reasons no duty of care should be imposed. The House of Lords refused leave to appeal,[118] a clear sign that it did not wish to re-consider its ruling in *Hill*. This time, however, the disappointed family did lodge an application in Strasbourg.

In *Osman v UK* the European Court confirmed the general principle that, when someone alleges that the state has violated its positive obligation to protect the right to life, it must be shown that:

[114] [1989] AC 53. See McIvor (2010). [115] Ibid, 63D. [116] Ibid, 65B.
[117] *Osman v Ferguson* [1993] 4 All ER 344.
[118] As indicated in *Osman v UK* (2000) 29 EHRR 245, para 66. See Gearty (2002b).

> [T]he authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[119]

The Court rejected the UK government's argument that the failure in question had to amount to gross negligence or to wilful disregard of the duty to protect life: such a rigid standard would not secure the practical and effective protection of the rights conferred by Article 2. On the particular facts of this application, however, the Court held that the applicants had not been able 'to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk'.[120] There was, therefore, no violation of Article 2.[121] To that extent the *Osman* case matches *LCB v UK*, decided by the European Court less than five months earlier.[122] There, the daughter of a member of the RAF, who was exposed to radiation when nuclear tests were carried out on Christmas Island in the Pacific Ocean in 1957–58, argued that the UK government should have warned and advised her parents about the risk of their children contracting leukaemia, and should have monitored her own health after she was born in 1966 (she was diagnosed as suffering from leukaemia in 1970). The Court held that, in view of the lack of information available at the time, the UK state could not have been expected to act of its own motion to notify the applicant's parents or to take any other special action relating to her.[123] Nevertheless, the fact that Article 2 does require states to take appropriate steps to safeguard the lives of those within its jurisdiction *was* acknowledged.[124]

In *Osman* the applicant was able to rely on a second argument, based on Article 6 of the Convention, which has been interpreted by the Court as not just guaranteeing the right to a fair trial but also the right of access to justice. The Court found that here there was a violation of Article 6(1) because the rule excluding negligence claims against the police, while not absolute in domestic law, had been applied as a disproportionate restriction on the applicant's right of access to a court.[125] It acknowledged that in other situations the UK courts had allowed negligence claims to be pursued against the police,[126] but it felt that in *Osman* the *Hill* principle had been applied too strictly:[127]

> [T]he application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity

[119] Ibid, para 11. See too *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135 (Ch 10 below, at 292).
[120] Ibid, para 121.
[121] Three of the 20 judges dissented on this point
[122] (1999) 27 EHRR 212.
[123] Ibid, paras 36–41.
[124] Ibid, para 36, citing *Guerra v Italy* (1998) 26 EHRR 357.
[125] Ibid, paras 141–54. The Court awarded each of the two applicants £10,000.
[126] Citing *Knightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Kirkham v Chief Constable of Manchester* [1989] 2 QB 283; *Swinney v Chief Constable of Northumbria* [1997] QB 464.
[127] The UK judge, Sir John Freeland, emphasized this point in his concurring opinion, para 2.

> on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases. In [the Court's] view, it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the opposite direction to the application of the rule.[128]

Once again, we see that the European Court abhors blanket rules. It demands flexibility. But, writing extra-judicially, Lord Hoffmann said the decision by the European Court filled him with apprehension,[129] and he added:

> [T]he case serves to reinforce the doubts I have had for a long time about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries.[130]

The House of Lords approved of *Hill* in *Calveley v Chief Constable of the Merseyside Police*[131] and also in *Brooks v Metropolitan Police Commissioner*,[132] neither of which raised right to life issues. In the latter, Lord Steyn and his colleagues accepted that not everything said in *Hill* could still be supported, but they stressed that the core principle—that the police do not owe a duty of care to victims of crime—held good. Even Lord Bingham, who said he was very reluctant to 'dismiss without any exploration of the facts a claim raised in a contentious and developing area of the law', was content to have the claim in *Brooks* struck out. Then, in *Smith v Chief Constable of Sussex Police*,[133] the House did apply *Hill* in a right to life context, where a gay man had been severely injured by his former partner despite the victim having told the police about threatening messages which had been persistently sent to him. Four of their Lordships—Lords Hope, Phillips CJ, Carswell, and Brown—were content to apply *Hill* and therefore strike out the claim. But this time Lord Bingham penned a detailed dissent in which not only did he argue for the claim to be allowed to go to trial but he criticized the Court of Appeal's decision in *Osman v Ferguson* and the High Court's decision in another case involving a claim against the minister responsible for HM Coastguard.[134] He argued in vain for the adoption of what he called 'the liability principle', which he phrased as follows:

> [I]f a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.[135]

[128] (2000) 29 EHRR 245, para 151.
[129] Hoffmann (1999), 164.
[130] Ibid.
[131] [1989] AC 1228. This was a claim brought by three police officers against their Chief Constable alleging a failure to expeditiously investigate complaints lodged against them; their appeal was dismissed.
[132] [2005] UKHL 24, [2005] 1 WLR 1495. Duwayne Brooks was a friend of Stephen Lawrence and was with him when Stephen was murdered in London by white racists in 1993.
[133] [2008] UKHL 50, [2009] 1 AC 225.
[134] *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897.
[135] [2009] 1 AC 225, [44].

The appeal in *Smith* was heard alongside another case on the right to life, *Van Colle v Chief Constable of the Hertfordshire Police*.[136] But whereas the claim in *Smith* was brought only under the common law, the claim in *Van Colle* was brought only under the Human Rights Act 1998. The House of Lords therefore had an excellent opportunity to compare and contrast how the right to life is protected under the two headings. In *Van Colle* the claimants were the parents of a man who had been shot dead shortly before he was due to give evidence at the gunman's trial for the crime of theft. The lower courts both held that the police had violated Article 2 of the European Convention and should be required to pay compensation to the claimants.[137] They did so largely on the basis that, by requiring Mr Van Colle to be a witness, it was the state which had exposed him to the risk to his life, and they relied for support on words of the Court of Appeal in a case which had arisen out of the Bloody Sunday Inquiry in Northern Ireland.[138] The House of Lords, however, unanimously disagreed with that reasoning, saying that the test for the imposition of a duty to protect life remained constant, regardless of how the risk to life arose. On the facts, given the lack of any indication that the alleged perpetrator of the theft posed a real and immediate risk to Mr Van Colle, as in *Osman*, there had been no breach of the duty in question.

It seems that the Lords did not see a claim under the Human Rights Act as in any sense a sub-set of the claims available under the law of tort: it was instead a special kind of claim which was triggered by a particular test. If the Lords saw it as in some way inconsistent with the general refusal to impose a duty of care on the police to protect potential victims of crimes, they did not say as much. The furthest Lord Bingham would go was to observe that:

> [O]ne would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law… There are likely to be persistent differences between the two regimes, in relation (for example) to limitation periods and, probably, compensation. But I agree with Pill LJ in [*Smith v Chief Constable of Sussex Police*][139] that 'there is a strong case for developing the common law action for negligence in the light of Convention rights' and also with Rimer LJ[140] that 'where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it'.[141]

Lord Hope, too, was non-committal on this point, although he intimated that a claim under the Human Rights Act could deal with 'perceived shortfalls' in the common law.[142] Lord Phillips said that it would be better if Parliament, rather than the courts, determined whether the existence of a duty of care to protect members of the public against criminal injury would impact adversely on the police's performance of their

[136] Ibid. Considered by Anthony (2009).
[137] [2006] EWHC 360 (QB), [2006] 3 All ER 963; [2007] EWCA Civ 325, [2007] 1 WLR 1821.
[138] *R (A) v Lord Saville of Newdigate* [2001] EWCA Civ 2048, [2002] 1 WLR 1249, a decision by Lord Phillips MR, Jonathan Parker, and Dyson LJJ.
[139] [2008] EWCA Civ 39, [2008] HRLR 600, [53].
[140] Ibid, [45].
[141] [2009] 1 AC 225, [58].
[142] Ibid, [82]. See too Lord Carswell, at [100].

more general duties.[143] Only Lord Brown was openly opposed to the common law being developed to reflect Strasbourg case law on the positive obligations arising under Article 2 (and 3) of the Convention. He thought that Lord Bingham's proposed 'liability principle' would go further than Strasbourg case law currently required, which he described as 'undesirable'[144] (but he refrained from pointing out that Lord Bingham's approach also seemed to contradict the *Ullah* principle). In giving his support to the maintenance of the full width of the *Hill* principle, Lord Brown implied, surely correctly, that sometimes considerations must be borne in mind which are even more important than human rights when deciding what is in the public interest,[145] although that does not mean that there needs to be an absolute immunity given to the police. There is already a tort known as misfeasance in public office. It ought to be possible to develop that tort in a way which embraces gross negligence on the part of the police whenever they are considering how to protect individuals against known serious risks to their lives.

Medical cases

The right to be protected against risks has also been considered in the context of claims made against hospital authorities by relatives of persons with mental illnesses who have committed suicide. It first arose at the level of the highest court in *Savage v South Essex Partnership NHS Foundation Trust*,[146] where the deceased's daughter sued the Trust under the Human Rights Act relying on an alleged violation of Article 2 of the European Convention. Her mother had absconded from a mental hospital, where she was compulsorily detained for treatment, and killed herself. The trial judge threw out the claim, ruling that the claimant had to show that the Trust had been guilty of gross negligence.[147] But both the Court of Appeal[148] and the House of Lords held that the test under the Human Rights Act was not so strict. Instead they applied the *Osman* test: did the Trust know, or ought it to have known, that a particular patient was under a real and immediate risk of suicide? On that basis the matter was referred back to the High Court for the trial to proceed. Their Lordships also accepted that health authorities have a more general duty under Article 2 to adopt measures to protect the lives of patients in hospitals. As Lord Rodger put it, citing *Powell v UK*[149] and *Dodov v Bulgaria*,[150] states must ensure 'that competent staff are recruited, that high professional standards are maintained and that suitable systems of working are put in place'.[151] If these duties are fulfilled, 'casual' acts of negligence by staff will not then violate Article 2. Baroness Hale, and the other Law Lords in the case, agreed with Lord Rodger's distinction between

[143] Ibid, [102]. [144] Ibid, [136]. [145] Ibid, [139].
[146] [2008] UKHL 74, [2009] 1 AC 681.
[147] [2006] EWHC 3562 (QB).
[148] [2007] EWCA Civ 1375, [2008] 1 WLR 1667.
[149] (2000) 30 EHRR CD 362.
[150] Application No 59548/00, judgment of 17 January 2008.
[151] [2009] 1 AC 681, [45]. See too [68]–[71].

this 'positive protective obligation' under Article 2 and the 'operational duty to protect a particular individual'.[152]

Interestingly, no reference was made in *Savage* to the *Ullah* principle,[153] even though there was no clear European Court precedent on the rights of psychiatric patients detained in hospitals (only in prisons): the Supreme Court was prepared to go where the Strasbourg Court had not yet gone. Three years later, in *Rabone v Pennine Care NHS Trust*,[154] the Supreme Court went even further, applying the *Osman* test in a situation where a mentally ill person was a *voluntary* patient. Melanie Rabone killed herself after she was allowed to leave hospital to go home for two days. The Trust admitted negligence and paid Melanie's parents £7,500 in settlement of their claim on behalf of her estate, but the Supreme Court thought that under the Human Rights Act each of the parents deserved to be awarded £5,000 as well. Two important features of the case were that the Trust had a statutory power to prevent Melanie from leaving hospital if she had insisted on doing so, but had failed to exercise it,[155] and that the compensation awarded for the negligence claim was payment to Melanie's estate, not payment to the parents in recognition of their own bereavement.[156] Moreover, the Supreme Court allowed the Human Rights Act claim even though it was launched four months after the one-year limitation period had expired: it was a case where it was equitable to exercise the judicial discretion to extend that period, mainly because the Trust had suffered no prejudice by the delay and the parents' claim was a strong one.[157] It also dismissed the suggestion that the Mr and Mrs Rabone were not 'victims' for the purposes of Article 2.[158] Lord Brown made interesting observations concerning the *Ullah* principle. He said it would be absurd to interpret that principle as meaning that a domestic court could never determine a question arising under the Convention unless it had already been specifically resolved by Strasbourg jurisprudence:

> Rather what the Ullah principle importantly established is that the domestic court should not feel driven on Convention grounds unwillingly to decide a case against a public authority (which could not then seek a corrective judgment in Strasbourg) unless the existing Strasbourg case law clearly compels this.[159]

Some might see this as a less than compelling *ex post facto* rationalization of the *Ullah* principle. As already argued, the Supreme Court would do better to quietly drop the principle altogether.[160] *Rabone* constitutes a forthright statement by the Supreme Court that it is now prepared to give this aspect of Article 2 a central place in English domestic law.

[152] Ibid, [97] (per Baroness Hale).
[153] See Ch 2 above, at 39–43.
[154] [2012] UKSC 2, [2012] 2 AC 72.
[155] Mental Health Act 1983, s 5.
[156] In *Bubbins v UK* (2005) 41 EHRR 24 the European Court strongly suggested that bereavement compensation was required to ensure 'adequate redress' to the applicant relative.
[157] [2012] 2 AC 72, [79] (per Lord Dyson). The power to extend time is conferred by the Human Rights Act 1998, s 7(5)(b). See Ch 2 above, at 88–90.
[158] Lord Scott, surprisingly, had suggested in *Savage* that this might be 'a major problem': [2009] AC 681, [5].
[159] [2012] 2 AC 72, [112].
[160] See Ch 2 above, at 43.

The right to a thorough investigation of deaths

On this third aspect of the right to life, the House of Lords and Supreme Court have again taken some time to adopt an approach which keeps UK law in line with the requirements of the European Convention. The House was starkly confronted with the issue in *R (Amin) v Secretary of State for the Home Department*,[161] where a young Asian man who was detained in a young offenders' centre was beaten to death by a racist cellmate. Although inquiries into the incident had been conducted by the Prison Service, the police, the coroner,[162] and even the Commission for Racial Equality, the family of the victim argued that the requirements for an effective investigation set down by the European Court of Human Rights in a series of decisions in 2001 relating to deaths which had occurred in Northern Ireland had still not been met.[163] In particular, the family complained that it had not had an opportunity to be involved in an investigation and there had not been the requisite degree of public scrutiny in any investigation. Overturning a strong Court of Appeal, which had held that the series of investigations which had already taken place did cumulatively satisfy the requirements of Article 2,[164] the House, led by Lord Bingham, ruled that a further inquiry was necessary.

The decision is a laudable one, but the shine is taken off it by the fact that, less than six months later, a different group of Law Lords ruled in a comparable appeal from Northern Ireland, *In re McKerr*, that the duty to comply with the European Court's standards did not apply in cases where the death occurred prior to the commencement of the Human Rights Act.[165] This was despite the fact that Zahid Mubarek, the victim in the *Amin* case, had been killed in March 2000, several months before the Human Rights Act commenced. To make matters worse, on the very same day that *McKerr* was decided, another group of Law Lords held in two further appeals relating to deaths which had occurred in England prior to the commencement of the Human Rights Act that the inquests into those deaths *were* required to comply with the European Court's standards.[166] In *McKerr*, Lord Nicholls brushed aside *Amin*, *Middleton*, and *Sacker* on the, frankly incredible, basis that everyone concerned in those cases appears to have assumed that the Human Rights Act could apply to pre-2000 deaths: there had been no argument on the matter.[167] Lord Steyn, who was the only Law Lord to sit in both *Amin* and *McKerr*, did not advert to the anomaly at all, nor did Lords Hoffmann, Rodger, or Brown. The contrast between the decision in *McKerr* and the three other decisions is all the greater, and all the more remarkable, given that the killing of Gervaise McKerr

[161] [2003] UKHL 51, [2004] 1 AC 653.
[162] But the inquest had been indefinitely adjourned after the cellmate was convicted of murder.
[163] eg *Jordan v UK* (2001) 37 EHRR 52.
[164] [2002] EWCA Civ 390, [2003] QB 581 (Lord Woolf CJ, Laws and Dyson LJJ).
[165] [2004] UKHL 12, [2004] 1 WLR 807. See too Ch 3 above, at 55–7, and Anthony and Mageean (2007).
[166] *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, and *R (Sacker) v West Yorkshire Coroner* [2004] UKHL 11, [2004] 2 AC 182.
[167] [2004] 1 WLR 807, [23].

had already been considered by the European Court, which had concluded that Article 2 had not been complied with.[168]

Tempting though it might be to do so, it would be inappropriate to draw the conclusion that the United Kingdom's top court was prepared to allow one approach to the right to life to prevail in England and Wales and another to prevail in Northern Ireland. But it is certainly the case that the Lords' construction of the Human Rights Act in *McKerr* did not contribute to the truth-recovery process in Northern Ireland.[169] Be that as it may, the Supreme Court was later gifted the opportunity to equate the two approaches when, in *In re McCaughey*,[170] it felt compelled to 'depart from' *McKerr* in the light of a subsequent decision by the Grand Chamber of the European Court in *Šilih v Slovenia*.[171] The Supreme Court held that, if the United Kingdom chooses to hold an inquest today into a death resulting from acts by agents of the state occurring before the Human Rights Act 1998 came into force, such an inquest has to comply with the procedural obligations implicit in Article 2 of the European Convention. Obviously not all pre-Human Rights Act deaths are embraced by this ruling: according to the Supreme Court the test (as derived from the European Court) is whether, by the time the Human Rights Act came into force, a 'significant proportion' of the investigative steps required to be taken had not yet occurred.[172] That is all that is necessary under *domestic law*, but the European Court will continue to expect all deaths occurring since the Convention became binding on the United Kingdom under *international law* (in 1953) to be investigated in accordance with Article 2's standards, subject to the six-month limitation period imposed on applications by Article 35(1) of the Convention.

The duty to implement judgments of the European Court clearly falls on the domestic state, but that includes the judicial authorities as well as the executive authorities. In its reviews of how the United Kingdom has implemented the European Court's judgments in the series of cases relating to deaths in Northern Ireland, the Parliamentary Joint Committee on Human Rights has not been satisfied with the progress made, even though almost 12 years have elapsed since the main judgments were issued in Strasbourg. In 2007 the Joint Committee noted the considerable delay involved in implementing those judgments, particularly as far as inquests are concerned,[173] and in 2008 it repeated its view that domestic courts take too narrow an approach to cases where the facts took place before the commencement of the Human Rights Act.[174] The decision in *In re McCaughey* goes a long way towards meeting the Joint Committee's disquiet, but there may well be further litigation arising out of the 'legacy' inquests still to be completed in some of these cases, and it would be no surprise if the Supreme

[168] *McKerr v UK* (2001) 34 EHRR 20. Indeed, the death had previously been considered by the House of Lords too, in *McKerr v Armagh Coroner* [1990] 1 WLR 649, where the Lords held that rules governing the conduct of inquests in Northern Ireland were not *ultra vires*.

[169] Anthony and Mageean (2007); Bell and Keenan (2005).

[170] [2011] UKSC 20, [2012] 1 AC 725.

[171] (2009) 49 EHRR 37. Lord Rodger, however, dissented. See too Ch 3 above, at 55–58.

[172] Ibid, para 163, endorsed by the Supreme Court in *In re McCaughey* [2012] 1 AC 725, [50] and [52] (per Lord Phillips), [93] (per Lord Hope), [130] and [139] (per Lord Dyson).

[173] Joint Committee (2007a), paras 95–6.

[174] Joint Committee (2008), paras 65–7. For earlier expressions of this view see Joint Committee (2007a), paras 144–6 and Joint Committee (2006), paras 16–18.

Court had to address the precise scope of this dimension of Article 2 in one or more future appeals.

Conclusion

The United Kingdom's top court came late to the idea that the law should protect the right to life, as such. In its interpretation of the criminal law, especially in cases concerning the use of lethal force by soldiers and police, it was slow to insist that the applicable principles should faithfully reflect the centrality of Article 2 of the European Convention. In medical cases, and those involving foetuses, mercy killings and assisted suicides, it has at times sent mixed messages concerning both the sanctity of life and the right to die with dignity. It has been loathe to develop the law in the absence of some indication from Parliament, or from an agency such as the Crown Prosecution Service, that the current law is failing to meet the people's demand for a more humane and consistent approach to the difficult issues it has to consider.[175] In three areas—the right to assisted suicide, the right to be protected against known risks to life, and the right to a thorough investigation of unexplained deaths, the top court has had to be prompted into action by decisions of the European Court of Human Rights. We have already noticed the same phenomenon as regards the applicability of the right to life in situations where UK armed forces are serving abroad,[176] and an appeal in that context is currently pending before the Supreme Court.[177] When future cases come before the Supreme Court on such issues as the right to life of unborn children who have relatively minor disabilities, the right of people with severe disabilities or terminal illnesses to kill themselves, and the right of relatives of those who have been killed to have the incidents thoroughly investigated (one thinks here of the families of those killed in Derry on Bloody Sunday in 1972 or of those who died in the Hillsborough football stadium disaster in 1989), one hopes that the Justices will focus more than they have in the past on the fundamental importance of the human right to life in all its manifestations.

[175] 'Remarkably, neither the House of Lords nor the Supreme Court has played a part in developing the law on domestic violence in a way which allows victims who kill their abusive partners to benefit from a more humane justice system. The developments were largely brought about by the Court of Appeal: see *R v Thornton* [1992] 1 All ER 306 and *R v Ahluwalia* (1993) 96 Cr App R 133. See now the new defence of 'loss of self-control', conferred by the Coroners and Justice Act 2009, ss 52–6.

[176] See Ch 3 above, at 94–8.

[177] The appeal is from the Court of Appeal's decision in *Smith v Ministry of Defence* [2012] EWCA Civ 1365, [2013] 2 WLR 27, which raises not just the issue whether UK armed forces were within the jurisdiction of the UK when they were serving in Iraq but also whether the Ministry of Defence can be sued for not providing a safe system of work and safe equipment. Lord Neuberger was the presiding judge in the Court of Appeal. See too <http://www.independent.co.uk/news/uk/home-news/exclusive-supreme-court-to-rule-on-a-soldiers-right-to-life-8301316.html>.

5

The Right Not to be Ill-treated

Introduction

Article 3 of the European Convention on Human Rights could not be more bluntly worded: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. As so often, however, the simplicity of the provision is deceptive. It does not tell us what amounts to 'treatment' or to 'punishment'. It does not say what kind of treatment or punishment qualifies as 'torture', as 'inhuman', or as 'degrading'. It does not explain what the consequences should be if a person is subjected to such treatment or punishment, or even whether those consequences should differ depending on the severity of the treatment or punishment. Perhaps most importantly of all, it does not explain whether the prohibition is limited to treatment and punishment meted out by organs of the state or whether it extends to treatment and punishment applied between private individuals. The European Court of Human Rights has provided answers to some of these questions, and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has supplemented those answers,[1] but the most senior judges within the United Kingdom have said very little on any aspect of this whole topic.[2] This is again due to the fact that the language of international human rights law has been imposed upon English common law which, over centuries, has developed its own specific approach to dealing with victims of physical or mental ill-treatment.

The common law approach to ill-treatment

Whether the common law allowed the use of torture is a question which is difficult to answer in short measure. According to Lord Bingham, who cited prominent English jurists such as Sir John Fortescue, Sir Edward Coke, and Sir William Blackstone, 'it is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture'.[3] But Lord Bingham had to admit that the views of these jurists were based on 'sources of doubtful validity'.[4] In addition, the use of 'trial by ordeal', where suspects were made to undergo severe suffering, such as submersion in water or ingestion of poison, to see how they reacted, was tolerated for some time. If the suspects were able to withstand the ordeal, they were deemed to be innocent. The direct purpose of the ordeal was not to extract a confession, although that was often an indirect consequence because the suspect was too frightened to undergo the ordeal.

[1] Nowak and McArthur (2008). See too Murray et al (2011).
[2] Wadham et al (2011), 127–38; Lester et al (2009), 187–215; Clayton and Tomlinson (2009), 470–87.
[3] *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [10].
[4] Ibid.

The direct purpose was rather to test the truthfulness of the suspect by seeing if God would protect him or her from the dangers inherent in the ordeal. Trial by jury was developed as an alternative to trial by ordeal but was not originally viewed by everyone as a more reliable method of determining the truth because it allowed all sorts of tittle-tattle to be considered as evidence rather than just the direct testimony of the suspect. In the sixteenth and seventeenth centuries the practice developed whereby suspects could be tortured if a warrant authorizing such treatment was issued by the Crown under the royal prerogative, and the common law was powerless to countermand such warrants.[5] But, as Langbein puts it, 'the systematic use of torture to investigate crime never established itself in English criminal procedure'.[6] In 1640 the Court of Star Chamber was abolished by Parliament[7] and no further torture warrants were issued, either by the monarch directly or by the Privy Council. The Bill of Rights of 1689 contained a guarantee that no-one would be subjected to 'cruel or unusual punishment', a phrase which had already appeared in earlier documents in the United States[8] and which was reprised a century later in the Eighth Amendment to the US Bill of Rights in 1791.

England's judges, however, never made torture a crime under the common law, being content to criminalize such behaviour as assault or murder. Nor did the UK Parliament do so until 1988, when, in anticipation of the government's ratification of the UN Convention against Torture,[9] it approved section 134 of the Criminal Justice Act 1988.[10] This provision limits the definition of torture to the behaviour of 'a public official or person acting in an official capacity' whereby he or she 'intentionally inflicts severe pain or suffering on another person in the performance or purported performance of his [or her] official duties'.[11] But it adds that other persons can be convicted of torture if they inflict such pain or suffering 'at the instigation or with the consent or acquiescence' of a public official.[12] The definition is expansive in four respects: it covers omissions as well as acts, the pain or suffering can be mental as well as physical, the nationality of the alleged torturer is irrelevant, and it does not matter whether the torturer was acting within the United Kingdom or elsewhere.[13] On the other hand, the alleged torturer has a defence if he or she can prove that there was lawful authority, justification, or excuse for the conduct in question (which certainly calls into question the absoluteness of the prohibition),[14] and purely 'private' torture, such as that committed by criminal gangs when extracting information from someone is not covered. There is no statutory definition in the United Kingdom of the terms 'inhuman treatment or

[5] See Lowell (1897). But in 1628, when King Charles I asked for advice from the judges as to whether it would be lawful to torture the man who was suspected of murdering the Duke of Buckingham, the judges replied that torture was 'not known or allowed by our Law': see the account of this in the judgment of Lord Nicholls in *A v Secretary of State for the Home Dept (No 2)* [2006] 2 AC 221, [64]–[65].

[6] Langbein (1976), 17. See too the valuable study by Friedman (2006).

[7] Act of 16 Charles I, c 10.

[8] eg the Massachusetts Body of Liberties of 1641 declared that 'for bodily punishments we allow amongst us none that are inhumane Barbarous or cruell', cited in Fellman (1957), 34.

[9] The United Kingdom ratified this Convention on 8 December 1988.

[10] Parliament had, however, declared long before this that no person accused of any crime was to be put to torture: Treason Act 1708, s 5, still in force in Great Britain.

[11] Section 134(1).

[12] Section 134(2)(a).

[13] Section 134(1)–(3).

[14] Section 134(4)–(5).

punishment' or 'degrading treatment or punishment', but it is worth noting that section 127 of the Mental Health Act 1983 makes it a crime for any person who is employed in a hospital or care home to ill-treat (or wilfully neglect) an in-patient or out-patient who is receiving treatment for mental disorder. There does not appear to be any comparable crime applicable in other types of hospital. The ill-treatment of a child under the age of 16 is also a crime under section 1 of the Children and Young Persons Act 1933.

The analysis which follows, after exploring what the top UK judges have said about definitional issues, continues with an examination of how the House of Lords and Supreme Court have dealt with torture as a crime of universal jurisdiction. It then has sections looking at the use that can be made of evidence which may have been obtained through torture, at where the burden of proof should lie in such cases, at the position regarding deportation to countries where torture might be practised, and at the immunity granted to state officials in respect of their civil, as opposed to criminal, liability for torture. The chapter's final section looks briefly at what the top courts have said about the ill-treatment of children, the position of people who are suffering from serious diseases, and the plight of the destitute and homeless.

The definition of ill-treatment, and the duty to prevent it

Neither the House of Lords nor the Supreme Court has had to squarely confront the problems of definition in this field, but they have acknowledged the views expressed by the European Court of Human Rights in *Ireland v UK*,[15] in particular the idea that inhuman and degrading treatment are types of conduct which fall short of torture.[16] They have also accepted the European Court's evolutionary approach to definitions, with Lord Bingham admitting that '[i]t would be…wrong to regard as immutable the standard of what amounts to torture'.[17] Both Lord Bingham and Lord Hoffmann have stated that the conduct complained of in *Ireland v UK*, which the European Court ultimately found to be inhuman and degrading treatment, might now be considered as torture.[18] The conduct in question included the spreadeagling of detainees against a wall, depriving them of food, water, and sleep, and exposing them to penetrating noises. None of the cases which have gone to Strasbourg from the United Kingdom and in which Article 3 issues have been raised are ones where a definition given to the terms of Article 3 by the country's top court has been challenged.[19]

Indeed, there is only one case which has passed through the hands of the Law Lords or Supreme Court Justices in which the European Court has found a breach of Article 3 after the House of Lords or Supreme Court has not done so. This is *Z v UK*,[20] which

[15] (1978) 2 EHRR 25.

[16] *A v Secretary of State for the Home Dept (No 2)* [2006] 2 AC 221, [53] (per Lord Bingham).

[17] Ibid.

[18] Ibid, [53] (per Lord Bingham), [97] (per Lord Hoffmann).

[19] See eg *Tyrer v UK* (1979–80) 2 EHRR 1, where the European Court held (by 6 v 1, the dissenting judge being Sir Gerald Fitzmaurice) that three strokes of the birch administered in the Isle of Man amounted to degrading treatment. In *A v UK* (1999) 27 EHRR 611 the UK government conceded in Strasbourg that a stepfather's punishment of his stepson had violated Art 3. See too *Costello-Roberts v UK* (1995) 19 EHRR 112; *Hill and Sparrowhawk v UK* App No 12680/87, friendly settlement approved 11 May 1988; and *Campbell and Cosans v UK* (1982) 4 EHRR 293.

[20] (2002) 34 EHRR 3. The ad hoc UK judge in this case was Arden LJ.

was heard in the Lords as *X (Minors) v Bedfordshire County Council*, and the facts of which took place before the Human Rights Act 1998 came into force.[21] The issue was whether four children who had been abused by their own parents could sue the local authority for not adequately protecting them against that abuse. The Law Lords unanimously held that no such suit could be brought in an English court because it would not be just and reasonable to impose a common law duty of care on such an authority (for fear of that authority becoming overly interventionist in families' lives), and nor was there any relevant legislation expressly or impliedly conferring a right of action. No part of the European Convention was cited to or by the court, but in Strasbourg all 19 Commissioners held that Article 3 had been violated. By the time the case reached the European Court the UK government had conceded that there was a breach of Article 3 in respect of the abuse and also the state's failure to intervene sooner, and the 17 judges unanimously endorsed that position. The Court acknowledged 'the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life',[22] but on the facts of this case it had no doubt that the system had failed to protect the applicants from serious, long-term neglect and abuse.

In a subsequent case where the facts were similar, *E v UK*,[23] the applicants had withdrawn their civil suit in Scotland on the basis of the precedent set by the House of Lords in *X (Minors) v Bedfordshire County Council*. In Strasbourg the UK government argued that there was no guarantee that if the local authority had intervened more quickly it would have prevented the abuse, but the European Court pointed out that for the purposes of Article 3 an applicant does not have to show that, 'but for' the failure of the public authority to act, ill-treatment would not have happened:

> [A] failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State… The Court is satisfied that the pattern of lack of investigation, communication and co-operation by the relevant authorities disclosed in this case must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least minimize, the risk or the damage suffered… There has, accordingly, been a breach of Article 3 in respect of the applicants in this case.[24]

In a post-Human Rights Act setting the Law Lords soon had an opportunity to directly consider the positive obligations imposed upon a state under Article 3 in *E v Chief Constable of the Royal Ulster Constabulary*,[25] litigation which arose out of the notorious 'protest' at Holy Cross Girls' Primary School in North Belfast in 2001. The mother of one of the girls applied for judicial review of the Chief Constable's strategy for policing the protest, arguing amongst other things that the police had failed to

[21] [1995] 2 AC 633.
[22] (2002) 34 EHRR 3, para 74.
[23] (2003) 36 EHRR 31.
[24] Ibid, paras 99–101.
[25] [2008] UKHL 66, [2009] 1 AC 536.

protect her and her daughter against the infliction of inhuman and degrading treatment. It was in many ways a test case on the extent to which the top court felt it would be appropriate for judges to second-guess the operational decisions of a police force. On one point the House was clear: following what an almost identical group of Law Lords had said in *Huang v Secretary of State for the Home Department*,[26] the House felt obliged to make its own assessment of whether the police had acted compatibly with the Human Rights Act. However, when making its assessment, the House was obliged by *Huang* to give 'appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'.[27] On that basis, and applying the standard of proof required by the European Court in *E v UK*,[28] Lord Carswell's judgment was that the evidence supported the overall wisdom of the course adopted by the police and assertions that more robust action could have been taken were not enough to establish that the police's actions were misguided.[29] Baroness Hale, likewise, concluded that it had not been demonstrated that 'had the police behaved at the outset in the way in which it is now said that they should have behaved, the children's experience would have been any better'.[30] The European Court was obviously very satisfied with this approach because when the disappointed mother took her case to Strasbourg the application was declared manifestly ill-founded.[31] The Court agreed that the actions of the loyalist protesters did reach the minimum level of severity required to constitute ill-treatment under Article 3, but did not specify whether the ill-treatment was inhuman, degrading, or both.[32] As regards the police's alleged failure to fulfil their positive obligations, the Court said:

> [T]he police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them… In view of the volatile situation in which they were operating, the Court accepts that the police took all reasonable steps to protect the applicants…[33]

Alleged police brutality was again at the heart of a more recent appeal brought to the Supreme Court from Scotland, *Ruddy v Chief Constable, Strathclyde Police*.[34] Mr Ruddy sued the police for alleged ill-treatment he suffered while being transported in a police car from Perth to Glasgow. He based his claim not just on the common law but also on the Human Rights Act, citing Article 3 of the European Convention. In addition, he claimed that both the police and the Lord Advocate had not properly investigated his complaint of ill-treatment, which was a further violation of Article 3. Reversing the

[26] [2007] UKHL 11, [2007] 2 AC 167. Lords Hoffmann, Carswell, and Brown, and Baroness Hale, sat in both cases. See too Ch 2 above, at 46–7.
[27] Ibid, [16].
[28] See n 23 above.
[29] [2009] 1 AC 536, [59].
[30] Ibid, [14]. Baroness Hale added: 'Indeed, [the experience] could have been a great deal worse'. Lords Hoffmann and Scott agreed with Lord Carswell. Lord Brown agreed with both Lord Carswell and Baroness Hale.
[31] *PF and EF v UK* App No 28326/09, decision of 23 November 2010.
[32] Ibid, para 38.
[33] Ibid, paras 41 and 43.
[34] [2010] UKSC 57.

Inner House of the Court of Session, the Supreme Court held that Mr Ruddy should be allowed to pursue all of these claims in the one action and that, in particular, he did not have to proceed by way of judicial review rather than by invoking the 1998 Act. The decision is yet further evidence that the Act is having a real impact on the accountability of public authorities right across the United Kingdom.

Torture as a crime of universal jurisdiction: the *Pinochet* case

The provisions of the Criminal Justice Act 1988 were at the centre of what was perhaps the most prominent case heard by the House of Lords in the last quarter of the twentieth century, a case which considerably raised the reputation of the United Kingdom's top judges in the human rights field. The former President of Chile, General Augusto Pinochet, had been arrested in London on the basis of a warrant issued by a prosecutor in Spain. The Spanish government wanted the United Kingdom to extradite Pinochet to Spain so that he could face accusations that he had ordered the torture of Spanish citizens in Chile. The application to extradite was made under the Extradition Act 1989, which was based on the Council of Europe's Convention on Extradition 1957. Pinochet's main defence was that, as he had been Head of State at the time of the alleged wrongdoing, he could claim state immunity for his actions. The law of the United Kingdom recognized state immunity through the State Immunity Act 1978, itself the result of the then government's ratification of another international treaty produced under the auspices of the Council of Europe.[35] The first judges to hear the case, in the Divisional Court, were Lord Bingham CJ, Collins and Richards JJ.[36] They ruled that the 1978 Act did indeed provide a defence because there was no subsequent Act which created an exception to state immunity for conduct such as torture. On appeal to the Lords, however, Lords Nicholls, Steyn, and Hoffmann held that a head of state could *not* claim immunity for acts of torture or hostage-taking, because under international law such practices were never acceptable. This was a significant breakthrough for the status of international law within the English legal system: it was an example of *ius cogens*, or a peremptory norm of international law, taking priority over the express words of an Act of Parliament.[37] A much more conservative line was taken by Lords Slynn and Lloyd, who both dissented.

When it later transpired that Lord Hoffmann had connections with Amnesty International, which had been allowed to intervene in the case, a new bench of Law Lords vacated the earlier judgment because it was tainted by perceptions that Lord Hoffmann might have been biased.[38] The appeal had then to be heard again before yet another bench of Law Lords.[39] The original decision was largely upheld, except that this

[35] European Convention on State Immunity 1972, ratified by the UK government on 3 July 1979.

[36] [1998] EWHC Admin 1013. Lord Bingham became the Senior Law Lord in 2000 and remained in that position until 2008. Collins J is not the man who was later appointed to the Supreme Court as Lord (Lawrence) Collins of Mapesbury, but Lawrence Collins QC did represent the Republic of Chile after it became a party to the *Pinochet* case.

[37] Higgins (2009), 466–9.

[38] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119. The judges were Lords Browne-Wilkinson, Goff, Nolan, Hope, and Hutton.

[39] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147. The judges were Lords Browne-Wilkinson, Goff, Hope, Hutton, Saville, Millett, and Phillips.

time the lifting of immunity was confined to actions taken by Pinochet after the date on which section 134 of the Criminal Justice Act 1988 came into force, 29 September 1988.[40] The rationale for this was that, under the so-called double criminality rule, a person can be extradited from the United Kingdom only if the conduct in question was criminal, at the time it took place, both under UK law and under the law of the requesting state, and torture and conspiracy to torture were not crimes under UK law until section 134 came into force.[41] This point had not been closely examined at the first hearing before the Law Lords, and may even have been conceded by Pinochet's lawyers at that stage.[42] On whether the State Immunity Act had to be read subject to the peremptory norm that the application of torture cannot be a state function, the majority of Law Lords (six out of seven) held that it did, at least from the date (8 December 1988) when the Convention against Torture had been ratified by all three countries involved, Chile, Spain, and the United Kingdom. Somewhat perversely, immunity did still apply to charges of murder and conspiracy to murder, because they were not yet international crimes under any treaty or norm of *ius cogens*.[43] The dissenting judge was Lord Goff, who ruled that that there was no principle, authority, or common sense support for the implication of any term in the Convention that state immunity was to be excluded.

Such is the authority of the House of Lords that its decision in *Pinochet*, besides attracting worldwide media attention at the time, has since had global ramifications. The authorities in Senegal, for example, agreed to prosecute the former dictator of Chad, Hissène Habré, and the current President of Suriname, Desi Bouterse, has had to confront charges of murder before a court in his own country.[44] The Law Lords' speeches also gave a fillip to the work of the newly established International Criminal Court, whose prosecutors have been actively pursuing alleged torturers and murderers from many different countries. The ruling must therefore rank as one of the greatest contributions ever made to the protection of human rights by the United Kingdom's top judges. It was so significant that it prompted former US Secretary of State, Henry Kissinger, to write an article condemning the very concept of universal jurisdiction; he thought it risked creating universal tyranny—of judges.[45]

At the same time one needs to remember that the decision in *Pinochet* did nothing to lessen the immunity granted to *serving* heads of state and members of government as regards torture.[46] This was made starkly clear by the International Court of Justice (ICJ) a couple of years later, in *Democratic Republic of the Congo v Belgium*, often referred to

[40] See 130 above.

[41] Lord Millett, normally considered to be a conservative judge, dissented on this point. In his view, 'the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984 . . . [and] had done so by 1973' (when Pinochet came to power). Along with Lord Hope, Lord Millett would also have allowed Pinochet to be extradited on charges of conspiracy to murder where the conspiracy took place in Spain.

[42] [2000] 1 AC 147, 192C (per Lord Browne-Wilkinson).

[43] Murder is an international crime only if the death occurs during a war (in certain circumstances) or as part of a genocide.

[44] Burbach (2003), 155–60.

[45] Kissinger (2001).

[46] See too 151–4 below.

as the *Arrest Warrant* case because it concerned an arrest warrant issued in Belgium in respect of the serving Foreign Minister of the DRC.[47] Having considered the *Pinochet* case and other national authorities, the ICJ concluded that it was unable to deduce that under customary international law there was 'any form of exception to the rule according immunity from criminal jurisdiction and inviolability to *incumbent* Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'.[48] In a later case, discussed below, Lord Hoffmann admitted that 'the *Arrest Warrant* case confirms the opinion of the judges in the *Pinochet* case that General Pinochet would have enjoyed immunity, on a different basis, if he had still been Head of State'.[49]

Torture as a source of evidence: the second *Belmarsh* case

It is all very well ensuring that people who have committed torture are tried for their crimes, but what about the information that has been obtained as a result of torture: should there be any legal constraints on when and how it can be used? If torture itself is so abhorrent that it requires the application of the principle of universal jurisdiction, should there not be very strict controls on what use can lawfully be made of evidence that is the product of torture?

That was essentially the question which was brought to the House of Lords in *A v Secretary of State for the Home Department (No 2)*,[50] sometimes referred to as the second *Belmarsh* case because it was follow-up litigation to the first *Belmarsh* case concerning the lawfulness of indefinite detention without trial of foreigners reasonably suspected of involvement in terrorism.[51] A group of such foreigners argued that, when the Special Immigration Appeals Commission (SIAC)—a superior court of record[52]—was considering their appeals against the Home Secretary's decision to 'certify' them as suspected terrorists, it could not rely on evidence that had or might have been procured by torture inflicted abroad (even if no British authorities were complicit in that torture). Both SIAC and the Court of Appeal[53] (with Neuberger LJ dissenting) held that such evidence could be admitted, but that the fact that torture might have been used would affect the weight to be given to it. The challenge facing the Lords was that, although the UN Convention against Torture contains a provision requiring States Parties to ensure that statements established to have been made as a result of torture are not invoked as evidence in any proceedings, that provision had not been incorporated into domestic law; in any event, the provision did not say what should happen to other evidence that *might* have been obtained as a result of torture. This forced the Lords to openly confront the question whether English common law restricted the use

[47] [2002] ICJ Rep 3.
[48] Ibid, para 58 (emphasis added).
[49] *Jones v Ministry of the Interior of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, [49]. See 151 below.
[50] [2005] UKHL 71, [2006] 2 AC 221.
[51] *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68. The first *Belmarsh* case is referred to in Ch 6 below, at 167–71.
[52] It was established under the Special Immigration Appeals Commission Act 1997 in direct response to the decision of the European Court of Human Rights in *Chahal v UK* (1997) 23 EHRR 413.
[53] [2004] EWCA Civ 1123, [2005] 1 WLR 414.

of evidence resulting from torture. It was a question which had previously been considered by the Divisional Court, but the judges there had managed to avoid giving a direct answer to it by ruling that on the facts before them the impugned document had not been validly adopted by the person whose evidence it purported to record.[54] At no point did the Divisional Court say that if it was shown that evidence had resulted from torture the evidence would be automatically inadmissible.

Yet the common law had in fact developed an exclusionary rule targeted specifically at confessions. This was first established by the Judicial Committee of the Privy Council in *Ibrahim v R*,[55] but was later confirmed by the House of Lords in *Commissioners of Customs and Excise v Harz*.[56] The rule stated that a confession was inadmissible if, having been challenged to do so, the prosecution could not prove beyond reasonable doubt that it had not been obtained by oppression or as a result of anything said or done which was likely to render it unreliable. So entrenched did that rule become in common law that it was incorporated into the Police and Criminal Evidence Act 1984, as section 76. It should be noted that the court has no discretion to admit a confession which fails to meet this test: the rule affects the very admissibility of the confession, not the weight to be accorded to it. But the exclusion does not extend to so-called 'real evidence' which has been obtained as a result of the torture (eg the stolen goods or the incriminating weapon): since the late eighteenth century it has been clear that the separate existence of such evidence makes it deserving of admissibility.[57] UK law knows nothing of the 'fruit of the poisoned tree' doctrine.

In the second *Belmarsh* case Lord Bingham surveyed the principles of the common law in this field, including the doctrine of abuse of process. He concluded that they compelled the exclusion of third party torture evidence as 'unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice'.[58] Indeed, he elevated this conclusion to the status of a constitutional principle.[59] Lord Nicholls, while not examining the authorities in detail, agreed that the common law had 'for centuries . . . set its face against torture'. This certainly meant that information extracted by torture within the United Kingdom, or by an official or agent of the United Kingdom anywhere else, could not be admitted as evidence in an English court. The only new question in this case was whether evidence obtained from torture used abroad by non-UK officials was also inadmissible. Lord Nicholls held that it was, the rationale being that 'the ethical ground on which information obtained by torture is not admissible in court proceedings as proof of facts is applicable in these cases as much as in other judicial proceedings'.[60] But he went on to make it clear that, while the law prohibited the use of evidence obtained by torture in court proceedings, it did not (and should not) prohibit its use by

[54] *Re Saifi* [2001] 4 All ER 168.

[55] [1914] AC 599 (an appeal from Hong Kong). See too *Wong Kam-Ming v R* [1980] AC 247 and *Lam Chi-ming v R* [1991] 2 AC 212. In the latter (at 220F) Lord Griffiths said the rule was 'perhaps the most fundamental rule of the English criminal law'.

[56] [1967] AC 760.

[57] *R v Warickshall* (1783) 1 Leach 263, 168 ER 234.

[58] [2006] 2 AC 221, [52].

[59] Ibid, [51].

[60] Ibid, [76].

the executive, including the police, in other contexts. He said that moral repugnance to torture does not require the government or police to close their eyes to information at the price of endangering the lives of citizens,[61] and he added:

> The executive and the judiciary have different functions and different responsibilities. It is one thing for tainted information to be used by the executive when making operational decisions or by the police when exercising their investigatory powers, including powers of arrest. These steps do not impinge upon the liberty of individuals or, when they do so, they are of an essentially short-term interim character. Often there is an urgent need for action. It is an altogether different matter for the judicial arm of the state to admit such information as evidence when adjudicating definitively upon the guilt or innocence of a person charged with a criminal offence.[62]

Lord Hoffmann, like Lord Bingham, labelled the rejection of torture by the common law as something which had 'constitutional resonance for the English people which cannot be overestimated'.[63] He implied that the rule whereby 'real' evidence obtained as a result of illegal conduct could be admitted as evidence might not apply in a situation where the illegal conduct amounted to torture,[64] but he acknowledged that admitting such evidence 'is the way we strike a necessary balance between preserving the integrity of the judicial process and the public interest in convicting the guilty'.[65] He said that the 'fruit of the poisoned tree' may be 'so compelling and so independent that it does not carry enough of the smell of the torture chamber to require its exclusion'.[66] In this case, however, the question was whether the 'raw product of interrogation under torture' should be excluded, even if it occurred abroad. Lord Hoffmann thought that it should, because the purpose of the rule excluding such evidence when the torture occurred in the United Kingdom was 'to preserve the integrity of the judicial process and the honour of English law' and it followed that 'the stain attaching to such evidence will defile an English court whatever the nationality of the torturer'.[67]

Lord Hope, modestly omitting to refer to his own learned article on torture which had recently been published in a leading law journal,[68] also had no doubt that, had the question come directly before a court, it would have ruled that at common law statements obtained from third parties by the use of torture could not be admitted as evidence in any proceedings, due to the very barbarity of the practice.[69] Lord Rodger agreed that the common law would not allow such statements to be admitted as evidence, but he conceded that he had doubts over whether Parliament had altered the common law when it conferred powers on the Special Immigration Appeals Commission. Lord Carswell also thought that allowing the admission of evidence obtained by torture 'would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement'.[70] He cited in support the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v Israel*,[71] where Barak P had said that the

[61] Ibid, [69]. [62] Ibid, [70]. [63] Ibid, [83].
[64] Ibid, [87]. [65] Ibid, [88]. [66] Ibid.
[67] Ibid, [91]. [68] Hope (2004). [69] [2006] 2 AC 221, [110].
[70] Ibid, [150]. [71] [1999] IsrSC 53(4) 817, (1999) 7 BHRC 31.

prohibition on the use of torture and cruel, inhuman or degrading treatment during the interrogation of suspects was absolute: 'There are no "exceptions" . . . and there is no room for balancing'.[72] Even if it was not already clear that the common law as it stands would forbid the reception in evidence of any statement obtained by the use of torture, Lord Carswell was prepared to extend the common law so as to accommodate that principle.[73] Lord Brown repeated that '[g]enerally speaking the court will shut its face against the admission in evidence of any coerced statement',[74] but he accepted that the fruit of the poisoned tree could be admitted and, like Lord Nicholls, he added that the executive was bound, not just entitled, to make use of coerced statements for otherwise it would be failing in its duty to safeguard the security of the state.

Having agreed that the common law prohibited reliance on evidence obtained through the torture of third parties abroad, the Law Lords unanimously held—though Lord Rodger had some doubts—that the legislation which conferred powers on the SIAC had not altered that prohibition. This was a laudable decision, if in truth a surprising one. Firstly, rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 clearly provided that the SIAC 'may receive evidence that would not be admissible in a court of law'. Secondly, the SIAC had to dismiss an appeal against the certification of someone as a 'suspected international terrorist' only if it considered that there were no reasonable grounds for a belief that the person's presence in the United Kingdom was a risk to national security or for a suspicion that the person was a terrorist.[75] To their credit, the Law Lords sidestepped both of these legislative obstacles. They considered that Parliament could not have intended rule 44(3) to abolish by mere implication the fundamental common law rule against the admissibility of evidence obtained by torture. And they interpreted the reference to belief or suspicion in this Part of the 2001 Act as meaning the belief or suspicion of SIAC itself, not of the Secretary of State. Lord Nicholls pointed out that the Prevention of Terrorism Act 2005, when it gave power to a court to supervise the Home Secretary's making of a non-derogating control order, specifically directed the court to apply the principles applicable on an application for judicial review.[76] The omission of any such direction in relation to the supervision of certificates issued under the 2001 Act suggested that scrutiny beyond that which would take place in judicial review proceedings was required. As Lord Hoffmann put it:

> In my opinion Parliament, in setting up a court to review the question of whether reasonable grounds exist for suspicion or belief, was expecting the court to behave like a court. In the absence of clear express provision to the contrary, that would include the application of the standards of justice which have traditionally characterised the proceedings of English courts.[77]

[72] Ibid, section 23 of Barak P's judgment.
[73] [2006] 2 AC 221, [152].
[74] Ibid, [161].
[75] Anti-terrorism, Crime and Security Act 2001, s 25(2).
[76] [2006] 2 AC 221, [77].
[77] Ibid, [95]. See too Lord Rodger at [137]: 'the revulsion against torture is so deeply ingrained in our law that, in my view, a court could receive statements obtained by its use only where this was authorized by express words, or perhaps the plainest possible implication, in a statute'. See Grief (2006).

What we are witnessing here is insistence by the Law Lords that, whatever use may be made by non-judicial authorities of information obtained by torture, the need to maintain the integrity and honour of the British judicial system means that no use whatsoever can be made of it in a court of law. Not for the first time, the top judges were demonstrating how committed they are to upholding human rights within the adjudication system itself. Their utmost priority, it seems, is to ensure fairness during all court proceedings. They were able to do this by relying only on the common law. Lord Bingham, alone amongst the judges, looked at what was required by the European Convention on Human Rights, but the most helpful authority he could come up with was the joint, partly dissenting, opinion of three judges in *Mamatkulov v Turkey*.[78] There was no clear Strasbourg-based authority for saying that information obtained by torture could not be admitted as evidence: the furthest the European Court had gone was to rule, in *Soering v UK*, that a state could not extradite a person to another state if that person was liable to be tried there in a way which constituted a flagrant denial of justice.[79] As we shall see later,[80] the European Court was not to encounter what it classified as a flagrant denial of justice in this context until early 2012, when it dealt with *Othman v UK*, the application brought by the radical Islamic preacher Abu Qatada.[81] But in the second *Belmarsh* case the Law Lords manifested their realism too. They accepted, for a start, that the common law still allows admission of the fruit of the poisoned tree, and they recognized that the executive must on some occasions make use of torture-tainted information.

The burden of proof

There was one point, however, on which the Law Lords seriously disagreed, namely who should bear the burden of proving that evidence is tainted by torture? The majority (Lords Hope, Rodger, Carswell, and Brown) held that the person challenging the admissibility of the evidence had to establish on the balance of probabilities that it had been obtained by torture. The minority (Lords Bingham, Nicholls, and Hoffmann) held that the burden lay on the state to show that torture had not been used. What does this difference of opinion tell us about attitudes to human rights in the top UK court? Lord Bingham's approach was certainly driven by a commitment to international law. Under the heading 'Public International Law' he wrote nearly 7,000 words highlighting the fundamentality of the universal prohibition on torture and quoting copiously from a number of UN sources and a judgment of the International Criminal Tribunal for the Former Yugoslavia.[82] He pointed out that, in contrast to all these authorities, the House had not been referred to any authorities suggesting that information obtained by torture was admissible in legal proceedings. He contended that requiring it to be 'established' that the information in question was obtained under torture would undermine 'the universal abhorrence expressed for torture and its fruits'.[83] Not mincing his words,

[78] (2005) 41 EHRR 25. [79] (1989) 11 EHRR 439. [80] See 147 below.
[81] (2012) 55 EHRR 1. [82] *Prosecutor v Furundzija* [1998] ICTY 3. [83] [2006] 2 AC 221, [59].

he said that the test preferred by the majority, as articulated by Lord Hope, could never be satisfied in the real world, was 'inconsistent with the most rudimentary notions of fairness',[84] and would 'undermine the practical effectiveness of the Torture Convention and deny detainees the standard of fairness to which they are entitled under Articles 5(4) or 6(1) of the European Convention'.[85] He agreed fully with Lord Nicholls' view that the majority's test would largely nullify, and pay lip-service to, the principle that courts will not admit evidence obtained by torture. Lord Hoffmann, too, said it would be 'absurd' to place the burden of proof on the detainee: it should be for SIAC, if there are reasonable grounds for suspecting that torture has taken place, 'to make its own inquiries and not to admit the evidence unless it is satisfied that such suspicions have been rebutted'.[86]

In fairness to Lord Hope, the minority could be accused of not fully representing his opinion on this matter. He himself pointed out that the only difference between his preferred test and Lord Bingham's was that, if SIAC was in doubt as to whether evidence had been obtained by torture he would require SIAC to admit it (but to bear its doubt in mind when evaluating it), whereas Lord Bingham would require SIAC to exclude it.[87] He pointed out that the UN Convention against Torture does not require it to be shown that statements were *not* made under torture; it does not even say that they must be excluded if there is a real risk that they were obtained by torture. To him it was Lord Bingham's test that was impossible to meet in practice, and he cited a statement supplied by the Director General of the Security Service which indicated that it was acutely difficult to obtain access to the sources of information provided by foreign intelligence services.[88] More daringly still, Lord Hope raised the thorny issue of 'balance':

> Too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages. Our revulsion against torture, and the wish which we all share to be seen to abhor it, must not be allowed to create an insuperable barrier for those who are doing their honest best to protect us. A balance must be struck between what we would like to achieve and what can actually be achieved in the real world in which we all live. Articles 5(4) and 6(1) of the European Convention . . . must be balanced against the right to life that is enshrined in Article 2 of the European Convention.[89]

Lord Rodger, always a more conservative judge than Lord Hope, agreed with the latter's view but justified it rather cursorily by asserting that the public interest does not favour rejecting statements merely because there is a suspicion or risk that they may have been obtained by torture.[90] He thought that Lord Bingham's approach would invert the true rule—that statements obtained by torture must be excluded—by requiring statements to be excluded unless there was no real risk that they had been obtained

[84] Ibid. [85] Ibid, [62].
[86] Ibid, [98]. [87] Ibid, [118].
[88] Ibid, [125]. [89] Ibid, [119]. [90] Ibid, [138].

by torture. He could see no warrant for Lord Bingham's test in the common law, in the Convention against Torture, or elsewhere in international law.[91] Lord Carswell also agreed with what he called the Hope test, although he confessed that he had initially favoured the Bingham test; what swung it for him, it seems, was that the Hope test involved fewer practical problems and struck a better balance.[92] Lord Brown summed up his position by saying that neither the integrity of the court's processes nor the good name of British justice requires evidence to be shut out whenever it cannot be positively proved to have been given voluntarily.[93]

Lord Brown was probably right when he said that it was most unlikely that the sole or decisive evidence against a detainee will be a coerced statement by that person,[94] which means that the nature of the test to be used for the burden of proof may not lead to many differences of outcome in practice. But the split between the seven judges does, it is submitted, reveal a fundamental difference of overall approach to human rights. For the majority, the emphasis was on pragmatism and practicability; for the minority it was on principle and integrity. The two leading judgments—by Lords Hope and Bingham—are each replete with references to 'authorities' of one kind or another, and both judges thought they were fulfilling the requirements of international human rights law, but Lord Bingham seemed to be driven by a special commitment to the idea of human rights whereas Lord Hope was fixated on how human rights can best be protected in practice. Neither can be said to be more 'human rights friendly' than the other; their disagreement relates more to tactics than to strategy. What is perhaps more noteworthy is the fact that all of the judges were in favour of protecting the right to a fair trial in a way which the European Court itself had not yet expressly endorsed. To that extent the decision is a breach of the House of Lords' 'mirror principle'.[95] The European Court did consider a group of applications lodged in Strasbourg by the *Belmarsh* detainees after their first victory in the Lords (where their detention was held to be unlawful but they were not released),[96] but that did not provide it with the opportunity to confirm its support for the House's decision in the second *Belmarsh* case. That had to await its consideration of the Abu Qatada case, to which we now turn.

Removing a person to a country where there may be ill-treatment

Although torture is not practised within the United Kingdom, it is, sadly, still prevalent in many other countries. Victims, or potential victims, of torture often travel to the United Kingdom in order to seek asylum there. They can do so provided they can establish that they have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. That is the test laid down in the UN Convention relating to the Status of Refugees 1951, as amended by a Protocol agreed in 1967. It has been incorporated into UK law through

[91] Ibid, [145]. [92] Ibid, [158].
[93] Ibid, [174]. [94] Ibid, [166].
[95] See Ch 2 above, at 19–43. [96] *A v UK* (2009) 49 EHRR 29.

the Immigration Rules, issued under the Immigration Act 1971.[97] In 1987 a case came before the House of Lords involving asylum applications by six Tamils from Sri Lanka, who claimed that if they were returned to Sri Lanka they would be persecuted on account of their ethnicity.[98] The Court of Appeal ruled that the claimants had to show only that they had what to themselves was a well-founded fear of persecution.[99] The Home Secretary appealed to the House arguing that he was entitled to refuse the applications on the basis of the facts known to him, regardless of the applicants' subjective fears. The UN High Commissioner for Refugees was allowed to intervene in support of the Court of Appeal's stance. The Lords, however, unanimously rejected that stance and allowed the Home Secretary's appeal. They could not find anything in the *travaux préparatoires* of the Geneva Convention which compelled a purely subjective test. At the end of his judgment Lord Goff said that the High Commissioner was free to continue to express his advice on the relevant test in the *Handbook on Procedures and Criteria for Determining Refugee Status*,[100] but he did not consider the Home Secretary to be bound by that document.[101] However he (and Lord Keith) accepted that the requirement for a well-founded fear of persecution could be met provided there was at least 'a reasonable degree of likelihood of persecution'.[102]

At no point in this domestic litigation was the European Convention on Human Rights mentioned. But, after losing in the Lords, five of the applicants lodged applications in Strasbourg and their case became only the second to be decided by the European Court of Human Rights after having already been decided by the House of Lords.[103] In *Vilvarajah v UK* the applicants claimed that their Convention right not to be ill-treated had been violated (Article 3), and also their right to an effective remedy (Article 13). At the European Commission, the Commissioners were split seven to seven on the Article 3 question, with only the casting vote of the President, Mr Nørgaard, meaning that there was a finding of no violation; on the Article 13 point, however, the decision was 13 to one in favour of finding a violation: English domestic law provided no effective remedy for someone claiming a violation of Article 3.[104] At the Court, however, there was a complete turnaround. The judges found by eight to one that there was no violation of Article 3 and by seven to two that there was also no violation of Article 13.[105] On the Article 3 issue the Court applied the test it had enunciated earlier the same year in *Cruz Varas v Sweden*,[106] namely, whether, in the light of all the material available to the Court, substantial grounds had been shown for believing the existence of a real risk of treatment contrary to Article 3. On the facts of this case there was merely a

[97] Rule 328 states: 'All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention'. But the Rules are not secondary legislation.

[98] *R v Secretary of State for the Home Dept, ex parte Sivakumaran* [1988] AC 958.

[99] Ibid.

[100] Then in its 1979 edition. The current edition dates from 1992, but the relevant paragraph [42] has not been amended.

[101] [1988] AC 958, 1001D.

[102] Ibid, 1000F.

[103] The first such case was *Sunday Times v UK* (1979–80) 2 EHRR 245. See Ch 10 below, at 282.

[104] Commission Report of 8 May 1990.

[105] (1992) 14 EHRR 248.

[106] (1992) 14 EHRR 1.

possibility that the applicants might be detained and ill-treated, but '[a] mere possibility of ill-treatment . . . is not in itself sufficient to give rise to a breach of Article 3'.[107] On the Article 13 issue the Court adopted the same attitude it had favoured in *Soering v UK*,[108] which meant that the right to seek judicial review of the Home Secretary's decision to refuse asylum was seen as an effective remedy even though it entailed only a review of the procedure by which the decision was reached, not of its merits. That issue had not, of course, been before the domestic courts, and nor had Article 3 per se, but the House of Lords must still have been relieved that the result it had arrived at was the same as that preferred in Strasbourg.

The case of *Vilvarajah* highlighted the fact that international law has two different tests for deciding whether it is lawful for one state to expel a person to another state. The first is whether the person would be persecuted in the receiving state (the Geneva Convention test), while the second is whether the person would be subjected to torture or inhuman or degrading treatment or punishment in the receiving state (the European Convention test). In two subsequent cases, *Horvath* and *Sepet*,[109] the House of Lords tried to reconcile the two tests—which are complementary rather than alternatives—by approving the definition of persecution set out by James Hathaway, a leading academic expert in the field of refugee law:

> persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.[110]

Further endorsement of that definition was given by Lord Steyn when, a few years later in *Ullah*, the House was asked whether UK courts could refuse to remove a foreigner from the country if there was a risk that a Convention article other than Article 3 might thereby be violated.[111] The Court of Appeal, surprisingly, had treated Article 3 as the sole gateway to successful resistance of expulsion.[112] In the Lords, JUSTICE, Liberty, and the Joint Council for the Welfare of Immigrants were allowed to intervene to argue that this was wrong, and the House agreed. First Lord Bingham, then Lords Steyn and Carswell, carefully examined the jurisprudence of both the European Commission and Court and could find no categorical assertion by either body that articles other than Article 3 could not be engaged in an expulsion or extradition case (what Lord Bingham called 'foreign cases').[113] There were not yet any Commission decisions or Court judgments where it had been held that other articles would be violated by an expulsion or extradition, but the possibility of this occurring still existed in principle.

[107] (1992) 14 EHRR 248, para 111.

[108] (1989) 11 EHRR 439.

[109] *Horvath v Secretary of State for the Home Dept* [2001] 1 AC 489, 495 (per Lord Hope) and *Sepet v Secretary of State for the Home Dept* [2003] UKHL 15, [2003] 1 WLR 856, [7] (per Lord Bingham). In *Re Musisi* [1987] AC 514 the House held that the Home Secretary, before removing someone to a foreign country, cannot simply rely upon the fact that it is a signatory to the Geneva Convention but must be satisfied that it complies with that Convention in practice.

[110] Hathaway (1991), 112. See now Hathaway (2005), 302–7.

[111] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [32]. See further Ch 2 above, at 39–43.

[112] [2002] EWCA Civ 1856, [2003] 1 WLR 770 (Lord Phillips MR, Kay and Dyson LJJ).

[113] Lord Walker and Baroness Hale concurred.

The Law Lords were agreed that the violation would need to be serious,[114] flagrant,[115] gross, or fundamental;[116] they also endorsed the phrase used by the Immigration Appeal Tribunal in an earlier case, namely that the right would need to be 'completely denied or nullified in the destination country'.[117]

In *Razgar*,[118] an appeal that was heard by the same bench of Law Lords immediately after *Ullah*, the Home Secretary had certified as manifestly unfounded an asylum seeker's claim that the Home Secretary had acted in breach of the claimant's fundamental rights by refusing him asylum on the ground that Germany was a safe third country to which he could be returned. The question for their Lordships was whether, if there had been an appeal against the refusal of asylum, the adjudicator might have allowed it. Given that the claimant appeared to have an extreme fear of being returned to Germany, and that ignoring this fear might violate his right to a private life under Article 8 of the European Convention, their Lordships held, albeit by three to two, that the Home Secretary's certificate should be quashed and that the claimant should be allowed to appeal to an adjudicator. Judgments by Lords Bingham and Carswell favoured the claimant, while Lord Walker and Baroness Hale held that the claimant's treatment in Germany would probably not be so much worse than his treatment in England as to amount to a flagrant infringement of his Article 8 rights. Lord Steyn simply concurred with Lord Bingham, thereby swinging the decision in favour of the asylum seeker. Both Lord Walker and Baroness Hale accepted that their position seemed callous[119] or harsh,[120] but the former justified his view by reminding us that '[t]here is no general human right to good physical and mental health any more than there is a right to expect (rather than to pursue) happiness'[121] and the latter said that [i]t does the cause of human rights no favours to stretch [the United Kingdom's international obligations] further than they can properly go'.[122] It is unusual to see Baroness Hale adopting what is a relatively conservative position concerning human rights, especially as a decision in favour of this claimant did not mean, as Lord Carswell was at pains to point out, that the claimant in question would necessarily go on to win his appeal before an adjudicator. The problem clearly lies with the use of the phrase 'manifestly unfounded' in the Immigration and Asylum Act 1999.[123] This was no doubt inserted into the Act, at the same time as another provision conferring a right to appeal on individuals whose applications to enter or remain in the United Kingdom had been refused, in an attempt to reflect the process in Strasbourg whereby applications can be declared 'manifestly ill-founded' and therefore inadmissible. But it is one thing to give a court of law the power to dismiss human rights claims *in limine*; it is quite another

[114] [2004] 2 AC 323, [18] (per Lord Bingham, referring to Art 8).
[115] Ibid, [24] (per Lord Bingham, referring to Arts 8 and 9), [50] (per Lord Steyn, referring to all articles other than Art 3).
[116] Ibid, [70] (per Lord Carswell, referring to all articles other than Art 3).
[117] *Devaseelan v Secretary of State for the Home Dept* [2002] UKIAT 702, [2003] Imm AR 1, [111], apparently referring to all articles other than Art 3.
[118] *R (Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 2 AC 368.
[119] Ibid, [39] (per Lord Walker).
[120] Ibid, [65] (per Baroness Hale).
[121] Ibid, [34].
[122] Ibid, [65].
[123] Section 72(2)(a).

to give that power to a minister in the government. The power still exists, and in an earlier appeal, *Thangarasa*,[124] the House held that the Home Secretary was entitled to rely on the authority of the European Court in *TI v UK*[125] when deciding to direct the appellant's removal (again to Germany) even though there was some evidence that Germany was more willing than the United Kingdom to deport Tamil asylum claimants to Sri Lanka, where their Article 3 rights might be at risk. Of course in authorizing removal to countries which, like the United Kingdom, have ratified the so-called Dublin Convention 1990,[126] the UK courts are seeking to uphold international comity as well as protecting human rights.

As explained earlier in this book,[127] in *R (Nasseri) v Secretary of State for the Home Department* the House of Lords found no incompatibility between the UK law's insistence that Greece was a 'safe country' to which an Afghani could be returned and its legal obligation to have regard to Article 3 of the European Convention. While this decision was not itself 'appealed' to the European Court of Human Rights, that court has since held in a separate case that the procedures in Greece for dealing with asylum seekers are so systemically deficient as to amount to a violation of Article 3.[128] The Court of Justice of the EU has come to a similar conclusion.[129] These decisions are bound to mean that, in any future case coming before the Supreme Court, the Justices will have to scrutinize the situation alleged to be prevailing in the foreign country even more carefully than in the past.

An interesting twist on the 'fear of persecution' requirement arose in *R (Bagdanavicius) v Secretary of State for the Home Department*,[130] where a married Lithuanian couple feared that, if their claim for asylum was rejected and they were returned to Lithuania, they would be subjected to violence from non-state agents on account of the fact that the husband's ethnic origin was Roma. While the couple accepted that the Lithuanian state provided a reasonable level of protection against the kind of violence they might suffer, their legal representatives argued that Article 3 of the European Convention imposed an absolute negative obligation on states not to expel someone who would then be at substantial risk in the country to which they were returned. In support of this proposition they cited the European Court's statement in *Soering v UK* to the effect that in cases of extradition or deportation what was at issue was not whether the receiving state would violate Article 3 (by failing to fulfil its positive obligations to protect people) but whether the expelling state would do so (by failing to ensure that people were not sent back to run the risk of such failure by the receiving country).[131] But Lord Brown, with whom the four other judges agreed, characterized this argument as both hopeless and

[124] [2002] UKHL 36, [2003] 1 AC 920, an appeal conjoined with *R (Yogathas) v Secretary of State for the Home Dept.*

[125] App No 43844/98, decision of 7 March 2000, [2000] INLR 211. The European Court did not find it established that there was a real risk that Germany would expel the applicant to Sri Lanka in breach of Art 3.

[126] Convention determining the state responsible for examining Applications for Asylum in one of the Member States of the European Communities, Cm 3806.

[127] Ch 2 above, at 45, and Ch 3 above, at 79.

[128] *MSS v Belgium and Greece* (2011) 53 EHRR 2 (GC).

[129] *NS v Secretary of State for the Home Dept*, Joined Cases C-441/10 and C-493/10, [2012] CMLR 9.

[130] [2005] UKHL 38, [2005] 2 AC 668.

[131] (1989) 11 EHRR 439, para 88.

impossible.[132] He stressed the distinction between ill-treatment perpetrated by state authorities and ill-treatment perpetrated by non-state agents. In both 'domestic' and 'foreign' cases ill-treatment by non-state agents would constitute a violation of the state's Article 3 obligations only if the state failed to take reasonable steps to protect the victim against such ill-treatment. In this case the applicants conceded that the Lithuanian state provided a reasonable level of protection against the kind of violence feared, so their application under Article 3 was bound to fail. Lord Brown observed ('for the guidance of practitioners and tribunals generally') 'that in the great majority of cases an Article 3 claim to avoid expulsion will add little if anything to an asylum claim'.[133]

We have seen how, in the second *Belmarsh* case, the Law Lords—both in the majority and in the minority—called in aid the European Court's decision in *Mamatkulov v Turkey*.[134] In that case the Grand Chamber held, by 14 v 3, that there were no substantial grounds for believing that if the applicants were extradited from Turkey to Uzbekistan they would face a real risk of torture or of inhuman or degrading treatment. In the Abu Qatada case the question was similar: if the United Kingdom extradited Abu Qatada, also known as Omar Mahmoud (or Mohammed) Othman, to Jordan, would he be at real risk of being tortured? He had been granted asylum in the United Kingdom in the mid-1990s on the basis that he had already been tortured in Jordan, and in 2000 a Jordanian court convicted him in his absence of conspiracy to cause explosions, but Abu Qatada alleged that the evidence used against him on that occasion had been extracted from others by torture. After the Home Secretary had decided that Abu Qatada's continued presence in the United Kingdom was a threat to national security and not conducive to the public good, he sought and received assurances from Jordan, in a memorandum of understanding, that if Abu Qatada were returned to Jordan he would not be ill-treated in a way that would violate Article 3 of the European Convention. Abu Qatada was then served with a notice of deportation. He appealed this to the Special Immigration Appeals Commission (SIAC) but lost: SIAC found that, while there was a real risk that in his trial in Jordan evidence would be produced that had been obtained in breach of Article 3, there was insufficient evidence to show that his trial would be a flagrant denial of his right to a fair trial under Article 6. The Court of Appeal, however, allowed his appeal, saying that SIAC had misunderstood the effect of the speeches of the Law Lords in the second *Belmarsh* case.[135] It relied on a recent judgment of the European Court of Human Rights, *Jalloh v Germany*, where the Grand Chamber had ruled that evidence obtained by torture, including fruit of the poisoned tree, should *never* be relied on as proof of the victim's guilt.[136]

In the House of Lords, surprisingly, only five Law Lords were called upon to hear the Home Secretary's appeal (which was conjoined with appeals in two other cases).[137]

[132] [2005] AC 668, [22] and [27].

[133] Ibid, [30]. By the time the case reached the Lords Lithuania had joined the EU, so the married couple acquired rights of free movement which largely made their claim for asylum of purely academic interest.

[134] (2005) 41 EHRR 25.

[135] [2008] EWCA Civ 290, [2010] 2 AC 110. The judges included Sir Anthony Clarke MR.

[136] (2006) 44 EHRR 32. Note that this ruling is limited to trials of the torture victim, not of third parties, but that it declares inadmissible even real evidence obtained as a result of torture.

[137] *RB (Algeria) v Secretary of State for the Home Dept* [2009] UKHL 10, [2009] 2 AC 110. See Garrod (2010); Elliott (2009).

They decided unanimously that SIAC had been correct and the Court of Appeal incorrect. There was no rule saying that there would a flagrant denial of justice in a foreign state if there was a risk of evidence obtained by torture being used in a trial in that state. Having reviewed the few relevant authorities from Strasbourg, Lord Phillips concluded as follows:

> Before the deportation of an alien will be capable of violating Article 6 there must be substantial grounds for believing that there is a real risk (i) that there will be a fundamental breach of the principles of a fair trial guaranteed by Article 6 and (ii) that this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights.[138]

Lord Hoffmann pointed out that, if the Court of Appeal's approach to the 'flagrant denial of justice' test was correct, it would mean that a person who was to be deported to and tried in a foreign country, which adopted the same admissibility test regarding evidence that might have been obtained by torture as that preferred by the majority of the House of Lords in the second *Belmarsh* case for use in English law, would nevertheless be able to claim a violation of Article 6. He reacted to such a conclusion by saying: 'That is too much of a paradox to form part of a rational system of jurisprudence'.[139] Lord Hope, not surprisingly, also thought that SIAC's approach was to be preferred to the Court of Appeal's because it was expressly based on what he and other judges in the majority had said in the second *Belmarsh* case.[140] Lord Brown, who had also sat in that case, likewise endorsed Lord Phillips' views as summarized above. He mentioned that, if the European Court in *Mamatkulov v Turkey* did not think that extradition to Uzbekistan was unlawful in the circumstances arising in that case, 'expulsion most certainly is not unlawful here'.[141] Lord Mance agreed with all the other four judges in the case.[142]

Then, just when the House of Lords was convinced that it had developed English law in a way which was consistent with the European Convention, the European Court decided to uphold Abu Qatada's claim that his deportation to Jordan would indeed violate his Article 6 rights.[143] The European Court's definition of 'a flagrant denial of justice' coincided with that preferred by the House, namely 'a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the essence, of the right guaranteed by that Article'.[144] Where the Court departed from the House of Lords was in relation to the appropriate test to apply when determining the risk of such a breach occurring. Whereas all five Law

[138] Ibid, [141]. At [139] Lord Phillips suggests that in extradition cases, where the prospective trial is relied on to justify the deportation, a real risk that the trial will be flagrantly unfair is likely to be enough to prevent extradition.

[139] Ibid, [202].

[140] Ibid, [243]–[249]. Lord Hope acknowledged, at [248], that in two intervening decisions the European Court had adopted an 'uncompromising approach' to the exclusion of evidence found to have been obtained as a result of torture: *Harutyunyan v Armenia* (2009) 49 EHRR 9 and *Gäfgen v Germany* (2009) 48 EHRR 13 (later adjusted by the Grand Chamber: (2011) 52 EHRR 1).

[141] Ibid, [260].

[142] Ibid, [262].

[143] *Othman v UK* (2012) 55 EHRR 1. See Michaelsen (2012).

[144] Ibid, para 260.

Lords, applying the Hope test preferred by the majority in the second *Belmarsh* case, had held that the applicant had to prove on the balance of probabilities that torture-tainted evidence would be admitted at his trial abroad (an almost impossible task), the seven judges in the European Court unanimously ruled that the applicant merely had to adduce evidence capable of proving that there were substantial grounds for believing that he or she would be exposed to a real risk of such evidence being admitted—once the applicant had done that it was then up to the respondent government to prove that such a risk would not exist. In other words, the European Court backed the Bingham test in the second *Belmarsh* case[145] and in so doing it underscored the fundamental reason for its position:

> [N]o legal system based upon the rule of law can countenance the admission of evidence—however reliable—which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[146]

For the first time in its history the European Court then found that the applicant's Article 6 right would be violated if he were to be deported to a foreign country. The Court's decision in *Mamatkulov v Turkey* was effectively distinguished on the basis that in that case the applicants could not demonstrate that they were at real risk of torture. The United Kingdom did not ask for the Chamber's decision in Abu Qatada's case to be referred to the Grand Chamber, but instead sought to negotiate with Jordan to ensure that evidence obtained by torture would not be used in any future trial of Abu Qatada in that country. At the last minute Abu Qatada's legal team decided to ask a panel of European Court judges to refer the decision to the Grand Chamber, perhaps more as a stalling tactic than because they hoped for an even more favourable ruling by that Court. This caused embarrassment to the UK government and delayed Abu Qatada's deportation,[147] but a month later the panel announced that it was refusing the request to refer the case.[148] The Home Secretary then told the House of Commons that she was confident that Abu Qatada would be deported within the law, although the process might take many months.[149] In October 2012 the Special Immigration Appeals Commission thwarted the Home Secretary's hopes by ruling that the assurances provided by the Jordanian government were still not adequate to satisfy the Commission that evidence obtained by torture would not be used against Abu Qatada if he were re-tried in Jordan.[150] The UK government is currently appealing that ruling.

[145] Ibid, para 264.

[146] Ibid.

[147] The UK government had thought that the Chamber's decision became final at midnight between 16 and 17 April 2012, whereas the applicant believed the deadline was midnight between 17 and 18 April. On this point the panel of judges agreed with the applicant.

[148] Press release ECHR 200 (2012), 9 May 2012. The panel does not give reasons for refusing or accepting a referral request.

[149] HC Debs, vol 545, col 8WS, 10 May 2012.

[150] *Othman v Secretary of State for the Home Dept* SC/15/2005, judgment of 12 November 2012, available at <http://www.siac.tribunals.gov.uk/Documents/Othman_substantive_judgment.pdf> (last accessed 4 December 2012).

A further controversial case is that of Abu Hamza, also known as Mustafa Kemal Mustafa, another radical Islamic preacher based in London. He is wanted in the United States on suspicion of terrorism offences, and in *Babar Ahmad v UK* the European Court held that it would not be a violation of the European Convention for the United Kingdom to extradite him (as well as a group of other suspects) to the United States, even though they are at risk of being imprisoned in a 'supermax' prison in Colorado, where they could be held in solitary confinement.[151] A group of non-governmental organizations[152] made a written intervention in the case trying to show that the safeguards against ill-treatment available to prisoners in the United States under the Eighth Amendment of the Constitution do not match those available under the European Convention, but the European Court was not convinced. Abu Hamza, like Abu Qatada, asked a panel of judges to refer his case to the Grand Chamber, but his request was unsuccessful. He and four others were then extradited to the United States on 5 October 2012. Apart from Mr Soering,[153] no-one in the United Kingdom has yet convinced the European Court that conditions in American prisons, or the criminal justice system there, are deficient enough to mean that Article 3 or 6 would be violated by extradition or deportation to that country. Two cases making such claims have been considered by the House of Lords. In *Norris v Government of the USA* the Law Lords held that on one of the counts against Ian Norris extradition was not possible because the price fixing offence with which he was charged in the United States did not exist in the United Kingdom.[154] In *McKinnon v Government of the USA* the challenge to the extradition request failed because the Law Lords were not persuaded that the attempt to get Mr McKinnon to plea bargain was an abuse of process.[155]

It is worth noting that the Extradition Act 2003 explicitly prohibits a court from authorizing a person's extradition if that would violate a person's Convention rights.[156] But the Parliamentary Joint Committee on Human Rights has reported that the provisions 'do not, in practice, offer adequate human rights protection for those subject to proceedings', because 'the courts have set their interpretation of the threshold for extradition to be refused on human rights grounds too high'.[157] It recommends that courts should regard reports by the European Committee on the Prevention of Torture as relevant evidence of possible human rights abuses.[158] With regard to extradition to the United States, the Committee suggests that the government should raise the level of proof required to the same level required when a person is being extradited from the

[151] Application Nos 24027/07 et al, decision of 10 April 2012.

[152] Interights, Reprieve, and the American Civil Liberties Union. See <http://www.interights.org/document/129/index.html> (last accessed 4 December 2012).

[153] See 140 above.

[154] [2008] UKHL 16, [2008] 1 AC 920. The case was remitted to a district judge for re-consideration of three other counts. Mr Norris was eventually extradited for obstruction of justice, and was sentenced in the United States to 18 months in prison.

[155] [2008] UKHL 59, [2008] 1 WLR 1739. On 16 October 2012 the Home Secretary announced that she had decided not to proceed with Mr McKinnon's extradition: HC Debs, vol 551, col 164.

[156] Sections 21 and 87.

[157] Joint Committee (2011a), para 71. See too Baker (2011).

[158] Ibid, para 72.

United States to the United Kingdom, that is, 'sufficient evidence to establish probable cause'.[159]

An interesting new question concerning the rights of persons whom the Home Secretary wishes to deport came before the Supreme Court in *W (Algeria)*.[160] Could an order be issued *ex parte* (ie in the absence of the Home Secretary) requiring the Home Secretary never to disclose to another person the identity of, and the evidence supplied by, a proposed witness for the prospective deportee? The case involved seven Algerians, one of whom wished to present evidence from a source who was prepared to supply information about the likelihood of deportees being ill-treated when returned to Algeria only if he or she was first provided with a cast-iron guarantee that his or her identity, and the information itself, would never be revealed to anyone who was not a party to the deportation proceedings. Reversing a unanimous Court of Appeal decision,[161] the Supreme Court held that such an order could be issued, albeit most sparingly, notwithstanding that such an order was inimical to fundamental principles of open justice and procedural fairness. Recognizing that the problem was the mirror image of that facing the government when it wanted to present evidence at a closed hearing, the Justices, led by Lord Brown and Lord Dyson,[162] concluded that they had to be guided by the imperative need to maximize the chances of the court in question arriving at the correct decision regarding the real risk of a violation of Article 3. This shows a highly commendable commitment to what is surely one of the most important of all the Convention rights.

Torture as a civil wrong and the doctrine of state immunity

So far we have seen that, while the House of Lords (and therefore the Supreme Court) is to be commended for having developed English law to a very significant extent in a direction which protects the right not to be tortured, the domestic position still falls short of what the European Court of Human Rights expects. The European Court does not approve of the admission as evidence of *any* material acquired as a result of torture, whereas the Supreme Court believes that fruit of the poisoned tree *can* be admitted. The European Court places the burden on the state to prove that torture has not been or will not be perpetrated, whereas the Supreme Court requires the person who alleges that evidence is or will be tainted by torture to prove that this has occurred or may do so. On one issue, however, the two courts are—unfortunately—agreed. They have both ruled that it is not a breach of any human right for a state to deny victims of torture the right to pursue a civil claim against a foreign government for its involvement in that torture.

The House's position was made quite clear in litigation brought against the government of Saudi Arabia, a country where the use of torture is far from unknown. In *Jones v Ministry of the Interior of Saudi Arabia* four individuals, in two separate actions, were seeking compensation in an English court from both the government

[159] Ibid, para 192.
[160] *W (Algeria) v Secretary of State for the Home Dept* [2010] UKSC 8, [2010] 2 AC 115.
[161] [2010] EWCA Civ 898.
[162] With both of whom Lord Phillips, Lord Kerr, and Lord Wilson concurred.

and various officials in Saudi Arabia for the torture they allegedly suffered while being questioned about terrorism and spying offences in that country.[163] A very strong Court of Appeal upheld the claim to immunity submitted by the government but permitted writs to be served abroad on individual defendants.[164] The UK government was permitted to intervene to support the view that the Saudis had immunity; the Redress Trust, Amnesty International, Interights, and Justice intervened to support the claimants. The thrust of the claimants' argument was that, even though the State Immunity Act 1978, as well as international law (through the European and UN Conventions on State Immunity[165] and the International Law Commission's Articles on State Responsibility), confer immunity on states and their officials (when they are acting as such), unless there is some explicit exception to that immunity, to deny victims of torture their right of access to justice would be a violation of their right under Article 6 of the European Convention on Human Rights. The claimants therefore invited the House to use section 3 of the Human Rights Act 1998 to 'read down' the State Immunity Act 1978 in a way which would subordinate the claim to immunity to the requirements of Article 6. Alternatively, they asked the House to issue a declaration of incompatibility under section 4 of the Human Rights Act.

With some reluctance the Law Lords all agreed that Article 6 was engaged in this kind of case.[166] This had been the view of the slimmest of majorities amongst the judges of the Grand Chamber in *Al-Adsani v UK*,[167] where the immunity of the government of Kuwait to civil actions brought against them in England by alleged torture victims was upheld.[168] Had the issue been left to the Lords themselves, they would have held that the immunity was recognition that no liability existed in the first place, not that it existed but that there was an exception to it. But the Law Lords went on to hold, unanimously, that as yet there was no rule of international law giving priority to civil claims in respect of torture over claims to state immunity. National legislatures, such as the US Congress when enacting the Alien Tort Claims Act 1789 and the Torture Victim Protection Act 1991, may have given priority to civil claims within national law, and one or two supreme courts, such as the Italian Court of Cassation, may have expressed the view that such priority was now required under international law too,[169] but the overwhelming consensus was that international law had not yet taken that step. A decision by the Ontario Court of Appeal to the same effect was expressly approved.[170]

[163] [2006] UKHL 26, [2007] 1 AC 270.

[164] [2004] EWCA Civ 1394, [2005] QB 699 (Lord Phillips MR, Mance, and Neuberger LJJ). Lord Phillips said that he no longer thought he was right when he said in *Pinochet* that, although the Torture Convention was incompatible with the applicability of immunity *ratione materiae*, the state of Chile could claim immunity on his behalf if General Pinochet was sued for damages in civil proceedings.

[165] UN Convention on Jurisdictional Immunities of States and their Property (2004).

[166] [14] (per Lord Bingham), [64] (per Lord Hoffmann).

[167] (2002) 34 EHRR 11 (9 v 8). The judgment was followed in *Kalegoropoulou v Greece and Germany*, App No 50021/00, decision of 12 December 2002, where an application complaining about the non-enforceability of a judgment against the German state was declared to be manifestly ill-founded.

[168] Affirming the Court of Appeal's view in *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536.

[169] *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04; 87 *Rivista di diritto internazionale* 539. Lord Bingham pointed out that this decision had divided opinion amongst academic commentators: it was approved by Bianchi (2005) but disapproved by Gattini (2005) and Fox (2006a) and (2006b).

[170] *Bouzari v Islamic Republic of Iran* 71 OR (3rd) 675.

Lord Bingham, giving the lead judgment, said that this position reflected the current compromise preferred by international law. Lord Hoffmann contributed a comparably long opinion in which he too carefully considered all the authorities for and against the proposition that international law granted immunity to state officials in civil proceedings relating to torture, and he concluded that it did. Lords Rodger, Walker, and Carswell entered simple concurrences with Lords Bingham and Hoffmann.

It is worth remarking that the treatment by the Law Lords of the arguments concerning immunity in civil proceedings was every bit as thorough as that of the Grand Chamber in *Al-Adsani v UK*,[171] where of course the same conclusion was reached. Both decisions are stark reminders that, however fundamental the right of access to justice might sometimes be claimed to be, it still has to give way, on current thinking, to greater imperatives, in this case the need for respect for the sovereignty of nations. The *Al-Adsani* case, when before the English courts, had not gone beyond the Court of Appeal because the Law Lords refused leave to appeal.[172] They must have been content with the words of Stuart-Smith LJ, who said:

> At common law, a sovereign State could not be sued at all against its will in the courts of this country. The [State Immunity Act 1978], by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification.[173]

Yet it remains hard to understand why there should be no immunity for torture as regards criminal proceedings but it continues to exist for civil proceedings. In particular, if the principle of sovereign immunity is a creature of the common law then it is surely within the power of the highest court in the United Kingdom, if it can point to good reasons for doing so, to alter that principle, or at least to carve out an exception to it.

It seems to this author that neither the English courts nor the European Court have supplied adequate justification for maintaining the blanket immunity even when a government minister is sued for such a heinous wrong as torture. In *Al-Adsani* the only practical reason Stuart-Smith LJ could provide for keeping the rule unqualified was that a great number of people come to the United Kingdom seeking asylum, many of whom claim that they are the victims of torture abroad and, while officials who have to decide whether to grant asylum will know a lot about the background to the claims of torture, a court of law would not be in a similar position and so 'would have no means of testing the claim or making a just determination'.[174] With great respect, this seems a weak proposition. The parties themselves, and interveners, could in many cases adduce credible information concerning the practice of torture in the country concerned. In the European Court in *Al-Adsani v UK*, two of the judges also stressed the difficulties national courts would face and added that these would extend even into the execution

[171] (2002) 34 EHRR 11.
[172] Decision of the Appeal Committee on 27 November 1996: ibid, para 19.
[173] (1998) 107 ILR 536, at 542.
[174] Ibid, 544.

phase, with courts being expected to enforce default judgments against the property of foreign governments.[175] There is more substance in this latter point, but again the problems are not insuperable. In a situation where it is individuals who are being sued, it will be their property that is at risk of the enforcement of judgments, not the property of the state. Bates, for one, has suggested that there are persuasive arguments for the European Court to adjust its ruling in *Al-Adsani* so as to initiate progress regarding extra-territorial civil claims for torture.[176] Caplan, in his analysis of the European Court's decision, argues that the principle of state immunity is itself an exception to the principle of adjudicatory jurisdiction, not the other way round, and that customary international law does not require immunity to be granted in situations where state conduct violates human rights.[177] This is close to the position expounded by Orakhelashvili in response to the *Jones* decision, where he thinks the House of Lords wrongly treated the majority approach of the European Court in *Al-Adsani* as 'axiomatic' without investigating whether it was properly supported by reasoning.[178] McGregor, too, condemns the current position for setting far too much store on out-of-date thinking.[179] It is time, surely, for the UK Supreme Court to go beyond the European Court in this field. It needs to return to the imaginative approach adopted towards international law by the House of Lords in *Pinochet*.

It is of course possible for claimants who allege that they have been ill-treated by organs of the UK state to bring a civil claim for damages in UK courts. This is what Binyam Mohamed and five other claimants did in respect of the alleged complicity of the UK Security Service (MI5), the Secret Intelligence Service (MI6), the Attorney General, the Foreign and Commonwealth Office, and the Home Office in their detention and ill-treatment at Guantanamo Bay and elsewhere. The claim was eventually settled on confidential terms, with no admission of liability, but a preliminary issue arose which reached the Supreme Court: did a civil court have the inherent power to order a 'closed material procedure' whereby the defence could disclose secret material to special advocates but not directly to claimants or their legal advisers? An eight-judge bench held by five to three that there was no such power and that only Parliament could authorize such a procedure.[180] The three Justices who dissented—Baroness Hale, Lord Mance, and Lord Clarke—did so only in order to stress that *in extremis* a claimant should be allowed to proceed with the case under such constraints rather than be denied any form of access to a court at all. The UK government, not content with the Supreme Court's ruling, is currently seeking Parliament's approval of legislation allowing for closed material procedures in civil cases.[181]

[175] Concurring opinion of Judge Pellonpää, with which Judge Bratza agreed.
[176] Bates (2003), 221–4. See too Hall (2006); Parlett (2006).
[177] Caplan (2003).
[178] Orakhelashvili (2007).
[179] McGregor (2007) and (2006). See too the UN's online 2008 lectures on this topic by Judge Rozakis, who at the time was a Vice-President of the European Court: <http://untreaty.un.org/cod/avl/ls/Rozakis_CT.html> (last accessed 4 December 2012). Scott (2001) argues convincingly that the US approach to civil liability for torture ought to be adopted in other jurisdictions.
[180] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531. The majority comprised Lords Phillips, Hope, Brown, Kerr, and Dyson. See too Ch 7 below, at 221–2; and Otty (2012).
[181] Justice and Security Bill, Pt 2. For a former Law Lord's view on Guantanamo Bay, see Steyn (2003).

Ill-treatment of children, the ill, and the destitute

In the section at the start of this chapter, dealing with the definition of torture and ill-treatment, attention was drawn to two cases where the victims of ill-treatment were children: *X (Minors) v Bedfordshire County Council*[182] and *E v Chief Constable of the Royal Ulster Constabulary*.[183] Another particular context in which a child's right to be free from ill-treatment has arisen is that of the corporal punishment of children within the family. In *A v UK* all nine judges in a Chamber of the European Court found that there had been a violation of Article 3 when a stepfather was permitted to strike his stepson several times with a garden cane and yet not be convicted of assault because the treatment amounted to 'reasonable chastisement', which English judges recognized as a defence under the common law.[184] At the time of the stepfather's acquittal the Attorney General could have considered referring the point of law to the Court of Appeal, and a further hearing might have taken place in the House of Lords. But no such reference was made, no doubt for the reason that, because Article 3 had not yet been incorporated into English law, there was no higher standard against which to measure the acceptability of the 'reasonable chastisement' concept. Nor was the possibility of law reform taken up by the Law Commission. Yet, when *A v UK* was argued before the European Court the UK government conceded that the European Commission of Human Rights had been correct to find (by 17 to none) that Article 3 had been violated. The Commission pointed out that the jury at the stepfather's trial had been given little guidance as to the meaning of 'reasonable and moderate chastisement' and no guidance at all as to the relevance of the age or health of the victim, the appropriateness of the instrument used, the frequency of the punishment, or the physical or mental suffering of the victim.[185] The common law's approach to the protection of a basic human right was found wanting.

The House of Lords did get an oblique opportunity to deal with corporal punishment of children in *R (Williamson) v Secretary of State for Education and Employment*,[186] where a group of teachers and parents at four independent schools in England argued that the statutory ban on corporal punishment in schools was incompatible with their right to freedom of conscience and belief under Article 9 of the European Convention. As explained in a later chapter,[187] their Lordships held that, while the teachers and parents did indeed have a belief which was deserving of respect and protection, on the facts of the case the statutory interference with that belief was legitimate and proportionate. This reasoning suggests that if the government were ever to introduce an absolute ban in England on the smacking of children, including by their parents, it might be deemed to be a disproportionate interference with the parents' rights. A quasi-ban, such as already exists in Scotland,[188] may be the 'safer' way forward.

[182] [1995] 2 AC 633.
[183] [2008] UKHL 66, [2009] 1 AC 536.
[184] (1999) 27 EHRR 611.
[185] Commission Report, 18 September 1997, para 52.
[186] [2005] UKHL 15, [2005] 2 AC 246.
[187] See Ch 9, at 265–7.
[188] Under the Criminal Justice (Scotland) Act 2003, s 51, when determining if a parent's punishment of a child was a justifiable assault, a court must have regard to a wide range of factors.

The position of people with mental illnesses was at issue in *R (Munjaz) v Mersey Care NHS Trust*,[189] which concerned the lawfulness of a seclusion policy adopted at the high security Ashworth Hospital. While largely based on a code of practice issued by the Secretary of State for Health, the policy differed from the code in that it provided for less frequent medical reviews of the persons who were secluded, particularly after seven days. Lord Bingham, after pointing out that the code had been drawn up for use in all mental hospitals and did not recognise the special position of patients who might need to be secluded for longer than a few days, could see no violation of Article 3 in the policy (nor of Articles 5 or 8). Lord Hope, likewise, found that, while the policy increased the risks to the patient's physical and psychological well-being, there was not enough evidence to show that this was 'a serious risk of ill-treatment of the required level of severity'.[190] Lord Brown differed only in that he thought there was a breach of Article 8, while Lord Steyn differed more completely and ruled that all three Articles of the Convention had been violated. He concluded his judgment by saying that the judgment of the majority lowered the protection afforded by the law to mentally disordered people and was 'a set-back for a modern and just mental health law'.[191] Interestingly, two of the judges in the Court of Appeal who also held the hospital's policy to be unlawful were Lord Phillips MR and Hale LJ.[192] In addition, Colonel Munjaz's arguments were supported by the important civil society organization MIND and by the Mental Health Act Commission. For the majority in the House to disappoint those bodies is a further sign of how controversial their decision was. However, when Colonel Munjaz took his case to Strasbourg he was again unsuccessful.[193] The Court found the claims based on Articles 3 and 14 to be inadmissible and those based on Articles 5 or 8 to be unmerited.

One of the most startling resorts to Article 3 of the European Convention by the country's top court occurred in *R (Limbuela) v Secretary of State for the Home Department*,[194] where the issue was, when does the Secretary of State have a duty, under the Nationality, Immigration and Asylum Act 2002,[195] to provide support to an applicant for asylum when his or her claim for asylum has not been made as soon as reasonably practicable after arrival in the United Kingdom? Lord Bingham gave an unequivocal response to this question;

> The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources

[189] [2005] UKHL 58, [2006] 2 AC 148. See too Ch 6 below, at 181.
[190] Ibid, [81]. Lord Scott agreed with Lords Bingham and Hope and added a few comments about Art 8.
[191] Ibid, [48].
[192] [2003] EWCA Civ 1036, [2004] QB 395.
[193] *Munjaz v UK* App No 2913/06, judgment of 17 July 2012.
[194] [2005] UKHL 66, [2006] 1 AC 396. See too O'Cinneide (2008).
[195] Section 55(5)(a).

> of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.[196]

This was a very useful formulation but, before we run away with the idea that this was judicial activism at its very best, it should be noted that it was Parliament itself which required the question to be answered because the 2002 Act specifies that, when a claim for asylum is not made as soon as reasonably practicable after the applicant arrives in the United Kingdom, the Secretary of State has the power to support the applicant 'to the extent necessary for the purpose of avoiding a breach of a person's Convention rights'.[197] In a sense, all that the Law Lords were doing was fleshing out what this means, but the fact that they did so within the framework of Article 3 is significant. Lord Bingham said: 'Does the regime imposed on late applicants amount to "treatment" within the meaning of Article 3? I think it plain that it does'.[198] As examples of when Article 3 would be breached he mentioned a late applicant for asylum having to sleep in the street ('save perhaps for a short and foreseeably finite period'), being seriously hungry, or being unable to satisfy the most basic requirements of hygiene.[199]

In his judgment, Lord Hope provided a welcome corrective to the approach adopted by Laws LJ when the case was before the Court of Appeal. Laws LJ had suggested that what was required under Article 3 depended on whether, on the one hand, there had been violence by state agents or, on the other, some act or omission by state agents which exposed someone to ill-treatment from other quarters.[200] As Lord Hope put it:

> [I]t would be wrong to lend any encouragement to the idea that the test is more exacting where the treatment or punishment which would otherwise be found to be inhuman or degrading is the result of what Laws LJ refers to as legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality. They are relevant when an obligation to do something is implied into the Convention. In that case the obligation of the state is not absolute and unqualified. But proportionality, which gives a margin of appreciation to states, has no part to play when conduct for which it is directly responsible results in inhuman or degrading treatment or punishment. The obligation to refrain from such conduct is absolute.[201]

[196] [2006] 1 AC 396, [8]. Lords Bingham, Hope, and Brown all distinguished *O'Rourke v UK* App No 39022/97, decision of 26 June 2001, where the European Court dismissed as inadmissible the applicant's claim that his long period of homelessness was a violation of Art 3, because it was of his own volition. The case had earlier been before the House of Lords, which had held that the claimant could not sue his local housing authority for failing to provide him with accommodation: *O'Rourke v Camden London Borough Council* [1998] AC 188.

[197] Section 55(5)(a). Under the Immigration and Asylum Act 1999, s 95, asylum-seekers who satisfy the Secretary of State that their claim for asylum was made as soon as reasonably practicable after their arrival in the United Kingdom qualify for support if they are or appear likely to become destitute within 14 days beginning with the day on which this question falls to be determined (see Asylum Support Regs 2000 (SI 2000/704), reg 7).

[198] [2006] 1 AC 396, [6].

[199] Ibid, [9]. See too *R v Drew* [2003] UKHL 25, [2003] 1 WLR 1213, discussed in Ch 6 below, at 181.

[200] [2004] EWCA Civ 540, [2004] QB 1440, [59].

[201] [2006] 1 AC 396, [55]. Baroness Hale (at [77]) also rejected Laws LJ's so-called 'spectrum analysis'.

Lord Scott added that, if domestic law banned NHS medical treatment to late asylum seekers, that too would be 'treatment' for the purposes of Article 3, and presumably a violation of it depending on the nature of the person's sickness. Agreeing with Lord Bingham's formulation, Baroness Hale added her own take on what would amount to degrading treatment under Article 3:

> [T]his is not a country in which it is generally possible to live off the land, in an indefinite state of rooflessness and cashlessness. It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age.[202]

We have in these judgments a clear indication that, in the appropriate circumstances, the UK Supreme Court is prepared to hold that the state's failure to ensure that people in this country are not destitute is a violation of its obligations under Article 3. Thus might the recognition and protection of socio-economic rights creep further into UK domestic law. The case is often cited as one of the occasions on which the United Kingdom's top court has gone beyond what the European Court already requires for the protection of Convention rights, notwithstanding the general principle enunciated in *Ullah* that UK courts should do no more and no less than what the European Court has done.[203]

Conclusion

The Supreme Court is unlikely to have to confront many Article 3 issues in the near future, but when it does it will be well positioned to deal with them in an enlightened and progressive manner. The outstanding judgments in the *Pinochet* case and the second *Belmarsh* case, the guidance subsequently provided by the European Court of Human Rights in *Jalloh v Germany* and by the Court of Justice of the EU in *NS v Secretary of State for the Home Department*, and the practical approach preferred by the Law Lords in *Limbuela*, all point to a hopeful future in this context. Any temptation on the part of the Supreme Court Justices to allow relativity to seep into their interpretation of Article 3 (one approach for domestic cases and a less demanding one for foreign cases) will surely now be resisted in the light of the European Court's decision in *Othman v UK*. The main blot on the landscape is the approach taken by both the Supreme Court and the European Court to the civil liability of foreign governments for torture. We can hope for a *volte-face* on the part of the Strasbourg body, but pending that development advocates should be strongly urging the UK Supreme Court to again set aside the *Ullah* principle and recognize that domestic law would not be in breach of the Convention or of international law if it made it possible for victims of torture to sue foreign governments in this country.

[202] Ibid, [78].

[203] See Ch 2 above, at 39–43. See, more generally on socio-economic rights in English law, Fredman and Wesson (2009); Usher (2008); Palmer (2007a).

6

The Right to Liberty

Introduction

The common law has had a commitment to the concept of liberty since time immemorial. Its reverence for the concept is encapsulated in the remedy known as *habeas corpus*, which has also been the object of Parliamentary attention for nearly 400 years. The Petition of Rights of 1628 is sometimes cited as the *fons et origo* of that remedy, but in fact its roots go back much further, almost to Magna Carta.[1] In the modern world the right to liberty has come under new stresses and strains, and the wording of Article 5 of the European Convention on Human Rights—since the full commencement of the Human Rights Act 1998—has had a profound influence on the way in which the House of Lords and Supreme Court have dealt with complaints concerning liberty. This chapter gives an account of how those top courts have proceeded, and of the views, where relevant, of the European Court of Human Rights on the same issues. We shall see that in only three cases has the House or Supreme Court found a violation of Article 5,[2] but in three other cases the majority in favour of holding that there was no violation was a slim three to two.[3] We begin by examining the right to liberty at the pre-custody stage, where the issues have mostly concerned the use of stop and search powers and the imposition of controls on crowds. We then look at the rights of individuals who have been detained as a precautionary measure (sometimes called 'administrative detention') or whose movements have been specifically restricted. This includes a section on the position of people who are confined in mental hospitals. Finally, we consider issues relating to persons who are in custody awaiting trial or in prison after being found guilty of a crime.

Throughout the analysis it is worth recalling the structure and precise wording of Article 5. Having conferred the right to liberty in the first sentence of paragraph 1, it proceeds to list exceptions to that right in six sub-paragraphs, (a) to (f). Unless the deprivation of liberty can be justified by reference to one of those exceptions, it must be unlawful, although in some circumstances it may be difficult to know whether the extent of the restraints placed upon a person are severe enough to justify finding that he

[1] Holt (1992), 13.

[2] *R (H) v Secretary of State for the Home Dept* [2003] UKHL 59, [2004] 2 AC 252; *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68; *Secretary of State for the Home Dept v JJ* [2007] UKHL 45, [2008] 1 AC 385. The House found a violation of the common law in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105 and therefore did not feel the need to express a clear view on whether Art 5 had also been breached.

[3] *R (Wardle) v Crown Court at Leeds* [2001] UKHL 12, [2002] 1 AC 754; *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738; *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [2007] 1 WLR 1910.

or she has suffered a deprivation of liberty. In paragraphs 2 to 5 the Article adds some supplementary rights for persons who have been arrested or detained. To fully understand the reach of Article 5, however, it is necessary to consider as well the concept of liberty as it operates within the purely domestic legal system. This is because Article 5(1) refers to the need for an arrest or detention to be 'lawful'. To the extent that domestic law's requirements are more exacting than those in the Convention, they are thereby written into how the European Court must interpret Article 5. As we shall see, at common law the concept of liberty is more encompassing than under Article 5: while the latter has been interpreted to refer only to restrictions on movement greater than those protected by Protocol No 4 to the Convention (which the United Kingdom has not ratified), the common law concept has embraced all restrictions on movement. Under the Convention, for example, people in prison no longer have any right to liberty, but at common law they do retain a residual right in that regard.

Police powers to stop and search

In a trio of post-Human Rights Act cases involving the use of police powers to stop and search, or to control a crowd, the House of Lords managed to avoid coming to the conclusion that Article 5 of the European Convention had been violated. This is because in one of them (*Laporte*) the common law was found to have been breached, which was enough to dispose of the case without much reference needing to be made to the position under the Convention, while in the other two cases (*Gillan* and *Austin*) the Lords held that there had been no 'deprivation of liberty' in the first place, so Article 5 was not even engaged.

In *R (Gillan) v Metropolitan Police Commissioner* there were three full-scale court hearings in England. The two claimants had been stopped and searched by police officers under section 44 of the Terrorism Act 2000, a provision which did not require the police to have a reasonable suspicion that the person stopped was involved in terrorism. The incident took place near a controversial arms trade exhibition at the ExCel Centre in East London, but the time taken for each search was no more than 30 minutes, and nothing incriminating was found. The claimants applied for judicial review of the decision to authorize the searches and argued that their right to liberty had been violated (as well as their rights to a private life, freedom of expression, and freedom of association). The Divisional Court dismissed the applications,[4] as did the Court of Appeal.[5] On a further appeal the Law Lords unanimously held that such stops and searches were not a 'deprivation of liberty'.[6] There had been a restriction on the right to freedom of movement, but that was not a breach of Convention rights in domestic law because the United Kingdom had not ratified Protocol No 4 to the Convention. Lord Bingham, giving the lead opinion, itemized no fewer than 11 features of the legislation in question which demonstrated to him that the government had imposed effective constraints on the stop and search power being used arbitrarily.[7] When dealing with the argument

[4] [2003] EWHC 2545 (Admin).
[5] [2004] EWCA Civ 1067, [2005] QB 388.
[6] [2006] UKHL 12, [2006] 2 AC 307.
[7] Ibid, [14].

that authorization for the use of the power had not been 'prescribed by law', as required by Article 5(1), he accepted that that requirement addressed 'supremely important features of the rule of law' but concluded that the stop and search regime under review did meet the test.[8] Lord Hope, too, could see no element of arbitrariness in the regime and so he found that the requirement of legality had been fully met.[9] Lords Scott, Walker, and Brown agreed with Lord Bingham. In the course of their opinions three Law Lords chose to issue *obiter dicta* concerning the race element to stops and searches: to varying degrees they accepted that race *could* lawfully be taken into account by a police officer before deciding whether to stop and search a person.[10] Moeckli, on the other hand, disputes the legality of this, because the Race Relations Act 1976 completely outlaws direct racial discrimination and under Article 14 of the Convention the onus is on the state to show that any such discriminatory approach is justified and proportionate, which is always difficult to do. He laments that the Law Lords were not clearer on this important issue.[11]

The losing claimants took their case to the European Court of Human Rights where, in *Gillan and Quinton v UK*, they won.[12] Unfortunately the European Court dealt first and foremost with the argument that the applicants' right to a private life had been unjustifiably interfered with under Article 8 of the Convention, concluding by seven to none that it had been. This was a relatively minor point when the case was before the Law Lords, but they held unanimously that Article 8 had not been breached. In view of its finding that one article of the Convention had been violated, the European Court declared, as is unfortunately often its wont, that there was therefore no need to consider the claims made under other articles. So we do not know whether the European Court would have agreed with their Lordships that no deprivation of liberty had occurred here. Had it found that there was such a deprivation of liberty it would doubtless have held that it was no more 'prescribed by law' than the interference with the right to a private life had been. The Court objected vehemently to the fact that members of the public could not easily know whether or not an authorization to carry out such stops and searches had been given: the legislation allowed for stops and searches to be carried out as soon as authorization was granted by a senior police officer, but it made no provision for public notification of this (even though in this case the authorization extended to the whole of London), and, while any authorization had to be confirmed by the Secretary of State within 48 hours, all things done under the authorized power within that interim period remained valid even if the authorization was not confirmed. Moreover, authorizations could last for up to 28 days and could be renewed as many times as was deemed necessary.

Shortly after the new coalition government took office in the United Kingdom in 2010, it announced that, in order to comply with this judgment from Strasbourg, it was suspending the operation of section 44 of the Terrorism Act 2000. It issued the Terrorism Act 2000 (Remedial) Order 2011[13] to tide things over and then made more

[8] Ibid, [34]–[35]. [9] Ibid, [53]–[56].
[10] Ibid, [43]–[47] (per Lord Hope); [68] (per Lord Scott); [92] (per Lord Brown).
[11] Moeckli (2007), esp 669–670.
[12] (2010) 50 EHRR 45.
[13] SI 2011/631.

permanent changes by the Protection of Freedoms Act 2012. This Act repeals section 44 of the 2000 Act[14] and inserts a new section 47A. The new section allows a senior police officer to authorize stops and searches of vehicles and pedestrians in relation to a specified area or place, but it requires the officer to have a reasonable suspicion that an act of terrorism will take place and to reasonably consider that the authorization is necessary to prevent such an act, bearing in mind the specified area and duration of the authorization. The power to search can be exercised only to look for evidence that a vehicle is being used for the purposes of terrorism or that a person is concerned in terrorism, but the officer conducting the search does not need to reasonably suspect that there is such evidence.[15] These reforms are welcome, because they regulate the exercise of an intrusive police power much more effectively than the 2000 Act. It is only regrettable that the country's top judges cannot take much credit for their introduction.

Police powers to control a crowd

The starting point here is *R (Laporte) v Chief Constable of Gloucestershire Constabulary*, which, like *Gillan*, had the benefit of three substantive hearings in domestic courts—in the Divisional Court,[16] the Court of Appeal,[17] and the House of Lords.[18] In 2003 three coaches travelling from London to RAF Fairford in Gloucestershire were stopped by the police about three miles from their destination. They were carrying passengers who planned to protest at the airbase against the recent invasion of Iraq by a coalition of Western forces. The police were worried that the coaches were transporting some very determined protestors who might get involved in incidents of serious violence at the base, as had occurred during previous demonstrations. A chief superintendent therefore authorized the use of stop and search powers conferred by the Criminal Justice and Public Order Act 1994.[19] In addition, as the chief superintendent thought that some of the passengers were likely to cause a breach of the peace at the RAF base, he ordered that the coaches and all their passengers should be escorted back to London, a journey of some two-and-a-half hours. Ms Laporte sought judicial review of the police's decision to prevent the coach from proceeding to the airbase and to force her to return to London. She argued that the former was a violation of her rights to freedom of speech and assembly under Articles 10 and 11 of the European Convention and that the latter was a violation of her right to liberty under Article 5.

[14] Protection of Freedoms Act 2012, s 61.

[15] The 2012 Act, by s 62, also inserts new ss 47AA–AE into the Terrorism Act 2000. These provide for the Secretary of State to issue a code of practice governing the exercise of powers under (amongst other provisions) s 47A.

[16] [2004] EWHC 253 (Admin), [2004] 2 All ER 874.

[17] [2004] EWCA Civ 1639, [2005] QB 678.

[18] [2006] UKHL 55, [2007] 2 AC 105.

[19] Section 60(1), as amended by the Knives Act 1997, s 8(2), reads: 'If a police officer of or above the rank of inspector reasonably believes (a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or (b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorisation that the powers conferred by this section are to be exercisable at any place within that locality for a specified period not exceeding 24 hours.' Section 60(4) then confers stop and search powers for that period.

The Divisional Court held that Article 5 *had* been violated, because the deprivation of liberty was not justifiable either under Article 5(1)(b), which permits arrest or detention for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law, or under Article 5(1)(c), which permits arrest or detention for the purpose of bringing a person before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him or her from committing an offence or from fleeing after having done so. While detaining someone in order to prevent a breach of the peace that was immediately apprehended would not be a deprivation of liberty if it lasted for just a 'transitory period', any detention beyond that period would be. On the facts here, there had been no immediate apprehension of a breach of the peace by Ms Laporte and, even if there had been, the length of the detention on the coach back to London was 'wholly disproportionate'. There had therefore been a violation of Article 5. The Court of Appeal upheld the Divisional Court's decision but said that, because the detention on the coaches was not lawful under the common law (as it had not been shown that there were no less intrusive courses of action which the police could have taken), it was not necessary to decide if the detention was justified under Article 5. This is logical—since Article 5, in its references to 'lawful' detention, imports a state's domestic standards into its requirements—but not particularly conducive to certainty in the law. The judges said that they were prepared to leave the interpretation of Article 5 to the case that was pending concerning the policing of May Day 2001—*Austin v Metropolitan Police Commissioner*, which is discussed below. When *Laporte* reached the House of Lords, the five judges unanimously allowed the claimant's appeal based on Articles 10 and 11 of the European Convention. As the police had conceded that if the applicant won on those issues there was no point in the police's pursuing their appeal on the Article 5 point, the Lords did not deal with it. But nor did they express any disagreement with anything said on that point by the lower courts, so we can presume that they endorsed its correctness. All in all the case illustrates very well how the common law sits alongside the European Convention and supplements the protection it accords to some rights. Even if the police's actions had been otherwise justifiable under Articles 10(2) and 11(2), they would still have been unlawful under the common law because they were outside what that law allows the police to do when no breach of the peace is reasonably apprehended as imminent.

The decision in *Laporte* was a good day for human rights in the United Kingdom. It gave a welcome boost to the right to demonstrate. Fenwick notes that the application of a proportionality test to police powers is a welcome corrective[20] and Hickman, too, applauds its use in this context, particularly as it brings to the fore what alternative actions were open to the police which would not have violated human rights.[21] Unfortunately the more rights-based approach to public protest did not remain evident for very long.

The May Day 2001 case referred to by the Court of Appeal in *Laporte* was decided by a High Court judge three months later, in March 2005.[22] The issue was whether the

[20] Fenwick (2010b), 682.
[21] Hickman (2008), 703 and 713. And see generally Mead (2010) and Joint Committee (2009a) and (2009b).
[22] *Austin v Metropolitan Police Commissioner* [2005] EWHC 480, [2005] HRLR 647.

police in London were justified in 'kettling' protestors, that is, keeping them within a tight cordon at Oxford Circus so that they could let off steam before becoming exhausted and being allowed to disperse. Tugendhat J held that the police's action was lawful under the common law, being a reasonable measure taken in the reasonable belief that a breach of the peace was imminent. Moreover, although the claimants had been deprived of their liberty, this was covered by the exception created by Article 5(1)(c) of the Convention.[23] The Court of Appeal felt that the containment of the claimants within the police cordon did not amount to a deprivation of liberty but only to a restriction on movement, and so there was no necessity to look for any justification for the containment in the sub-paragraphs of Article 5(1).[24] The Law Lords endorsed the Court of Appeal's position, ruling unanimously that, even in relation to fundamental rights which appeared to have no limitation within the terms of the European Convention, the courts should be pragmatic, take full account of all the circumstances, and consider how the rights could be reconciled with the interests of public safety and the protection of public order.[25] Lords Walker and Neuberger cited the European Court's statement in *HM v Switzerland* to the effect that, when determining if there has been a deprivation of liberty, 'the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors such as the type, duration, effects, and manner of implementation of the measure in question'.[26]

The case then went to the European Court, where, to the surprise of many, the position of the House of Lords was affirmed as correct. In *Austin v UK*[27] the Grand Chamber held by 14 to three that there had been no deprivation of liberty at all, not that there had been a deprivation but that it was justified. The majority relied on the argument that Article 5 should not be interpreted 'in such a way as to incorporate the requirements of Protocol 4 in respect of States which have not ratified it',[28] or 'in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness'.[29] Furthermore, 'the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good'.[30] On the 'specific and exceptional' facts of this case, there was no deprivation of liberty because, although the coercive nature of the containment within the cordon, its duration, and its effect on the applicants, all suggested that they had been deprived of their liberty, the 'type' and 'manner of implementation' of the control measure in question suggested more strongly the contrary.[31] The three dissenting judges thought that the majority's

[23] Article 5(1)(c) covers, amongst other things, arrest or detention when it is reasonably considered necessary to prevent the commission of an offence.
[24] [2007] EWCA Civ 989, [2008] QB 660 (Sir Anthony Clarke MR, Judge P, and Lloyd LJ).
[25] *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 1 AC 564. See too Mead (2009).
[26] (2004) 38 EHRR 17, para 42.
[27] (2012) 55 EHRR 14.
[28] Ibid, para 55.
[29] Ibid, para 56.
[30] Ibid, para 59.
[31] Ibid, paras 64 and 65.

decision sent out a bad message to police authorities. It created a dangerous precedent by suggesting that, contrary to what the Grand Chamber had previously said in *A v UK* in the context of combating terrorism,[32] a measure does not amount to a deprivation of liberty if it is required for a legitimate public-interest purpose. To boot, the majority had given Article 5 a much broader interpretation in *Gillan and Quinton v UK*, where the degree of coercion was much lower than in *Austin*. One could add to this list of criticisms the point that the majority did not explain why the restraining of so many entirely innocent people for so long was *not* arbitrary.

It does appear that the European Court, while being very protective of Article 8 rights,[33] is less strict as regards Article 5 rights. The Justices of the UK Supreme Court may well ask themselves whether the human rights of the two individuals in *Gillan*, who were delayed for no more than 30 minutes, were more seriously breached than those of the hundreds of people in *Austin*, who were contained for several hours. Writing at a time before the European Court announced its decision in *Austin*, the Parliamentary Joint Committee expressed its reservations about the practice of 'kettling':

> [T]here does appear to be a lack of clarity about the level or seriousness of the violence that must have occurred before containment or 'kettling' can be resorted to. We are concerned about the apparent lack of opportunity for non-violent protestors to leave the contained or 'kettled' crowd, the adequacy of arrangements to ensure that the particularly vulnerable such as disabled people are identified and helped to leave the containment, and the general lack of information available to the protestors about how and where to leave.[34]

It must be doubted whether these reservations have been alleviated by the judgment of the European Court, which has conferred considerable flexibility on police forces to control crowds in a way which restricts movements for the common good. It is unlikely that the Supreme Court will take a different view unless and until the Strasbourg Court adjusts its position in a future case.

Administrative detention

One of the most controversial decisions taken by the House of Lords in the twentieth century was *Liversidge v Anderson*,[35] where by four to one the Law Lords held that the Home Secretary of the day, Sir John Anderson, was legally entitled to intern people whom he had 'reasonable cause to believe' were persons 'of hostile associations', without the courts having the ability to check whether there was any objective justification for such a belief. The power to intern had been conferred on the Home Secretary by the Defence of the Realm Regulations 1939,[36] which in turn had been issued under a power conferred by the Emergency Powers (Defence) Act 1939. While it is impossible to ignore the grim war-time atmosphere that was gripping the nation at the time of this

[32] (2009) 49 EHRR 29. See Ch 7 below, at 218–9.
[33] As we shall see in Ch 8 below.
[34] Joint Committee (2011b), para 15.
[35] [1942] AC 206. See Simpson (1992) and Neuberger (2009b).
[36] Regulation 18B.

decision, it is still highly regrettable that the majority of Law Lords did not do more to assert the rule of law. Only Lord Atkin propounded the view that the phrase 'reasonable cause' meant that judges could review the decision to see if there was indeed a reasonable ground underlying it. He expressed himself in words which are among the most stirring ever written by a senior UK judge:

> In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[37]

The majority in *Liversidge v Anderson*, led by Viscount Maugham (a former Lord Chancellor), thought that judges could review the exercise of the Home Secretary's discretion only if Parliament had expressly given them that power, including the power to examine (but not disclose) any material which was very sensitive from a security point of view.

We had to await the 1960s before witnessing a flowering of the courts' supervisory jurisdiction, led by a quartet of famous decisions by the House of Lords.[38] While the development of administrative law was seen at the time as an illustration of the real meaning of the rule of law, even though there were some prominent doubters,[39] few would have gone so far as to justify it on purely human rights grounds. Indeed, international human rights law came late in the day to the notion that everyone has a right to administrative justice.[40] Today, we can see more clearly that, when the concept of the rule of law is unpacked, it reveals the protection of human rights as a central supporting pillar of the whole edifice. In the context of administrative detention the human rights framework is now firmly in place, but it took some time for it to be constructed and fully accepted. The policy of internment in Northern Ireland, and the legal reaction in Britain to the events of 9/11, discussed in the next section, provide a hard lesson in this regard.

Administrative detention in Northern Ireland and after 9/11

The context within which administrative detention was first subjected to a human rights analysis was the conflict in Northern Ireland. The engagement of the House of Lords

[37] [1942] AC 206, 244.

[38] *Ridge v Baldwin* [1964] AC 40; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Anisminic Ltd v Foreign Compensation Commission* [1969] AC 147; see, generally, Craig (2009), 525–39, and Ch 2 above, at 33.

[39] See Griffith (1997), esp Ch 4. Griffith is also an opponent of Sir John Laws' attempts to constitutionalize rights (Griffith, 2000) and of the incorporation of the European Convention into domestic law (Griffith, 2001). He says that the last 100 years provide little evidence of human rights and the rule of law protecting the weak against the strong (Griffith, 2001, 61). For a response, see Sedley (2001).

[40] No mention is made of it in the Universal Declaration of Human Rights, the European Convention, or the International Covenant on Civil and Political Rights. It is, however, included in the South African Constitution 1996 (s 33(1) and (2)) and in the EU Charter of Fundamental Rights 2010 (Art 41(1) and (2)).

with the issue has been chronicled elsewhere, and from the early 1970s it was heavily influenced by the views of the European Commission and Court of Human Rights.[41] A few years after the European Convention came into force for the United Kingdom at an international level in 1953, the UK government notified the Secretary-General of the Council of Europe that it needed to derogate from Article 5 of the Convention in relation to administrative detention in Northern Ireland.[42] This notice was renewed several times (often to coincide with new spurts of terrorist activity in Northern Ireland), the confidence of the UK government having been raised in this regard by the European Court's acceptance of the comparable derogation notice issued by the government of the Republic of Ireland.[43] But the latter derogation was allowed to lapse in the early 1960s and the Republic of Ireland's government was then to the fore in arguing that the derogation in Northern Ireland should also be withdrawn. In the inter-state case of *Ireland v UK*,[44] however, the European Court accepted that there was a public emergency threatening the life of the nation in the United Kingdom and that the derogation notice issued in 1971 in relation to administrative detention in Northern Ireland was proportionate and non-discriminatory. The relevant legislation was amended in later years and eventually settled on the position that a person could be administratively detained—at the request of a UK government minister—for up to seven days; only then did the person have to be brought before a judge.[45] No court in the United Kingdom, including the House of Lords, saw anything illegal in this, and the derogation notice was accordingly withdrawn at Strasbourg in 1984.

Then, in *Brogan v UK*,[46] the European Court ruled that seven-day administrative detention was not permissible under Article 5, effectively holding that persons could be held in custody only for a maximum of four days before having to be brought before a judge.[47] The United Kingdom's immediate reaction was to re-impose its derogation notice, which in due course the European Court validated in *Brannigan v UK*.[48] The derogation remained in place until February 2001, nearly three years after the Belfast (Good Friday) Agreement. That is when the Terrorism Act 2000 came into force, which substituted a maximum period of four-day, police-authorized, detention for the previous seven-day, government-authorized, detention. But, in the wake of the terrorist attacks in the United States on 11 September 2001, Parliament enacted the Anti-terrorism, Crime and Security Act 2001, which, because it permitted the indefinite detention without trial of non-Britons who were reasonably suspected of involvement in terrorism, required a further derogation notice to be submitted to the Council of Europe. However, in a momentous decision taken in December 2004 (in what is referred to as the first *Belmarsh* case, analysed below), the House of Lords found the derogation notice to be

[41] Dickson (2010), 53–70 and Ch 6; also Dickson (2009a).
[42] This 1957 notice, and its successors, are set out in SACHR (1977), 103–7.
[43] *Lawless v Ireland* (1979–80) 1 EHRR 1.
[44] (1979–80) 2 EHRR 25.
[45] Prevention of Terrorism (Temporary Provisions) Act 1974, s 7(2). This was re-enacted several times.
[46] (1989) 11 EHRR 117.
[47] This is the same period as the UK government had introduced for persons arrested on reasonable suspicion of involvement in non-terrorist offences: Police and Criminal Evidence Act 1984, ss 41–44.
[48] (1993) 17 EHRR 539.

invalid, because it was disproportionate and discriminatory.[49] As a result, the government secured the enactment of the Prevention of Terrorism Act 2005, which introduced the mechanism known as control orders. As a result of the many legal disputes arising out of control orders, and the change of government in 2010, they were eventually replaced by 'terrorism prevention and investigation measures' (T-PIMs), issued under the Terrorism Prevention and Investigation Measures Act 2011.[50]

Looking back over the years since 9/11, how have the House of Lords and Supreme Court responded to challenges to preventative custody based on human rights grounds? If we are to believe commentators such as Ewing, Tomkins, Dyzenhaus, and Griffith, the top court has not performed at all well.[51] This is partly because, institutionally, it does not have the power to deliver real justice to people who are the victims of human rights abuses: it cannot order someone's release from custody if the custody is authorized by an Act of Parliament, it cannot make an award of substantial compensation if the tort of false imprisonment has not been committed, and it cannot devise some other kind of vindicatory remedy such as an apology from the state. But the top court has also disappointed some commentators because the judges who sit there are inevitably (in these commentators' eyes) conservative, pro-state, unwilling to intrude in matters best left to Parliament or the government, and strong advocates of the precautionary principle (which suggests that if steps are not taken to prevent A from doing X then it will become easier for B to do Y[52]). While it would be wrong to counter these complaints by saying that our top judges have done all that they possibly could to protect human rights in the context of the prevention of terrorism, it is surely a gross exaggeration to say that the judges have been useless or their actions 'futile'. As noted by Fenwick when reviewing a book by Ewing,[53] such reasoning is 'extreme', ignores some important rulings by the Lords (not least in *Laporte*[54]), and sets up a false choice between resorting to either judges or elected politicians as the protectors of human rights.[55] For Gearty, the first *Belmarsh* case was a key turning-point. Prior to then the record of the British courts was 'bleak indeed'. He added:

> What had been surprising [up to the *Belmarsh* case] had been the extent to which the senior judiciary had been willing to justify egregious attacks on civil liberties as sanctioned by, rather than an affront to, the Human Rights Act. There had not been conflict, with declarations of incompatibility aplenty and ongoing tension over judicial efforts to rein in executive excess. Instead, there had been the quiet of a code of human rights always anxious not only to see but also to lie down before the other point of view.[56]

[49] *A v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 2 AC 68. Nine judges sat in this case. Lord Walker was the only dissenting voice on this point.

[50] Walker and Horne (2012).

[51] Ewing (2010); Ewing and Gearty (1990); Tomkins (2011) and (2005); Dyzenhaus (2005); Griffith (2001).

[52] Feintuck (2005).

[53] Ewing (2010).

[54] Discussed at 162–3 above.

[55] Fenwick (2010b), esp at 686.

[56] Gearty (2005), 28. While he praises the Lords for their decision in the first *Belmarsh* case, he upbraids the Court of Appeal for its decisions in *Gillan* and the second *Belmarsh* case. Later the Lords upheld the former but reversed the latter. See too Shah (2005).

In the first *Belmarsh* case the House held, with one dissent, that it had not been shown that the government had misdirected itself in concluding that there was a public emergency threatening the life of the nation (one of the prerequisites for the issue of a derogation notice under Article 15 of the Convention). The only dissenter on this point was Lord Hoffmann, who made an impassioned plea for a more restrained approach to terrorist violence:

> I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation… Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community… The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.[57]

While one might have expected supporters of human rights to applaud this assertion of judicial activism,[58] some were reluctant to do so. This was partly because they remembered Lord Hoffmann adopting an apparently different stance towards government assessments of what was necessary to protect national security in *Secretary of State for the Home Department v Rehman*,[59] decided three years earlier. There Lord Hoffmann had stated that, while there is no difficulty in defining 'national security' as 'the security of the United Kingdom and its people', the question of whether something is 'in the interests of national security' is 'not a matter for judicial decision' but for the executive.[60] He did qualify this by giving three examples of respects in which the executive's area of responsibility should not be exaggerated: the courts could still check the factual basis for the executive's opinion, it could still decide that the opinion was one which no reasonable minister could have held, and it could still prevent the executive from responding to a threat to national security by violating the right not to be tortured or subjected to inhuman or degrading treatment.[61] Lords Clyde and Hutton expressly agreed with Lord Hoffmann in *Rehman* and the opinions of Lord Slynn and Lord Steyn are not at variance with it.[62]

Dyzenhaus jumped on this apparent inconsistency in Lord Hoffmann's position by claiming that Lord Hoffmann was equating human rights with the values of the common law constitution. Without actually quoting any relevant passage from the judge's opinion, Dyzenhaus went so far as to say it was 'subversive of the rule of law'. But he failed to point out that, even though Lord Hoffmann did not go on to consider whether, if there was an emergency threatening the life of the nation, the derogation complied with the other preconditions set out in Article 15 of the Convention, Lord Hoffmann's conclusion was based on the assumption that Article 5 *had* clearly been violated. Moreover, if Lord Hoffmann's judgment was subversive of the rule of law then the judgments of the other eight Law Lords, who refused to accept that they had any jurisdiction to challenge the

[57] [2005] 2 AC 68, [96]–[97]. See too Arden (2005), 615–6.
[58] Dickson (2005); Hickman (2005b).
[59] [2001] UKHL 47, [2003] 1 AC 153.
[60] Ibid, [50].
[61] Ibid, [54].
[62] See, in particular, ibid, [22] (per Lord Slynn) and [31] (per Lord Steyn).

government's assessment that there was an emergency threatening the life of the nation, must be considered even more so. It must also be remembered that what was centrally at issue in *Rehman* was whether a court could counter a government's position that when considering the national security of the United Kingdom it was entitled to take into account actions targeted at other states, a much narrower issue than what, in general, a court could take into account when considering the security of the United Kingdom.

Nevertheless, it is worth questioning whether Lord Hoffmann's preference for a common law rather than a Convention-based approach to the national security question is entirely justifiable. It presupposes that the common law has a commitment to human rights which at least equals, if it does not exceed, that demonstrated by the European Convention. As Poole observes, it is a judicial myth to suggest that 'the rights articulated by the Convention and the rights previously supported by the common law are to all intents and purposes the same'.[63] He goes on to express a position which also underpins this book's characterization of the attitude of our top court to human rights, grounded as it is in a 'common law' culture:

> There can be no doubt that the incorporation of the Convention involves, at the very least, a substantial change in judicial style. What we are witnessing, in effect, is the inter-meshing of a rationalist, rights-dominated legal framework with a legal system which operated, while staying largely true to its basic anti-rationalist mindset, a venerable but, by contemporary standards, rather flaccid jurisprudence of rights. To guide us through this period of transition, we need a judiciary fully aware of the gravity of the situation rather than one that tries to blind itself to the difficulties (and opportunities) that exist.[64]

Tierney, it is submitted, is closer to the mark when he exonerates the majority of their Lordships in the first *Belmarsh* case for their deference to the government's assessment of a public emergency but goes on to criticize Parliament for not playing a greater role in examining the post 9/11 legislation at the time it was being enacted.[65] It is left to Hickman to point out that, as well as proper parliamentary consideration of proposed legislation, it is appropriate for judges to apply 'the most anxious scrutiny' to derogating measures.[66] Like Zedner, Hickman warns against viewing the *Belmarsh* case as a new dawn: 'in several key aspects it also represents a disappointing defence of the UK's newly established human rights regime'.[67] It bears repeating, however, that in holding the derogation notice to be incompatible with the Convention the House was invalidating secondary legislation and putting down a clear marker that, as regards the right to liberty, UK law could not discriminate against people purely on the ground of their nationality.

[63] Poole (2005c), 538. He later refers to this as 'judicial sleight-of-hand' (ibid).

[64] Ibid, 539 (footnotes omitted). He refers, amongst others, to Ewing (2001), 108, (1999); Stevens (2002), 112–18; and Tubbs (2000).

[65] Tierney (2005).

[66] Hickman (2005b), 665, chides Lord Bingham for not acknowledging that the European Court (in *Handyside v UK* (1976) 1 EHRR 737) accepted that in Art 15 the term 'necessary' means, as in Art 2(2) on the right to life, 'indispensable'. According to Zedner (2005) 'it may be too soon to read [the first *Belmarsh* case] as a decisive paradigm shift in judicial activism' (526). She is surely correct.

[67] Ibid, 666. For the comment by Zedner, see n 66 above.

Lord Walker's dissent was based on his view that the derogating measures in question were not disproportionate, irrational or discriminatory. More particularly, they were proportionate because, following the approach adopted to the phrase 'strictly necessary' in Article 15 of the European Convention by the European Court of Human Rights in *Ireland v UK*,[68] they were in accordance with 'the precautionary principle'.[69] They were rational and non-discriminatory because there were sound grounds for treating British and non-British nationals differently in this context. Besides, the legislation was temporary in nature and only 17 individuals had been subjected to this form of detention in three years. He also deemed it relevant that the detention provisions were only one Part of the 2001 Act, 'most of whose provisions are aimed impartially at British nationals and non-nationals'.[70] The judgment is an honest and measured one, but it is surely unprogressive and unduly deferential to Parliament.

Control orders

As was predictable, when the control order regime began operating under the Prevention of Terrorism Act 2005 it soon gave rise to litigation. Since then the regime has been considered in four different cases in the Lords or Supreme Court. Several appeals were heard over a six-day period in 2007, leading to three separate sets of judgments.[71] The appellant in one of these cases returned to the Lords two years later complaining that he had still not received a fair hearing.[72]

In the first three cases, which together embraced nine appellants, the main question was whether the restrictions placed upon the controlees had been so extensive as to amount to a deprivation of liberty. In six of the nine appeals the Lords held (by three to two) that there had been an unlawful deprivation of liberty,[73] and in the remaining three they held that there had not.[74] In making their assessment the Law Lords took into account a wide range of factors, the most important of which was the length of time in each 24-hour period during which the controlee was not permitted to leave the flat in which he was required to live (all the applicants were males). It was suggested by Lord Brown that a curfew of more than 16 hours would be very hard indeed to reconcile with Article 5.[75] In all of their opinions the Law Lords looked for answers to the questions in case law of the European Court, but such was the wealth of authority, coupled with the

[68] (1978) 2 EHRR 25.

[69] [2005] 2 AC 68, [209].

[70] [2005] 2 AC 68, [207].

[71] *Secretary of State for the Home Dept v JJ* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Dept v MB and AF* [2007] UKHL 46, [2008] AC 440; *Secretary of State for the Home Dept v E* [2007] UKHL 47, [2008] AC 499. See Feldman (2008a); Forsyth (2008); Sandell (2008).

[72] *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. This case is discussed further at Ch 3 above, at 79, and Ch 7 below, at 220–1.

[73] The *JJ* case, n 71 above. Lord Bingham, Baroness Hale, and Lord Brown were in the majority; Lords Hoffmann and Carswell dissented.

[74] The *MB and AF*, and *E*, cases, n 71 above. In *MB and AF* the majority (Lord Hoffmann again dissenting) found a violation of Art 6 but thought the legislation could be 'read down' to make it compliant: see Ch 3 above, at 78–9, and Ch 7 below, at 220–1.

[75] In the *JJ* case, n 71 above, at [108]. He said that he was unrepentant for suggesting at what point curfews would, by virtue of their length, involve a deprivation of liberty.

relative paucity of established principle, that judges in the majority and minority were able to mine the same cases for dicta which supported different points of view.[76]

These appeals presented the House of Lords with a good opportunity to comment more generally on the government's policy of issuing control orders, a highly controversial topic. But, as could have been predicted, they chose not to make any remarks about the wisdom of the policy, limiting their statements to the technicalities of its implementation. Even the straightforward question as to whether the limitations imposed on the controlees restricted their movements or deprived them of their liberty was reduced to one concerning numbers of hours, access to facilities, and distance from relatives. Perhaps that is satisfactory: Parliament can be left to deal with the substance of policies while courts can consider the niceties of the application of the law. But laws can only be applied on a principled basis, and that demands some degree of analysis of the purpose behind the policy, the implications of adopting it, the reasons for not adopting alternative policies, and the impact of the policy on the rule of law. Sadly, we do not see any such analysis in the opinions of the five Law Lords who sat in these nine appeals.

Asylum and deportation

The issue of immigration has for long been a hot topic in the United Kingdom, even more so after the events of 9/11. A particular spotlight has been placed on immigrants who claim asylum. The dilemma for the immigration authorities is whether to allow such claimants to enter the country and live freely there while their claim is being considered or to keep them in detention when they first arrive so that, pending a relatively quick decision on their claim, they cannot become untraceable or get up to no good.

The House of Lords had to consider this problem in *R (Saadi) v Secretary of State for the Home Department*,[77] a case where the asylum claimant had not sought to enter the country by evading immigration controls. The Law Lords held that detaining the claimant was lawful. Lord Slynn, giving the only substantive opinion,[78] said that there was no arbitrariness in the system:

> I do not see that either the method of selection of these cases (are they suitable for speedy decision) or the objective (speedy decision) or the way in which people are held for a short period (ie short in relation to the procedures to be gone through) and in reasonable physical conditions even if involving compulsory detention can be said to be arbitrary or disproportionate.[79]

When the case later went to Strasbourg the Grand Chamber approved this conclusion, albeit by a majority of 11 v 6, but held that there had been a violation of Article 5(2)[80] in that Mr Saadi had not been told the reasons for his detention until 76 hours had elapsed

[76] *Guzzardi v Italy* (1980) 3 EHRR 333 was certainly in this category.
[77] [2002] UKHL 41, [2002] 1 WLR 3131. See, more generally, Chakrabarti (2005).
[78] With which Lords Nicholls, Mustill, Hutton, and Scott concurred.
[79] [2002] 1 WLR 3131, [45].
[80] Article 5(2) reads: 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'.

since his detention began.[81] As regards the need to avoid arbitrariness in this context the Court said:

> To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country';[82] and the length of the detention should not exceed that reasonably required for the purpose pursued.[83]

Buoyed by this affirmation of their approach to Article 5, the Law Lords no doubt felt they had got the measure of how it should be applied in a migration context. The Supreme Court Justices were no doubt further relieved when, in *Othman v UK*,[84] the case about the deportation to Jordan of the radical Islamic cleric Abu Qatada, the European Court held that sending him back to Jordan would not be incompatible with Article 5 because he was not at serious risk of suffering a 'flagrant' breach of the right to liberty in that country. Even if he was detained there for 50 days without charge, this would not be such a breach.[85] Clearly the European Court's toleration of restrictions on liberty rights outside of Europe is every bit as great as that of the United Kingdom's top court, although Strasbourg did go on to hold, contrary to the United Kingdom's top court, that the use at Abu Qatada's trial in Jordan of evidence obtained by torture (even from third parties) would amount to a flagrant violation of Article 6.

Confinement in mental hospitals

On at least seven occasions since the commencement of the Human Rights Act 1998, the United Kingdom's top court has been asked to rule on whether an aspect of the English system for compulsorily confining people who are mentally ill is compliant with Article 5. There have also been two decisions concerning the position of mentally ill persons more generally within the criminal justice system. Remarkably, in only one of these nine cases did the court find a violation of any part of Article 5.[86] Five of these post-Human Rights Act cases led to applications being lodged in Strasbourg, but none was successful on the merits. It would seem that when interpreting Article 5(1)(e) of the Convention—which authorizes the detention of persons of unsound mind—both the top domestic court and the European Court are not as insistent on adherence to strict standards as they are when interpreting Article 5(1)(c)—which authorizes the arrest or detention of persons reasonably suspected of committing a criminal offence.[87]

[81] (2008) 47 EHRR 17. A Chamber had come to the same conclusions by 4 v 3 on Art 5(1) and by 7 v 0 on Art 5(2): (2007) 44 EHRR 50.

[82] Citing *Amuur v France* (1996) 22 EHRR 533, para 43.

[83] (2008) 47 EHRR 17, para 74. This conclusion was reached despite urgings to the contrary by the UN High Commissioner for Refugees and several NGOs.

[84] (2012) 55 EHRR 1. See too Ch 5 above, at 147–9.

[85] Ibid, para 235, agreeing with Lord Phillips in *RB (Algeria) v Secretary of State for the Home Dept* [2009] UKHL 10, [2009] AC 110 [132].

[86] *R (H) v Secretary of State for the Home Dept* [2003] UKHL 59, [2004] 2 AC 252. See 177–8 below.

[87] On the European Court's attitudes see Reid (2012), paras 595–602.

Pre-Human Rights Act decisions

Just prior to the commencement of the Human Rights Act, the House of Lords was confronted with three separate challenges to the detention of mental patients, two of which failed in the top domestic court but were later successful in Strasbourg. The first, and most significant, was *R v Bournewood Community and Mental Health NHS Trust, ex parte L*.[88] An autistic and deeply mentally underdeveloped 48-year-old man had become very agitated at his day centre and was taken to a hospital where he was admitted as an informal patient (ie not compulsorily detained). He was not kept in a locked ward, but the consultant who admitted him was clear that he would have detained Mr L compulsorily if he had tried to leave the ward. The question for the Law Lords was whether Mr L had been the victim of the tort of false imprisonment. As a defence to the claim, the hospital relied on a provision in the 1983 Act, which read as follows:

> Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or mental nursing home in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or mental nursing home in pursuance of such arrangements after he has ceased to be so liable to be detained.[89]

The provision was identical to one in legislation which was replaced by the 1983 Act[90] and which had always been interpreted as allowing the hospitalization of patients who, although not having the capacity to consent, had displayed no objection to being hospitalized. The legal basis for the care and treatment then given to such hospitalized patients was said to be the common law doctrine of necessity. In the Court of Appeal, the judges were unimpressed by the hospital's arguments.[91] They cited authorities which seemed to show that it is statute and statute alone which authorizes a hospital to detain a mental patient[92] and they disagreed with textbooks, including one written by Brenda Hoggett (later Baroness Hale),[93] which suggested the contrary. No reference was made to the European Convention, but one of the authorities cited did mention Magna Carta.[94] On further appeal, however, the Lords reversed this decision and held in favour of the hospital.

In the appeal to the Lords, evidence was submitted as to the unfortunate practical consequences of the Court of Appeal's decision, which had been projected to lead to a rise in the number of mental patients formally detained on any one day in England

[88] [1999] 1 AC 458. See, generally, Fennell (2005).
[89] Section 131(1).
[90] Mental Health Act 1959, s 5(1).
[91] [1999] 1 AC 458, 461 (Lord Woolf MR, Phillips and Chadwick LJJ).
[92] Ibid, 470A–472H.
[93] *Mental Health Law* (4th edn, 1996), 9. The latest edition (the 5th) dates from 2010.
[94] In *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603C, Sir Thomas Bingham MR said: 'no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of the law. That is a fundamental constitutional principle, traceable back . . . to chapter 39 of Magna Carta 1215'.

and Wales from around 13,000 to around 35,000.[95] The Secretary of State for Health was allowed to intervene to argue that detention under the doctrine of necessity would not infringe Article 5.[96] Astonishingly, the Convention is nowhere mentioned in the Law Lords' opinions, even though the Human Rights Bill was making its way through Parliament at the time. What the House of Lords did in the *Bournewood* case was to apply the common law, not as a source for the protection of human rights but as a source for their violation. The majority even held that Mr L had not in fact been 'detained', so no justification for what had happened to him had to be provided.[97] The court saw the whole question as one arising in the law of torts, not as a human rights issue. The only concession to the rights dimension was made by Lord Steyn: having agreed with his colleagues that the doctrine of necessity provided legal justification for what had occurred in this case, he urged the government to proceed with its plans to reform mental health law so as to extend to informal patients the safeguards enshrined in the Mental Health Act 1983 for formal patients.[98]

The Lords' decision in *Bournewood* was then considered in Strasbourg, although, shamefully, more than six years elapsed between the two sets of judgments. In *HL v UK* the European Court found unanimously that there had been a breach of Articles 5(1) and 5(4) of the Convention, but it awarded no compensation for either violation.[99] As far as Strasbourg was concerned, the problem was not that the common law was too vague but that it did not provide sufficient safeguards against informal patients being arbitrarily deprived of their liberty. The Court was struck by the contrast between the extensive safeguards applicable to patients who were formally admitted under the Mental Health Act 1983 and 'the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted'.[100] It added:

> In particular and most obviously, the Court notes the lack of any formalized admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention.[101]

By approving a system whereby full control of the liberty of vulnerable incapacitated individuals was given to health care professionals, based only on the latter's own clinical assessments, the House of Lords was found to have deprived the individuals of safeguards which were designed to protect them against professional lapses.[102]

The reforms which Lord Steyn had called for in *Bournewood* did not materialize until the enactment of the Mental Health Act 2007, which amended the Mental Capacity Act

[95] [1999] 1 AC 458, 481F.
[96] Ibid, 477B.
[97] Lords Nolan and Steyn dissented on this point.
[98] [1999] 1 AC 458, 497E–H.
[99] (2004) 40 EHRR 32.
[100] Ibid, para 120.
[101] Ibid.
[102] Ibid, para 121.

2005 by adding new safeguards for informal patients.[103] In 2007 the Parliamentary Joint Committee on Human Rights admitted that filling 'the *Bournewood* gap' raised very complex issues and that it understood the government's wish to pursue an overarching reform of mental health law in one statute, but it was 'not persuaded that any benefits of administrative convenience, or future legal certainty, could outweigh the need to execute the judgment in *HL v UK*, with efficacy and speed'.[104] The Committee elsewhere criticized the reforms as being too complex and yet not far-reaching enough. It is likely that further questions concerning their compatibility with Convention rights, including Article 5, will come before the Supreme Court in the not too distant future.[105]

The two other pre-Human Rights Act challenges to mental health law were the Scottish cases of *Reid* and *K*. In *Reid v Secretary of State for Scotland*[106] the question was whether a patient who was suffering from a psychopathic disorder was entitled to be discharged from hospital if his or her condition was not capable of being alleviated by treatment. The Lords thought there was such a right to be discharged, but on the facts of this case they accepted the conclusion reached by the sheriff at first instance that the patient's condition was capable of being alleviated by medical treatment. The patient then applied to Strasbourg, where the European Court agreed that there was no breach of Article 5(1) but found a breach of Article 5(4), firstly because domestic law required the patient to prove why he or she should not be detained rather than requiring the state to prove why the patient should be detained, and secondly because there had been undue delays in processing Mr Reid's appeals against the sheriff's initial decision.[107] One of these delays was the seven months and three days which had elapsed between the setting down of the case for hearing by the House of Lords and the delivery of the House's decision rejecting the appeal.[108] Strasbourg's conclusion was a severe indictment of the lack of priority which domestic courts accorded to the plight of persons with mental difficulties, but the European Court did not express a view on whether it was a violation of Article 5 to keep a person in confinement even if his or her mental condition could not be treated.

The Scottish Executive was sufficiently perturbed by the outcome of *Reid* to ensure the enactment of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. This allowed persons convicted of criminal offences to be kept in detention even if they could not be treated for their mental disorder, provided this was necessary to protect the public from serious harm. The compatibility of the measure with Article 5 was brought before the Judicial Committee of the Privy Council as a devolution issue in *A v Scottish Ministers*,[109] and the five Law Lords who dealt with it unanimously agreed that there was no incompatibility and that therefore the legislation was within the Scottish Parliament's competence to make. Lord Hope stressed that under the European Convention it was a

[103] See the Mental Capacity Act 2005, s 4A and Sch A1.
[104] Joint Committee (2007a), para 108.
[105] For a full account of the new provisions, see Jones (2011), 1029–46.
[106] [1999] 2 AC 512.
[107] *Hutchison Reid v UK* (2003) 37 EHRR 9.
[108] Ibid, para 76. The Court cited in support *Rutten v The Netherlands* App No 32605/96, judgment of 24 July 2001.
[109] [2001] UKPC D3, 2002 SC (PC) 63.

matter for domestic law whether a person who is deprived of his or her liberty as a person of unsound mind should also receive treatment for his or her mental condition.[110]

In *K v Craig*[111] the Lords were asked whether two paragraphs in the Mental Health (Scotland) Act 1984 could be read together[112] in a way which allowed a community care order to be made that would provide a person with supervised compulsory treatment, even though one of the paragraphs, read literally, suggested that the appellant in this case could not be made the subject of such an order because she was already compulsorily detained in a hospital. On this occasion, again, the Lords came to a conclusion which facilitated compulsory treatment: they said that if the two paragraphs were read together they made it clear that Parliament's intention was to preserve the original hospital-based treatment provided to the patient until the alternative community-based treatment became available, even if the language used in one of the paragraphs was defective. Had this case, or indeed the *Reid* case, arisen at a time when the Human Rights Act 1998 applied, it is submitted that the decisions would have been the same: as we shall see when looking at *R (B) v Ashworth Hospital* below, Article 5 of the Convention says nothing about how a detained mentally ill patient person should be *treated*. Construing the Mental Health (Scotland) Act 1984 in the way that the House of Lords did in *K* would not have resulted in an interpretation violating the Convention, so there would have been no need to use either sections 3 or 4 of the Human Rights Act. In any event, Ms K did not apply to Strasbourg after losing in the Lords.

The compatibility of the UK mental health laws with the European Convention was therefore a very topical issue around the time of the commencement of the Human Rights. But it was ultimately left to the legislators to ensure that wrinkles in domestic law were ironed out—again the country's top judges cannot claim credit in that regard.

Post-Human Rights Act decisions

In subsequent years the top judges have not been much more sympathetic to challenges to mental health laws based on the right to liberty. In *R (Von Brandenburg) v East London and the City Mental Health NHS Trust*[113] the issue was whether a patient could be compulsorily admitted to hospital for treatment even though a mental health review tribunal had just ordered his or her discharge. The Law Lords again held that this was lawful, provided an approved social worker had formed the reasonable and bona fide opinion that there was information not known to the tribunal which put a significantly different complexion on the case compared with what had been presented to the tribunal. No application seems to have been lodged in Strasbourg by the losing applicant. And in *R (H) v Secretary of State for the Home Department*,[114] an appeal heard immediately after that in *Von Brandenburg*, there was a challenge to the position that a mental health review tribunal had no power (because of a House of Lords'

[110] Ibid, [29]. See too [58] (per Lord Clyde). Lords Slynn, Hutton, and Scott concurred with Lords Hope and Clyde.
[111] 1999 SC (HL) 1.
[112] Section 35B(8)(a) and (b).
[113] [2003] UKHL 58, [2004] 2 AC 280.
[114] [2003] UKHL 59, [2004] 2 AC 252.

precedent dating from 1987[115]) to reconsider its own decision to direct a conditional discharge of a patient. The Lords departed from their previous decision and held that there had been a breach of Article 5(4) because, although the tribunal had directed the claimant's conditional discharge in February 2000 (the condition being that he be supervised by a named forensic psychiatrist), this had not been implemented within a reasonable time.[116] However, they found there was no breach of Article 5(1)(e), since at no time had the patient been unlawfully detained. An application was then lodged in Strasbourg, but was declared inadmissible.[117] The European Court said that 'there can be no question of interpreting Article 5(1)(e) as requiring the applicant's discharge without the conditions necessary for protecting himself and the public or as imposing an absolute obligation on the authorities to ensure that the conditions are fulfilled'.[118] This is a strange and not particularly helpful statement, because if the state's obligation to fulfil the prescribed conditions is not absolute it would be useful to know to what extent it is actually binding. The European Court added that, as a failure to use best efforts to provide the treatment would be amenable to judicial review, it could not be argued that the patient's discharge into the community was being wilfully or arbitrarily blocked without proper grounds or excuse. But this too is not wholly satisfactory: judicial review proceedings permit challenges only to the procedures used in a decision-making process, not to the substantive merits of the decision.

No doubt in 2004 the Law Lords became well aware of the criticisms that had been voiced in Strasbourg in *HL v UK* concerning their approach in *Bournewood* to the interpretation of Article 5 in the context of the confinement of mental patients. The European Court's decision in that case may also have emboldened other litigants to pursue appeals to the House of Lords in the hope that a more Convention-compliant approach would thereafter be adopted. But none of the challenges subsequently raised were successful, and nor were any of the three follow-up applications to Strasbourg. To date the Supreme Court has not had to deal with any case raising mental health law issues connected with Article 5.

In *R (B) v Ashworth Hospital*[119] a patient who had been detained for treatment under the Mental Health Act 1983 was treated against his will for a mental disorder other than the particular disorder from which he was classified as suffering when the order to detain him was first obtained. The Court of Appeal, without needing to resort to the Human Rights Act 1998, ruled that the relevant provision of the Mental Health Act 1983, when examined within the Act as a whole, could not be construed as permitting such additional treatment.[120] It was perhaps odd that the hospital did not rely on the common law necessity test, which had been revitalized by the House in the *Bournewood* case and had not yet (ie by April 2003, when the Court of Appeal decided

[115] *R v Oxford Regional Mental Health Review Tribunal, ex parte Secretary of State for the Home Dept* [1988] AC 120.

[116] But the Lords did not award any compensation for this breach. Article 5(4) reads: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

[117] *IH v UK* App No 17111/04, decision of 21 June 2005.

[118] Ibid, under 'The Law'.

[119] [2005] UKHL 20, [2005] 2 AC 278.

[120] [2003] EWCA Civ 547, [2003] 1 WLR 1886 (Simon Brown, Dyson, and Scott Baker LJJ).

the *B* case) been refuted in Strasbourg. But in the Lords an alternative 'true construction' of the provision in the 1983 Act was preferred, one which focused more on the natural and ordinary meaning of the words used and which took account of the policy reality, namely that it was difficult to be precise when conducting a psychiatric diagnosis and that doctors needed to treat 'the whole patient'. The only substantive opinion delivered was that of Baroness Hale, with which the other four Law Lords concurred. It was Baroness Hale's first opportunity since being appointed to the House of Lords early in 2004 to write an opinion on an aspect of mental health law, a subject on which she was a leading academic expert and practitioner. She emphasized that the classification of mental disorders in the 1983 Act relates to criteria for the initial and continuing detention of patients, not to the treatment those patients receive while they are in detention. She ended her opinion by observing that there was nothing in the European Convention to require a different result in this case: treatment in a psychiatric hospital may violate Articles 3 or 8 of the Convention, but there is 'nothing in the Strasbourg jurisprudence which requires prior safeguards against the inappropriate treatment of patients who are lawfully detained under the Convention'.[121] There was no subsequent application to Strasbourg, presumably because the applicant's legal advisers could see nothing in the European Court's previous judgments to contradict Baroness Hale's assertion. The decision exposes once again what appears to be a lacuna in the Convention case law, namely, that patients who are lawfully confined in a mental hospital have few if any rights in relation to the treatment to which they are there subjected.

Furthermore, the House was also unsupportive of challenges to the procedures involved in detaining a mental patient or in allowing such a patient to sue the relevant authorities. Thus, in *Ward v Commissioner of Police for the Metropolis*[122] the Law Lords held that a warrant to detain a mentally ill person[123] was not invalid just because the individuals named in the warrant as those who would accompany the police officer who was executing it were not in fact the persons who did so. The Court of Appeal had held that the detention was unlawful,[124] but in the Lords' view there was no power to name any such companions at all in the warrant (the names were just 'surplusage'[125]) and therefore the non-appearance of those named persons, or the appearance of different persons, could not affect the legality of the warrant or its execution. Likewise, in *Seal v Chief Constable of South Wales Police*[126] the House held that the provision which subjected civil proceedings challenging a person's removal to a place of safety under the Mental Health Act 1983 to the prior condition that the leave of the High Court must first be obtained[127] was not in breach of Article 6 of the European Convention as an infringement of the right of access to a court, even though a failure to comply with the condition meant that the proceedings taken were a complete nullity. The requirement had been first imposed by the Mental Treatment Act 1930 as a reassurance to

[121] [2005] 2 AC 278, [37]. See too Hale (2004a).
[122] [2005] UKHL 32, [2006] 1 AC 23.
[123] Issued under the Mental Health Act 1983, s 135(1).
[124] [2003] EWCA Civ 1152, [2003] 1 WLR 2413.
[125] [2006] 1 AC 23, [20].
[126] [2007] UKHL 31, [2007] 1 WLR 1910.
[127] In particular, s 139(2).

professionals who care for the mentally ill.[128] However, Lord Woolf and Baroness Hale dissented. As explained elsewhere in this book,[129] their dissent was based on the point that right of access to a court is such a fundamental constitutional right that it cannot be removed by Parliament unless this is done so explicitly. This was a conclusion reached under the principles of the common law, but Baroness Hale stressed that she felt the European Convention compelled the same result, and cited the words of the European Court in *Ashingdane v UK* in support.[130] As it happened, Mr Seal did subsequently lodge an application in Strasbourg, but it was unsuccessful.[131] The European Court held that the aim pursued by the statutory provision was legitimate (namely, the protection of professionals, including police officers, who work with the mentally ill), that it was not targeted solely at persons of unsound mind but affected anyone wishing to complain about professionals' conduct, and that other causes of action remained available to the claimant even if the statutory claim under the Mental Health Act 1983 fell away. In other words, the restriction on bringing court proceedings was proportionate and non-discriminatory. Although the Court noted the provision in the UN Convention on the Rights of Persons with Disabilities 2006, which guarantees people with disabilities equal recognition before the law,[132] it did not refer to it in its assessment of what the European Convention required. The case of *Seal*, therefore, is one where, if just one of the majority in the Lords had sided with Lord Woolf and Baroness Hale, the common law could have gone beyond the European Convention in protecting the right of access to justice of mentally disabled people. But that was not to be.

A further decision on a procedural matter is *R (H) v Secretary of State for the Department of Health*,[133] where the House, reversing the Court of Appeal, which had issued two declarations of incompatibility in relation to separate provisions of the 1983 Act,[134] held that there was no violation of Article 5(4) in the fact that the Act does not permit a person who lacks mental capacity to apply to a mental health review tribunal him- or herself and does not provide a right of review at reasonable intervals to the nearest relative of a patient in cases where an 'acting nearest relative' (usually a local authority) has been appointed. The House, whose other four Law Lords simply concurred with the lead opinion of Baroness Hale, held that the relevant provisions in the 1983 Act could be read in such a way as to comply with Article 5(4). Baroness Hale said there was no Strasbourg case law which implies into Article 5(4) the requirement of a judicial review in every case where a patient is unable to make his or her own application,[135] but she observed that the Code of Practice in England and Wales required hospital managers, in effect, to make the patient's rights practical and effective.[136]

[128] Section 16.
[129] See Ch 2 above, at 29. See more generally Ch 7 below, at 196–202.
[130] (1985) 7 EHRR 528. Lord Woolf confined his opinion to the common law.
[131] *Seal v UK* (2012) 54 EHRR 6.
[132] Article 12. This was relied upon in particular by the Equality and Human Rights Commission, which was allowed to intervene in the case: ibid, para 73. The United Kingdom ratified the UN Convention on 8 June 2009.
[133] [2005] UKHL 60, [2006] 1 AC 441. See too Ch 3 above, at 77.
[134] [2004] EWCA Civ 1609, [2005] 1 WLR 1209.
[135] [2006] 1 AC 441, [24].
[136] Ibid, [25].

As regards reviews in situations where 'acting nearest relatives' had been appointed, mechanisms did exist to allow them to take place (eg through the Secretary of State referring the matter to a mental health review tribunal[137]). Baroness Hale admitted that in some cases these mechanisms will not be invoked, but then the violation would be a result of the fault of the relevant authorities, not of an inherent incompatibility in the legislation.[138]

The Law Lords were again split in *R (Munjaz) v Mersey Care NHS Trust*,[139] a case about a Health Trust's written policy governing the seclusion of patients, already alluded to in Chapter 5. The Court of Appeal, in a judgment delivered by Hale LJ, as she then was, held that the seclusion policy was in breach of Articles 3 and 8 of the European Convention, but not Article 5,[140] but the House reversed the conclusion on Articles 3 and 8.[141] The majority ruled that the policy was consistent with domestic law because, although it did not require the frequency of reviews proposed by the relevant Code of Practice issued by the Secretary of State, that Code was not binding law.[142] Lord Bingham noted that the approach of the European Court to the concept of 'residual liberty' (ie the liberty which remains to a person once he or she has been lawfully deprived of their liberty for some particular reason) is different from that prevailing under the Canadian Charter of Rights and Freedoms:[143] the European Court deals with the issue as a matter falling within the ambit of Articles 3 or 8, whereas the Canadian courts still treat it as an issue of liberty.[144] Lord Steyn, on the other hand, thought that the European Convention did protect the concept of 'residual liberty' and that 'a substantial period of unnecessary seclusion of a mentally disordered patient, involving total deprivation of any residual liberty that the patient may have within the hospital, is capable of amounting to an unjustified deprivation of liberty'.[145] On this point Lord Bingham was proved correct, because when Mr Munjaz took his case to Strasbourg he lost on all grounds.[146]

The House of Lords has on many occasions considered the relevance of mental illness to criminal law more generally. Often this has occurred in the context of sentencing or of available defences. Two post-Human Rights Act decisions merit a mention in this regard. In *R v Drew*[147] the House could find nothing contrary to the European Convention in the statutory imposition of an automatic life sentence on a mentally ill person who had committed a second serious offence.[148] The man in question then applied to the European Court of Human Rights, alleging a violation of Article 3 in that the court had been required to sentence him to life imprisonment despite the fact that

[137] Under the Mental Health Act 1983, s 67(1).
[138] [2006] 1 AC 441, [32].
[139] [2005] UKHL 58, [2006] 2 AC 148.
[140] [2003] EWCA Civ 1036, [2004] QB 395 (Lord Phillips MR, Hale and Latham LJJ).
[141] For more on the Art 3 point, see Ch 5 above, at 156.
[142] Though it was issued under the Mental Health Act 1983, s 118. It proposed reviews of a patient's seclusion every two hours by two nurses and every four hours by a doctor.
[143] As interpreted by the Supreme Court of Canada in *Miller v The Queen* (1985) 24 DLR (4th), 9.
[144] [2006] 2 AC 148, [30]; see too [84]–[86] (per Lord Hope).
[145] Ibid, [43]. He cited dicta in *Bollan v UK* App No 42117/98, decision of 4 May 2000. Lord Hope referred to this admissibility decision too, but drew the opposite conclusion from it.
[146] *Munjaz v UK* App No 2913/06, judgment of 17 July 2012.
[147] [2003] UKHL 25, [2003] 1 WLR 1213.
[148] Under the Powers of Criminal Courts (Sentencing) Act 2000, s 109.

he was suffering from a mental illness and needed to continue his hospital treatment. But the European Court held that the applicant's suffering—which consisted of being held in a prison medical wing for eight days without access to effective medication—did not reach the threshold required for a breach of Article 3.[149] It distinguished the facts from those in *Keenan v UK*,[150] where a serious disciplinary punishment involving segregation and additional detention, without any effective monitoring or psychiatric care, had been imposed on a mentally ill prisoner who was known to be a suicide risk. It is interesting that in *Drew* no complaint was made under Article 5 of the Convention, no doubt because it is established law that the European Court will not interfere with sentencing decisions unless they are so severe as to be in breach of Article 3.

Finally, in *R v G*,[151] the House ruled that mental illness (coupled with a non-terrorist purpose behind the collecting of information, namely the annoyance of prison staff) was not capable of amounting to a 'reasonable excuse' for someone who was charged with collecting information for terrorist purposes.[152] Again an application to the European Court of Human Rights was declared inadmissible.[153] The applicant alleged that section 58 of the Terrorism Act 2000 was so vaguely worded that it violated Article 7 of the Convention: there was no means of knowing whether one had a 'reasonable excuse' for possessing the proscribed information because the issue seemed to be entirely a matter for the jury's subjective view of what was reasonable.[154] He also complained that his conviction was a disproportionate interference with his right to freedom of expression under Article 10 of the Convention. The European Court could not agree that the House of Lords' ruling had left the law too vague, even within the approach to Article 7 which the Grand Chamber had recently laid down in *Kononov v Latvia*.[155] Any uncertainty would be considerably lessened by the fact that juries would have the benefit of full submissions from prosecution and defence counsel, as well as directions from the judge in his or her summing up. The House of Lords itself had given clear directions concerning the factors which a trial judge could ask a jury to take into account when considering the issue of 'reasonable excuse'.[156]

It may just be that litigation by or on behalf of persons with mental illness is more likely to reach domestic courts, and the top court in particular, but it does seem to be the case that comparatively few of the complaints brought to the courts on human rights grounds are successful. Lawyers are, of course, always pushing the envelope when it comes to human rights claims, so it is natural to expect many of them to fail. The Supreme Court is fortunate, moreover, to have more than one Justice who is

[149] *Drew v UK* App No 35679/03, decision of 7 March 2006.
[150] (2001) 33 EHRR 38.
[151] [2009] UKHL 13, [2010] 1 AC 43.
[152] Under the Terrorism Act 2000, s 58(3).
[153] *Jobe v UK* App No 48279/09, decision of 14 June 2011.
[154] Article 7(1) begins thus: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'.
[155] (2011) 52 EHRR 21. At para 85 the Grand Chamber said: '…an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision—and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice—what acts and omissions will make him criminally liable'.
[156] *Jobe v UK*, n 153 above, 'The Law, A'.

particularly well versed in the field. One is nevertheless left with a feeling, even after examining the record of the European Court in this area, that in general persons with mental illness do not get as much from the European Convention as they deserve. There remains scope for the Supreme Court to interpret domestic law more generously, *pace* the *Ullah* principle.

Custody and imprisonment

Even after a person has been lawfully taken into custody, he or she retains the right to be released if there is no longer any lawful excuse for the detention. But, as already mentioned,[157] the European Court of Human Rights takes the view that, once a person has been lawfully imprisoned following the sentence of a court, he or she cannot thereafter raise a complaint under Article 5 in relation to the treatment experienced during that imprisonment. Any such complaints have to be considered under other provisions, such as Articles 3, 6, 7, 14, or Article 1 of Protocol No 1. As we shall see, this has not prevented prisoner-appellants in the United Kingdom's top court from raising right to liberty issues in an indirect manner.

R (Al-Hasan) v Secretary of State for the Home Department,[158] which was decided under pre-Human Rights Act law, is one such case. Two prisoners had been found guilty of breaches of prison discipline after they had refused to obey a prison officer's order to squat in order to allow a physical examination to be made of their private parts. As punishment for these breaches, they were deprived of certain privileges and one was given two additional days' imprisonment and 10 days' confinement in his cell. The prisoners argued that the adjudication was procedurally unfair because it had been conducted by the deputy governor of the prison, who had been present when the governor approved the order requiring them to squat. Although the High Court and Court of Appeal had each thrown out the complaint,[159] the House of Lords unanimously upheld a further appeal. It applied the common law's test on bias:[160] a fair-minded and informed observer would have thought it a real possibility that the deputy governor would have been predisposed to decide the dispute in a certain way. Although Strasbourg's case law on Article 5 was not taken into account, their Lordships considered Strasbourg case law on Article 6. In a recognition that the common law had already been influenced by Convention law, Lord Rodger said: 'the decisions of the European Court of Human rights, on the significance of an adjudicator's prior involvement in the subject of the dispute which he has to decide, may be helpful in formulating the approach of the common law in a case like the present'. And Lord Brown, who gave the leading opinion in *Hasan*, observed that in an earlier Scottish appeal[161] the

[157] See 160 and 181 above.

[158] [2005] UKHL 13, [2005] 1 WLR 688. This appeal was heard alongside that in *R (Greenfield) v Secretary of State for the Home Dept* [2005] UKHL 14, [2005] 1 WLR 673, on which see Ch 3 above, at 91. The bench comprised Lord Bingham, Lord Rodger, Baroness Hale, Lord Carswell, and Lord Brown.

[159] [2001] EWHC Admin 110, [2001] HRLR 706; [2001] EWCA Civ 1224, [2002] 1 WLR 545.

[160] Recently laid out in two other decisions by the House: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 and *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856.

[161] *Davidson v Scottish Ministers* [2004] UKHL 34, 2005 SC (HL) 7.

House had already sought to ensure that the common law test on bias was compatible with the European Court's test. This is a good example of the country's top judges using Strasbourg jurisprudence to develop the common law of human rights.

On two occasions the House of Lords had to consider Article 5 in relation to persons who were in custody awaiting trial. In the first, *R (Wardle) v Crown Court at Leeds*,[162] Article 5 was invoked by a defendant who, having been detained on murder charges, was then charged with manslaughter, whereupon a new 70-day custody time limit began to run for the purposes of the Prosecution of Offences (Custody Time Limits) Regulations 1987.[163] He challenged the legality of his custody period being thus extended, but he lost in the Lords. The facts had occurred prior to the commencement of the Human Rights Act, but on the assumption that it nevertheless applied the majority held there would have been no incompatibility with Article 5.[164] When Mr Wardle then took his claim to Strasbourg, his application was declared inadmissible.[165]

The second case concerned the right to bail for persons in custody. While there is a right to bail unless the prosecution can show good cause for its refusal, in *R (O) v Crown Court at Harrow*,[166] according to one piece of legislation the suspect was entitled to bail only if there were exceptional circumstances justifying it,[167] while according to another he should have been granted bail because the prosecution had not acted with due diligence and expedition.[168] In finding that bail could be denied in these circumstances, the Lords found that there was authority from the European Court of Human Rights for holding that a lack of due diligence causing delay did not necessarily mean that there was a violation of Article 5(3) of the Convention.[169] Again, a subsequent complaint to Strasbourg was declared inadmissible.[170]

As regards sentences per se, the House was asked to rule in *R v Lichniak* that the mandatory life sentence for murder, which has to be imposed under the Murder (Abolition of Death Penalty) Act 1965,[171] is incompatible with both Articles 3 and 5(1) of the European Convention in situations where the trial judge concludes that the convicted person would pose no risk to the public on release.[172] But again, this time in a unanimous seven-judge decision, their Lordships did not think there was any breach of the Convention. Amongst other authorities, they relied on the judgment of the European

[162] [2001] UKHL 12, [2002] 1 AC 754.

[163] SI 1987/299, reg 4(4).

[164] Lords Slynn, Hope, and Clyde were in the majority; Lords Nicholls and Scott dissented. Lord Scott suggested that s 3 of the Human Rights Act 1998 compelled the Regulations to be interpreted in a way which ensures no possibility of a violation of Convention rights: [132]–[135].

[165] *Wardle v UK* App No 72219/01, 27 March 2003.

[166] [2006] UKHL 42, [2006] 3 All ER 1157. This time Lord Nicholls agreed with his colleagues.

[167] Criminal Justice and Public Order Act 1994, s 25.

[168] Prosecution of Offences Act 1985, s 22(3)(b).

[169] Citing *Contrada v Italy* App No 27143/95, judgment of 24 August 1998; *Grisez v Belgium* (2003) 36 EHRR 48.

[170] *O'Dowd v UK* App No 7390/07, 21 September 2010.

[171] Section 1(1).

[172] [2002] UKHL 47, [2003] 1 AC 903. There were two appeals in this case, which was heard alongside *R (Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2003] 1 AC 837. See Ch 3 above, at 73–4.

Court in *V v UK*,[173] where there was an implicit recognition that indeterminate sentences do not constitute arbitrary and disproportionate punishment.[174] One of the appellants in *Lichniak* later applied to Strasbourg, but it was struck out after he withdrew the claim.[175]

Early release from prison

There have been several cases in which the top court has had to consider whether Article 5 has been violated in the application of the parole process. In *R (Giles) v Parole Board*[176] the Law Lords held that when, in order to protect the public from serious harm,[177] a person is sentenced to a period of imprisonment beyond that which is commensurate with the seriousness of his or her offence, he or she is not entitled to a review of the detention in accordance with Article 5(4) of the Convention. This is because the review required by Article 5(4) is deemed to be incorporated in the original sentence and does not have to be repeated.

Five years later the House came to a similar conclusion in *R (Walker) v Secretary of State for the Home Department*.[178] The three appellants in that case had all been given indeterminate sentences for public protection (IPPs),[179] which permitted their release after the expiry of their 'tariff' period provided they could demonstrate to the Parole Board that they were no longer a danger to the public. Their problem was that the Home Secretary had failed to put in place a system of courses which might enable them to demonstrate that it would be safe to release them. This was a test case, with the position of hundreds of other prisoners depending on the outcome. The Law Lords held that there was nothing unlawful about the continuing detention of the prisoners, even though the Home Secretary had admitted, after litigation, that he had failed to comply with his public law duty to put such a system in place.[180] The detention was not illegal under the common law, Article 5(1) of the Convention would not be breached unless the delay in providing the required system continued for years rather than months,[181] and Article 5(4) was not even engaged by the delay. The leading judgments were delivered by Lord Brown and Lord Judge CJ, both of whom took refuge in the principle laid down by the European Court whereby a decision not to release a prisoner is not inconsistent with Article 5 provided it is connected with the objectives of the legislature and court.[182]

On this occasion the appellants continued their fight by lodging applications in Strasbourg and in 2012 they won their cases.[183] The European Court held that, although IPPs could be justified under Article 5(1), there had to be a real opportunity for the

[173] (2000) 30 EHRR 121. This is the case involving Jon Venables, the 10-year-old convicted of murdering Jamie Bulger in 1993.
[174] Ibid, [17] (per Lord Bingham), [27] (per Lord Hutton).
[175] Application No 17413/03, decision of 25 August 2005.
[176] [2003] UKHL 42, [2004] 1 AC 1.
[177] Under the Criminal Justice Act 1991, s 2(2)(b).
[178] [2009] UKHL 22, [2010] 1 AC 553.
[179] Under the Criminal Justice Act 2003, s 225.
[180] [2008] EWCA Civ 30, [2008] 1 WLR 1977 (Lord Phillips CJ, Dyson and Toulson LJJ). The Home Secretary did not appeal against this finding.
[181] [2010] 1 AC 553, [51] (per Lord Brown).
[182] See *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443.
[183] *James, Wells and Lee v UK* App Nos 25119/09, 57715/09, and 57877/09, judgment of 18 September 2012.

prisoners to show that they had been rehabilitated, otherwise the detention would become arbitrary. Delays in granting access to rehabilitation courses were acceptable only if they were reasonable, and here they were not. One of the appellants, for example, had had to wait nearly three years after his nine-month tariff period had expired before he could access any relevant courses. The European Court did not need to consider Article 5(4) because it raised issues which had already been examined in relation to Article 5(1). Each of the appellants was awarded compensation.[184] This case illustrates even more so than *Gillan*[185] the wide gap that appears to exist between the position of the United Kingdom's top court concerning the reach of Article 5 and the position of the Strasbourg Court. Not one of the five Law Lords could see any violation of Article 5 in the three appeals, yet all seven judges in the European Court (including the UK judge) saw it fairly easily. The Lords' judgments, while deploring the Home Secretary's failure to put appropriate courses in place for prisoners, did not give pride of place to the right to liberty of the prisoners, many of whom had had to languish in prison for years just because they were unable to demonstrate, through no fault of their own, that they were no longer a danger to the public.

In *R (Clift) v Secretary of State for the Home Department* complaints were raised in three appeals that the system for allowing the early release of prisoners was improperly discriminatory and therefore in breach of Article 5 read in conjunction with Article 14.[186] In all three appeals the claim to early release was found to fall 'within the ambit' of Article 5, which had the welcome effect of extending the reach of that provision, but, as noted elsewhere,[187] the complaint was still unsuccessful in two of the appeals and upheld only in the third. The House found that distinguishing between prisoners on the basis of their length of sentence, or whether it was determinate or not, was not contrary to human rights law,[188] but distinguishing between them on the basis of their national origin was contrary to that law. The relevant provisions in the Criminal Justice Act 1991 were declared to be incompatible with Article 14, read with Article 5. The incompatibility was subsequently remedied on a temporary basis, by the introduction of an administrative process to ensure that the Secretary of State would treat the recommendation of the Parole Board in respect of all affected prisoners as binding. The law was then changed more permanently by the insertion of a clause in what was to become the Criminal Justice and Immigration Act 2008.[189] The Parliamentary Joint Committee on Human Rights commended the government for acting in such a simple and speedy manner to remedy the incompatibility identified by the top court.[190]

Meanwhile, one of the unsuccessful appellants, Mr Clift, took his case to the European Court of Human Rights, and in 2010 was successful.[191] The Chamber held unanimously that there was no objective justification for the difference in treatment displayed by

[184] €3,000, €6,200, and €8,000.
[185] See 160–1 above.
[186] [2006] UKHL 54, [2007] 1 AC 484. See Padfield (2007).
[187] Chapter 3 above, at 74–5 and 82.
[188] Citing *Gerger v Turkey* App No 24919/94, judgment of 8 July 1999.
[189] Section 27.
[190] Joint Committee (2008), para 107.
[191] *Clift v UK* App No 7205/07, judgment of 13 July 2010.

the release system in England and Wales, especially since life sentence prisoners were now treated in the same way as prisoners serving determinate sentences of less than 15 years, leaving prisoners serving determinate sentences of more than 15 years in a worse position than potentially even more dangerous prisoners. Those serving a sentence of more than 15 years had to secure the approval of the Home Secretary for their release, as well as a positive recommendation from the Parole Board. The case of *Gerger v Turkey* was held by the European Court not to be as conclusive of the issue as the House of Lords had assumed,[192] and the criticism by Lord Bingham of the anomaly in English law was endorsed.[193] In line with the House's view in *Clift* about the differences between determinate and indeterminate sentences, the House held in a comparable case just two years later, *R (Black) v Secretary of State for Justice*,[194] that it was compatible with Article 5(4) of the Convention for the Home Secretary to have the power to reject a Parole Board recommendation that a prisoner serving a determinate sentence of more than 15 years should be released. This was because the House wished to follow the European Court's case-law, which distinguished between determinate and indeterminate sentences on this issue. It would have been open to the House to interpret Article 5(4) more strictly at the national level, but in furtherance of the *Ullah* principle it chose not to do so, even though all four judges in the majority believed that the Home Secretary's power was indefensibly anomalous and should be relinquished. As in the *Walker* case above, there was a timidity here which was not required. The result in *Black* is surely thrown into question by the ruling of the European Court in *Clift*.

In *R (Roberts) v Parole Board*[195] the Parole Board had withheld material relevant to the appellant's parole review from the appellant's legal representatives and had instead disclosed it to a specially appointed advocate, who, albeit in the absence of the appellant and his legal representatives, was able to represent the appellant at a closed hearing before the Parole Board. Three of their Lordships (Lords Woolf, Rodger, and Carswell) held that this procedure was compatible with Article 5, but Lords Bingham and Steyn strongly dissented. The conservative wing of the top court won out here; one could easily imagine the decision going the other way had the composition of the bench been different.[196]

There have been two cases dealt with by the top court concerning the rights of prisoners who have been recalled to prison after being released on licence. In the first, *R (Smith) v Parole Board*,[197] the question was whether the Parole Board had breached the rights of two recalled prisoners who were denied an oral hearing by the Parole Board when it was considering whether to revoke their licences. The Lords held that there was no breach of Article 5(1) or 5(4) (or indeed of Article 6(1)), but that there was a breach of the common law duty of procedural fairness—an unusual example of national human rights standards in the United Kingdom being found to be higher

[192] Ibid, para 61. See note 188 above.
[193] Ibid, para 77.
[194] [2009] UKHL 1, [2009] AC 949. Lord Phillips dissented.
[195] [2005] UKHL 45, [2005] 2 AC 738.
[196] See Dickson (2011b), 292–3.
[197] [2005] UKHL 1, [2005] 1 WLR 350 (Lords Bingham, Slynn, Hope, Walker, and Carswell).

than the international standards, and an approach to the development of human rights law which this book applauds and wishes would occur more frequently. The common law has the potential to contribute greatly to the protection of human rights in the United Kingdom and no institution is better placed to ensure that this happens than the Supreme Court. In a Northern Irish appeal to the Lords, *In re D*,[198] the applicant had been recalled to prison on suspicion of committing child abuse after his release from prison for the crime of murder. He argued that something stronger than proof of his guilt 'on the balance of probabilities' had to be shown before he could be re-imprisoned. But the House disagreed, and it also held that the delay between his return to prison in 1997 and the determination of his position in 2005 by the Life Sentence Review Commissioners—Northern Ireland's equivalent at that time to the Parole Board in England and Wales—was not a breach of his right under Article 5(4) to a speedy decision on the lawfulness of his detention. If ever there was a case which shows that the European Convention is *not* 'a paedophile's charter', this is it. While the standard of proof decision may be understandable, given the conditions of the applicant's release on licence,[199] there can surely be no justification for making him wait more than eight years to have the legality of that further imprisonment determined.

We can see from this quick survey of the House of Lords' engagement with Article 5 in prisoner cases (there are not yet any Supreme Court decisions on the provision) that the top court has a relatively limited approach to the content of the right to liberty. It has not been prepared to go beyond the Strasbourg jurisprudence in situations where it might have done, and it has only rarely chosen to develop the common law's standards in a way which exceeds the Convention standards. In addition, it has itself fallen short of what the European Court eventually held should be the appropriate standard in particular contexts.[200]

Conclusion

The United Kingdom's top court has engaged on many occasions with Article 5 of the European Convention and has not always found it easy to know what the European Court's position would be on a particular issue. It has had to be guided, or corrected, by seminal European Court decisions such as *Brogan v UK* and *Gillan and Quinton v UK*, while in areas such as the policing of crowds or the confinement of people with mental illnesses the domestic approach has been validated in Strasbourg. A sign of the UK government's nervousness regarding the right to liberty is the immediate reaction provoked by a judge's finding that, when the police, having arrested someone for questioning, then bailed him with a view to calling him back to the police station for further questioning at a later date, the period of bail did not interrupt the 36-hour period which is available to the police to conduct such questioning.[201] Rather than let the matter be decided by the Supreme Court, with which an application for permission

[198] [2008] UKHL 33, [2008] 1 WLR 1499.

[199] The Court of Appeal in Northern Ireland had required a higher standard of proof: [2007] NICA 33.

[200] Notably, release schemes for convicted prisoners: see *James, Well and Lee v UK* and *Clift v UK*, nn 183 and 191 above.

[201] Under the Police and Criminal Evidence Act 1984, ss 41(1) and 42(1).

to appeal had already been lodged, the government rushed a Bill through Parliament to remove any ambiguity from the legislation.[202] The whole episode shows the sensitivities around depriving someone of their liberty by taking them to a police station. Neither the UK top court nor the UK government seems quite as concerned to protect the right to liberty in other contexts, such as when stop and search powers are exercised, when measures are taken to prevent terrorist activity (the Lords' decision in the first *Belmarsh* case is an obvious exception to this), when vulnerable people such as those with mental illnesses are restricted in their movements, or when the rights of prisoners are at issue. Opportunities to develop national law at a faster pace than that demanded by Strasbourg have been missed.

[202] Police (Detention and Bail) Act 2011. In Northern Ireland the Divisional Court disagreed with the English courts' view, so no amending legislation has been required there: *In re Connelly's Application* [2011] NIQB 62.

7

The Right to a Fair Trial

Introduction

Trying cases is the core activity of judges. Their basic function is to ensure that parties to court proceedings receive a fair hearing and a just decision. They are appointed to the role partly because they have been able to demonstrate that they know the existing law very well and are able to apply it objectively to the facts which they find (or assume) to exist in the cases brought before them. It is little wonder, then, that the House of Lords and Supreme Court have had much to say about what constitutes a fair trial in the United Kingdom.[1] To date there have been more than 50 post-Human Rights Act cases in which those courts have ruled on whether Article 6 of the European Convention has been violated. Much more frequently than not, they have concluded that there has been no violation. In fact in only six cases (including two in which a declaration of incompatibility was issued) has a violation been found.[2]

In this chapter the analysis will begin with a consideration of the top court's approach to the right to a fair trial *before* the Human Rights Act came into force—what relevant common law principles did it develop and how did it approach legislation dealing with the area? The chapter then examines the attitude of the court to the reach of Article 6—when is it engaged, to what extent does it guarantee access to justice, what does it mean by the term 'civil rights'? Next, the way in which the Law Lords and Justices have applied Article 6 in a range of different contexts is set out and the consequences of a violation being found are considered. Throughout the chapter, the focus is more on criminal cases than civil cases. A running theme is that the common law could be made to do more to ensure the adherence to fairness during the entirety of the trial process.

The right to a fair trial before the Human Rights Act

The principal implements in the common law's toolkit for ensuring fairness in trials are the doctrine of abuse of process and the judicial discretion to exclude evidence when its probative value is outweighed by the unfairness its admission would entail. The former doctrine has a long pedigree, but its parameters are still rather vague. One leading textbook describes it as 'reserved for the most deplorable behaviour',[3] and the authors

[1] Wadham et al (2011), 160–88; Clayton and Tomlinson (2009a), paras 11.06–11.318; Bailey (2009).

[2] The two cases in which declarations were issued are *R (Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2003] 1 AC 837 and *R (Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] AC 739. The other four cases are *R (Hammond) v Secretary of State for the Home Dept* [2005] UKHL 69, [2006] 1 AC 603; *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 AC 221; *Secretary of State for the Home Dept v MB and AF* [2007] UKHL 46, [2008] AC 440; and *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128.

[3] Sanders et al (2010), 708.

point up apparent inconsistencies in its application. In the present account attention is focused on the comments of the House of Lords on the subject.

The abuse of process doctrine

One outstanding example of the application of the abuse of process doctrine is *R v Horseferry Road Magistrates' Court, ex parte Bennett*, where a New Zealander was forcibly transferred from South Africa to England in order to stand trial for raising finances by making false pretences.[4] In the course of his committal proceedings he applied for an adjournment so that he could challenge the court's jurisdiction, but both the magistrates' court and, on appeal, the Divisional Court[5] refused his request. In a further appeal to the Lords, however, the applicant was resoundingly successful,[6] the judges holding that a person should not be tried in the United Kingdom if he or she has been forcibly brought to this country in disregard of available extradition mechanisms. One of the arguments raised against this conclusion was that the US Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the US Constitution. Another was that the role of the judge should be restricted to the trial process itself and not extended to rule of law considerations such as the behaviour of the police or the prosecuting authority. In rejecting such arguments Lord Griffiths firmly asserted that judges in the United Kingdom have 'a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law'.[7] He repeated with approval the statement of Lord Devlin made 30 years earlier in *Connelly v DPP*:

> The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.[8]

The same strong line against executive misconduct was taken in a later case involving a suspected IRA terrorist. In *R v Mullen* the defendant had been deported from Zimbabwe to England, again without any regard for the available extradition procedures. At his trial in England in 1990 he was convicted of conspiring either to cause explosions likely to endanger life or to cause serious injury to property and was sentenced to 30 years' imprisonment. Seven years later (with the benefit of the House's decision in *Bennett*) he was granted leave to appeal on the basis of the circumstances of his deportation from Zimbabwe. The Court of Appeal allowed his appeal, even though the offence in question was a terrorist crime: the 'blatant and extremely serious failure to adhere to the rule of law' outweighed 'the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted . . . the IRA'.[9]

[4] [1994] AC 42.
[5] [1993] 2 All ER 474 (Woolf LJ and Pill J).
[6] But Lord Oliver dissented.
[7] [1994] AC 42, 62A.
[8] [1964] AC 1254, 1354.
[9] [2000] QB 520, 535G–H (per Rose LJ for the court).

It is interesting that Mr Mullen had not tried to vindicate his human rights by lodging an application in Strasbourg. He was presumably advised that he would be very unlikely to achieve satisfaction through that route. He did, however, claim compensation from the British state for the injustice he had suffered, and that matter went all the way to the House of Lords. On account of the weak wording of the relevant legislation, and because the facts occurred at a time when the Human Rights Act was not yet in force, his claim ultimately failed.[10]

Abuse of process can also occur when law enforcement officials 'entrap' people into committing a crime. In *R v Latif*, for instance, an informer and a customs officer had allegedly been implicated in drug-smuggling and had lured one of the defendants from Pakistan to England.[11] On the particular facts the Law Lords did not think that the trial judge had erred in law by exercising his discretion to let the public interest in trying people charged with serious crimes outweigh the public interest in avoiding an abuse of process. The conduct of the customs officer 'was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed'.[12] Nor was it in *R v Looseley*, where a police officer, having obtained from a person in a public house the telephone number of the defendant as someone who might supply illegal drugs, rang the defendant and asked him whether he could 'sort us out a couple of bags', to which the defendant had replied 'yes'.[13] However, in a case referred to the Lords by the Attorney General which was dealt with at the same time as *Looseley*,[14] their Lordships held that the judge had been right to stay the proceedings against a defendant because, having never previously dealt in heroin, he had been induced to do so by a police officer through the lure of making a large profit on a trade in smuggled cigarettes. The officer had therefore caused the defendant to commit an offence which he would not otherwise have committed, rather than merely give him an opportunity to commit an offence which he would have been likely to commit in any event.[15]

The abuse of process doctrine can also be invoked in cases in which no allegations of kidnap or entrapment are made. In *R v G*, for example, the majority of the Law Lords held that it had not been an abuse of process to charge a 15-year-old boy with statutory rape whenever a lesser charge was available.[16] But two of the judges, Lord Hope and Lord Carswell, thought that the prosecution was a violation of the boy's right to a private life as guaranteed by Article 8 of the European Convention. However, when an application was brought to the European Court of Human Rights it was summarily dismissed as manifestly ill-founded, as regards both Article 6 and Article 8.[17] The Court

[10] *R (Mullen) v Secretary of State for the Home Dept* [2004] UKHL 18, [2005] 1 AC 1. Whether this approach to compensation for a miscarriage of justice is compatible with the presumption of innocence as guaranteed by Art 6(2) of the European Convention is currently being considered by the Grand Chamber of the European Court in *Allen v UK* App No 25424/09; a hearing took place on 14 November 2012. Ms Allen had been refused permission to appeal her case to the House of Lords.

[11] [1996] 1 WLR 104.

[12] Ibid, 113C (per Lord Steyn). For criticism of this decision see Ashworth (1998).

[13] [2001] UKHL 53, [2001] AC 2060. See too 210–1 below.

[14] *Attorney General's Reference No 3 of 2000*, ibid.

[15] For the effect of the Human Rights Act on these facts, see 209–11 below.

[16] [2008] UKHL 37, [2009] AC 92, [12] (per Lord Hoffmann). Baroness Hale and Lord Mance agreed with Lord Hoffmann: [41] and [63]. See also 210 below.

[17] *G v UK*, App No 37334/08, decision of 8 September 2011.

stressed, in relation to the former, that '[i]t is not the Court's role . . . to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused' and, in relation to Article 8, that states had a margin of appreciation as to what was 'necessary in a democratic society' when prosecuting offences.

The discretion to exclude evidence

The history of the development of the judges' common law discretion to exclude evidence when its admission would be unfair has been well summarized by Ormerod and Birch.[18] They emphasize how, just when it seemed that a unified theory was being constructed that would substantiate a general exclusionary discretion based on unfairness, a process to which the House of Lords had itself contributed significantly in *R v Christie*[19] and *R v Selvey*,[20] the House issued a disappointing set of judgments in *R v Sang*,[21] where 'the five diverse and confusing speeches failed to deliver a satisfactory answer' to the problem.[22] On the other hand, the lack of judicial consensus was perhaps understandable, given that the adoption of a unified theory would have amounted, in effect, to judicial legislation on a very controversial topic. When the Police and Criminal Evidence Bill was going through Parliament in the early 1980s, Lord Scarman tried to insert an amendment that would have restored the exclusionary rule to the condition it was in prior to *R v Sang*, but this was too much for the government of the day and instead a weaker provision was introduced, which in due course became section 78(1) of the Police and Criminal Evidence Act 1984:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Described by some as a 'lottery',[23] and by another as 'an excuse for achieving whatever result is wanted without rigorous justification',[24] this exclusionary power is very frequently considered by trial judges, but neither the House of Lords nor the Supreme Court has tried to systematize the resulting case law in accordance with 'types' of unfairness or guiding principles.[25] In any event, section 82(3) of the Police and Criminal Evidence Act 1984 preserves all other judicial discretions to exclude evidence.

[18] (2004), 768–72. See too Dennis (2011).
[19] [1914] AC 545 (especially per Lord Moulton at 559).
[20] [1970] AC 304 (especially per Lord Diplock at 341).
[21] [1980] AC 402.
[22] Ormerod and Birch (2004), 771.
[23] Sanders et al (2010), 290. On the basis of the Court of Appeal's approach in *R v Higgins* [2003] EWCA Crim 2943 the authors add: 'It is evident that the fairness standard, as interpreted by the courts, covers relatively little of what might ordinarily be regarded as "unfair"'.
[24] Zuckerman (1987), 60.
[25] For an attempt by academics see Sanders et al (2010), 706–8.

In 2004 Ormerod and Birch concluded that 'twenty years after enactment, section 78 remains firmly anchored in the reliability (relevant evidence) rather than rights-based principle'.[26] They found that this emphasis became even more explicit after the enactment of the Human Rights Act 1998,[27] yet note that 'section 78 has been something of a saving grace for English law in that the all-encompassing nature of the inquiry satisfies Article 6'.[28] On account of the width of the discretion conferred by section 78 there has been little cause to resort to the residual common law discretions preserved by section 82. The net result is a criminal justice system where the fairness of trials is protected not just by the requirements of Article 6 but also by common law requirements which go beyond the demands of that provision.

Whether Article 6 is engaged or not

Although the wording of Article 6 does not make this explicit, the European Court of Human Rights has interpreted the article as conferring not just a right to a fair trial whenever a trial is taking place, but a right to have a trial in the first place in situations where the state makes some kind of remedy available for the alleged wrong.[29] This was articulated in the first judgment ever issued by the European Court in a case brought against the United Kingdom, *Golder v UK*.[30] A prisoner was complaining that he had been denied the right to contact a solicitor in order to discuss his wish to sue a prison officer for libel. The UK government argued that Article 6 applied only to trials which were already pending but the European Court, invoking principles of interpretation set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969 (even though that Convention was not yet in force), ruled by six to three[31] that Article 6 extends to securing a right of access to the courts for every person wishing to begin an action in order to have his or her civil rights and obligations determined. The Court saw this right as being part of 'the rule of law', a concept referred to in the Preamble to the Convention as part of the common heritage of States Parties to the Convention,[32] and also as 'one of the universally "recognised" fundamental principles of law'.[33] Moreover, the right was distinct from that protected by Articles 5(4) and 13 of the Convention: the former relates only to the right to liberty, while the latter relates to an effective remedy before a 'national authority', which may not be a court or tribunal within the meaning of Article 6.

The European Court's approach to the right of access to a court was further expanded in *Airey v Ireland*, where a woman who had allegedly been treated cruelly and deserted

[26] Ormerod and Birch (2004), 779.
[27] Ibid, 782.
[28] Ibid, 787, citing *R v Khan* [1997] AC 558, even though the European Court went on to hold in that case that the lack of domestic legal regulation governing the use of covert listening devices amounted to a violation of Art 8 of the European Convention, the right to a private life; there was also a violation of Art 13, but not of Art 6, though Judge Loucaides dissented on the last point. See too 217 below.
[29] White and Ovey (2010), 254–9.
[30] (1979–80) 1 EHRR 524.
[31] Amongst the dissenters on Art 6 was the UK judge, Sir Gerald Fitzmaurice.
[32] (1979–80) 1 EHRR 524, para 34.
[33] Ibid, para 35.

by her husband could not obtain a decree of separation from him in the Irish High Court because she could not afford to go there to ask for it. There was no financial help provided by the state for such proceedings, and she did not have the requisite legal knowledge to represent herself.[34] The European Court found, by five to two,[35] that this meant that there was no 'practical and effective' remedy available to Mrs Airey, only one that was 'theoretical and illusory'. It added that 'fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State' and '[t]he obligation to secure an effective right of access to the courts falls into this category of duty'.[36] In addition, 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention'.[37] The Court was careful to point out that state funding would not need to be made available for every remedy which the legal system provided: all would depend on the complexity of the case and the capacity of the applicant.

Whether the non-availability of legal aid in England and Wales was a violation of Article 6 came before the European Court in *Steel and Morris v UK*.[38] The two applicants had been sued for libel by the fast-food chain McDonald's. The trial was preceded by 28 interlocutory applications and lasted 313 days, during most of which the applicants had no legal aid and represented themselves. They eventually lost and faced a damages award of £60,000. They appealed to the Court of Appeal (in proceedings which lasted a further 23 days) but only succeeded in having the award of damages reduced to £40,000.[39] McDonald's did not ask for its own legal expenses to be paid by the applicants, which amounted to more than £10 million. During the domestic proceedings, which took place before the Human Rights Act 1998 came into force, it does not seem that the relevance of Article 6 was raised. The House of Lords presumably spotted no Article 6 issue, or any fairness issue at all, when it refused the applicants leave to appeal. Yet five years later, when the European Court issued its judgment on the applicants' case, it found unanimously that Article 6(1) had been violated (as well as Article 10). This was despite the fact that an earlier application by the applicants had been declared inadmissible by the European Commission, at a time when the full complexity of the proceedings was not appreciated.[40] Basing itself again on the criterion of effectiveness, the Court was convinced that the applicants had not experienced equality of arms with McDonald's. The decision represents a stark contrast with the blindness of English judges, including the most senior, to this aspect of fairness in trial proceedings. It was responded to by provisions in the Access to Justice Act 1999, which provide for grants of legal aid to be made in exceptional cases which would not otherwise

[34] (1979–80) 2 EHRR 305. The main representative of the applicant in the European Court was Mary Robinson, then a Senator in the Irish Senate, later President of Ireland and UN High Commissioner for Human Rights.

[35] One of two dissenters was the Irish judge, Judge O'Donoghue. He again dissented regarding Art 8, which the Court held by 4 v 3 had also been violated.

[36] (1979–80) 2 EHRR 305, para 25.

[37] Ibid, para 26.

[38] (2005) 41 EHRR 22.

[39] Neither the High Court nor the Court of Appeal decisions are reported.

[40] *HS and DM v UK* App Nos 27436/95 and 28406/95, decision of 5 May 1993.

qualify for such aid,[41] but it remains to be seen if it causes a shift in judicial thinking more generally.

The line between substance and procedure

We have seen how the European Court has stuck its neck out in demanding that, where remedies are available at the national level, they must be provided in a way which makes them accessible. Otherwise the right to a fair trial will not be effectively protected. But it has been less activist in insisting that state legal systems must make certain remedies available in the first place. It is not a breach of Article 6, for instance, that in Malta the legal remedy of divorce is not available. But deciding whether the absence of a remedy is because the legal system does not in any way recognize the right which that remedy is meant to protect ('substantive denial') or because one of the conditions which requires to be met before the remedy can be promised is not satisfied on the facts of a particular case ('procedural denial') can often be difficult task.

In situations where the remedy is denied because the time for applying for it has run out, the European Court will start by recognizing that there is a right under the national law and will then proceed to evaluate whether the restriction imposed upon the exercise of the right was in pursuit of a legitimate aim (namely, the avoidance of stale claims) and was not disproportionate. Hence the Court rejected the applicant's claim in *Stubbings v UK*,[42] after the House of Lords had controversially ruled that victims of child sex abuse must bring their civil claims within six years of turning 18 years of age (with no possibility of an extension) and not within three years (with some possibility of an extension).[43] In delivering that ruling the Lords had not adverted to any human rights dimension of the issue. In an interesting sequel 15 years later, the House overturned its decision in *Stubbings v Webb* and ruled instead that a claim for damages for personal injuries caused by a sexual assault did fall within section 11 of the Limitation Act 1980, thereby allowing a limitation period of three years from the date when the claimant first considered the injury sufficiently serious to justify proceedings and the possibility of an extension beyond that period if it was equitable to grant one.[44] The man who became liable to pay compensation to the successful claimant as a result of that ruling, and who was worth suing only because he had won £7 million in the national lottery while he was on a day's release from prison, himself lodged an application with the European Court of Human Rights, arguing that his right to peaceful enjoyment of his possessions, guaranteed by Article 1 of Protocol No 1 to the Convention, had been violated.[45] His claim was unsuccessful, as was his argument that his Article 6 rights had been breached in that, having been ordered to pay the claimant's costs as well as his own, he was in effect being made to pay personally for the change to the law made by the House of Lords. This is a further example of the European Court's tolerance of the way in which UK judges can make law by overturning precedents.

[41] See the analysis of this response in Joint Committee (2006c), paras 24–35.
[42] (1996) 23 EHRR 213.
[43] *Stubbings v Webb* [1993] AC 498.
[44] *A v Hoare* [2008] UKHL 6, [2008]. 1 AC 844. See Prime and Scanlan (2008), and Ch 12 below, at 363–4.
[45] *Hoare v UK* (2011) 53 EHRR SE1.

It also helps to explode the myth that the human rights of prisoners somehow always trump the human rights of their victims.

The substance of the law, criminal or civil, is therefore for the national legal system to determine, so the United Kingdom's top court has on several occasions ruled that both statutory provisions[46] and common law rules which prohibit the bringing of legal claims are not in breach of Article 6. In *Holland v Lampen-Wolfe*[47] the state immunity granted to a worker at a US military base in England (in respect of an allegedly defamatory memorandum he had written about an instructor at the base) was held to fall into the common law category. This time—it being a question of *state* immunity—the exemption was justified because of the international comity due to foreign nations. This sits rather oddly with the principle that the European Convention is meant to protect *all* people within the Council of Europe's Member States and one wonders if the same result would have been so easily reached if the military base in question had not been that of the United States but of a European power? Of course, even if an applicant is able to escape the reach of the state immunity doctrine, he or she may still be obstructed by the fact that the European Court does not extend the protection of Article 6 to officials who are performing functions connected with the governance of the country. It was in *Vilho Eskelinen v Finland* that the Grand Chamber stated that for Article 6 to be excluded two conditions had to be fulfilled:

> Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.[48]

The Court added that it is not in itself decisive that the civil servant is in a sector or department which participates in the exercise of power conferred by public law or that there is a 'special bond of trust and loyalty' between the civil servant and the state, as employer: the state must also show that the subject-matter of the dispute is related to the exercise of state power or has called into question the special bond. Applying this test, the Grand Chamber in *Cudak v Lithuania* denied immunity to a Polish official when a switchboard operator in the Polish Embassy in Vilnius sought to complain about sexual harassment by a male colleague,[49] and in *Sabah El Leil v France* the Grand Chamber, disagreeing with the French Cour de Cassation, allowed the head accountant of the Kuwaiti Embassy in Paris to access French courts in order to sue the Kuwaiti government for improperly dismissing him.[50]

A different category of obstruction to a remedy arose for consideration by the House of Lords in *R (Kehoe) v Secretary of State for Work and Pensions*,[51] where the question was whether section 8 of the Child Support Act 1991 is in breach of Article 6 because it denies to a mother direct access to a court to claim financial support for her children from their father. In place of that remedy the Act creates a statutory scheme which empowers the Child Support Agency to track down and impose financial obligations on

[46] See *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163. See too Ch 3 above, at 78.
[47] [2000] 1 WLR 1573.
[48] (2007) 45 EHRR 43, para 62.
[49] (2010) 51 EHRR 15.
[50] Application No 34869/05, judgment of 29 June 2011. See too Ch 5 above, at 151–4.
[51] [2005] UKHL 48, [2006] 1 AC 42.

absent fathers. The House held that Article 6 was not violated, because the Act constituted a substantive denial of recovery, not a procedural denial. In Lord Bingham's words: 'it is clear that the function of Article 6 of the Convention is to guarantee certain important procedural safeguards in the exercise of rights accorded by national law and not ordinarily to require that particular substantive rights be accorded by national law'.[52] In a typically ingenious manner Baroness Hale dissented, basing herself on the argument that the 1991 Act had not completely replaced the rights of children to be maintained but had merely altered the machinery for assessing and enforcing those rights.[53] Such a conclusion does, however, fly in the face of the explicit wording of section 8(3) of the 1991 Act, which reads: 'In any case where [a child support officer would have jurisdiction to make a maintenance assessment with respect to a qualifying child], no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child'. In this matter Baroness Hale was too Convention-minded even for the European Court, because when Ms Kehoe took her application to Strasbourg the Court held unanimously that there had been no violation of Article 6 (or of Article 13).[54] One can imagine the frustration the UK government would have felt if the Court had run a coach and horses through the statutory scheme created in 1991. Instead the Court was, it is submitted, appropriately deferential to the UK government's approach:

> [T]he Court must also give due weight to the government's arguments as to the purpose and context of the child support system within England and Wales… The mere fact that it is possible to envisage a different scheme which might also allow individual enforcement action by parents in the particular situation of the applicant is not sufficient to disclose a failure by the State in its obligations under Article 6.[55]

In *R v G*,[56] alluded to above,[57] the 15-year-old defendant was charged with the rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003. He pleaded guilty because he had been advised that his belief that the child was aged 15 was no defence. He then appealed, arguing that section 5 was incompatible with the presumption of innocence guaranteed by Article 6(2) of the Convention (and also that his prosecution was a disproportionate interference with his Article 8 right to respect for his private life). But the Court of Appeal and House of Lords both held unanimously that section 5 was not incompatible with Article 6(2) (and the Lords held by three to two that there was no breach of Article 8). Again the rationale for this decision was that it was not part of the Convention's role to dictate to states what the content of their law must be, even their criminal law.[58] The House was again vindicated when the appellant's application to the European Court was declared inadmissible.[59]

[52] Ibid, [8], citing, amongst other cases, *Z v UK* (2001) 34 EHRR 97, paras 87 and 98. See too Lord Hope at [41].

[53] Baroness Hale added that her dissent would come as no surprise: ibid, [77].

[54] *Kehoe v UK* (2009) 48 EHRR 2. Three of the seven judges were female.

[55] Ibid, para 49.

[56] [2008] UKHL 37, [2009] 1 AC 93.

[57] See 192, and also Ch 8 below, at 238.

[58] [2009] 1 AC 93, [4] (per Lord Hoffmann), [27] (per Lord Hope). See, generally, Buxton (2000b).

[59] *G v UK* App No 37334/08, decision of 30 August 2011. The Court also held that any violation of Art 8(1) was justified under Art 8(2).

Access to court in negligence cases

In situations where the remedy is denied because not all the conditions necessary for liability have been satisfied (in a claim for negligence, for instance), the European Court—largely due to the House of Lords' insistence—has accepted that these conditions are part of the substantive law of the United Kingdom, not procedural requirements. In *Osman v UK*, a case in which the House of Lords had refused the claimants leave to appeal from the Court of Appeal[60] because the police do not owe a duty of care to the victims of crime,[61] the European Court nevertheless held unanimously (20 v 0) that Article 6 was engaged and had been violated.[62] The UK judge, Sir John Freeland, issued a concurring opinion in which he stated that:

> The difficulty for me arises primarily from the fact that in the present case the [exception] appears to have been applied as if conferring on the police a blanket exception from liability in negligence so far as concerns their function in the investigation and suppression of crime, to the exclusion of any examination by the court of considerations which might pull in another direction.[63]

In a subsequent case in which a boy who had spent his childhood in care sued his local authority for their negligence in not ensuring his welfare during that time, the House of Lords heavily criticized the European Court's judgment in *Osman v UK*.[64] Lord Browne-Wilkinson, the Senior Law Lord at the time, confessed that he found the European Court's decision 'extremely difficult to understand'.[65] Lords Nolan and Steyn agreed with Lord Browne-Wilkinson, while Lord Slynn ignored the European Convention dimension and Lord Hutton found it unnecessary to consider it because he thought that the claim should in any event be allowed to proceed under the common law. The majority's complaint with *Osman v UK* was that it appeared to say that the United Kingdom could not have a blanket rule denying certain categories of potential claimants their right to sue in negligence: 'the applicability of such [an] exclusionary rule has to be decided afresh in each individual case'.[66] But on one reading that is a distortion of what the European Court actually said. What the European Court was opposed to was denying a claimant the right to go to court to argue that the balance between competing public interests should in his or her case be struck in a way which permitted the claim to continue. This is, by another name, the same as the House of Lords' test whereby a duty of care will be held to exist only if it is fair, just, and reasonable in all the circumstances.[67] The question whether that duty has been breached is another one altogether. Indeed, in *Osman* the UK government appears to have argued

[60] *Osman v Ferguson* [1993] 4 All ER 344.

[61] A rule laid down in *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53. See too Ch 4 above, at 120–4.

[62] (2000) 29 EHRR 245. The Commission also held, but by 12 v 5, that Art 6 had been violated. The five dissenters joined in an opinion penned by the UK Commissioner, Nicolas Bratza, explaining why the exclusion of liability was not disproportionate to the legitimate aim served: (2000) 29 EHRR 245, 299–300.

[63] (2000) 29 EHRR 245, concurring opinion, para 2.

[64] *Barrett v Enfield LBC* [2001] 2 AC 550. See too the extra-judicial criticism in Hoffmann (1999), discussed in Ch 4 above, at 122.

[65] Ibid, 558E.

[66] Ibid, 559C (per Lord Browne-Wilkinson).

[67] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

in Strasbourg that the exclusionary rule for claims against the police 'does not automatically doom to failure such a civil action from the outset but in principle allows a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case is or is not suitable for the application of the rule'.[68]

In *Z v UK*, another case about the abuse of children and the liability of local authorities in relation to it, the European Court conceded that its understanding of the UK law of negligence in *Osman* needed to be reviewed in light of the clarification issued in *Barrett*.[69] The case had already been considered by the House of Lords, which had decided that no duty of care was owed by the local authority in cases where children were abused by their own parents (even when the authority should have known that abuse was taking place).[70] In Strasbourg the Court did think that Article 6 was engaged but held that it had not been violated because the applicants had at least had their day in court. However, it also held that Article 3 had been violated and it awarded the four child applicants a total of £320,000 by way of compensation. It therefore seems as if this first spat between the European Court and the House of Lords—or first example of 'dialogue' between the two adjudicating bodies—was more about who should have the final say over the content of English law than it was about different understandings of what that content should be. In the end the two courts seem to have come to an agreement as to the part which Article 6 should play in determining the quality of justice in a national legal system. But the story does not end there.

In *D v East Berkshire Community Health NHS Trust*[71] the majority of their Lordships held that it would not be a breach of the Convention to hold that no duty of care could be owed by a doctor or social worker to parents who had been negligently accused of abusing their own children. Lord Bingham, however, vigorously dissented, believing that precedents of the House of Lords itself, as well as of the European Court, led to the conclusion that it would be a breach of Article 6 to impose a blanket ban on such a duty existing.[72] He also considered that it was no longer plausible to argue that a common law duty of care may not be owed by a publicly-funded health care professional to a child with whom the professional is dealing.[73] On the same day, interestingly, the same bench held, this time unanimously, that no duty of care could be owed by the police to victims of crime or witnesses of crime.[74] Strangely, the compatibility of such a rule with Article 6 of the Convention does not seem to have been canvassed before, or by, their Lordships. But the father and daughter in the *East Berkshire* case later took a case to Strasbourg, where the Court unanimously held that their Article 8 right to a private life had been violated: *MAK and RK v UK*.[75] This was in line with the Court's decision in *Venema v The Netherlands*, where an 11-month-old child had been taken away

[68] (2000) 29 EHRR 245, para 138.
[69] (2002) 34 EHRR 3.
[70] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. See too Ch 5 above, at 131–2.
[71] [2005] UKHL 23, [2005] 2 AC 373.
[72] Only Lord Bingham had sat on the Appeal Committee which granted leave to appeal. Amongst the judges in the Court of Appeal (upheld in the Lords) were Lord Phillips MR and Hale LJ.
[73] [2005] 2 AC 373, [30].
[74] *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495. See Ch 4 above, at 122.
[75] (2010) 51 EHRR 14. See Greasley (2010).

from her mother because of fears that the mother was suffering from Munchausen syndrome by proxy.[76] This case had been considered by the Law Lords in the *East Berkshire* appeals but it did not convince them to find a violation on the facts there. In those appeals no claim was made for breach of a Convention right at all, because the relevant events occurred before the Human Rights Act 1998 came into force. Lord Nicholls actually considered whether the common law concept of a duty of care in negligence cases should be abandoned altogether and replaced with an approach analogous to that adopted when human rights are being considered, namely one where '[i]n deciding whether overall the end result was acceptable the court makes a value judgment based on more flexible notions than the common law standard of reasonableness'.[77] However, the learned judge concluded that such an approach would lead to too much uncertainty unless the concept of duty of care was replaced by some other control mechanism, as yet unidentified. This was a rare example of what amounts to radical blue skies thinking on the part of a Law Lord, even if at the end of the day he was predictably cautious in his conclusions.

For many years the House of Lords presided over a legal system which also made it difficult to ensure that actions taken in relation to children in care were always in their best interests. Parliament had entrusted the responsibility for the care of such children to local authorities[78] and when parents or others then tried to get the children declared wards of court so that the High Court could take decisions in place of the local authority the courts resisted those efforts. The House of Lords was particularly clear, in both *A v Liverpool City Council*[79] and then in *W v Hertfordshire County Council*,[80] that the High Court had no right to intervene in such cases: while Parliament had not removed the inherent jurisdiction of the High Court to make a child a ward of court, it had impliedly forbidden the High Court, except through judicial review proceedings, to supervise the exercise of discretion within the field of responsibility allocated to local authorities. Many applications were subsequently lodged in Strasbourg arguing that the House of Lords' position violated the Article 6 and/or 8 rights of the parents and other close relatives of children, but in all of them the European Commission or Court deferred to the House of Lords' pronouncements.[81] Eventually, in *O, H, W, B and R v UK*,[82] the European Court did effectively disapprove of the House's decision in *A v Liverpool City Council*, and Parliament stepped in to clarify the law, while still preserving the principle that courts cannot intervene in the way local authorities discharge their responsibilities in implementing care orders.[83]

Worries persisted that local authorities were not always looking after children as well as they might, and that courts were relatively powerless to make them perform

[76] (2002) 39 EHRR 5.
[77] [2005] 2 AC 373, [93]. In this connection Lord Nicholls cited Fairgrieve et al (2002).
[78] eg under the Children and Young Persons Act 1969.
[79] [1982] AC 363.
[80] [1985] AC 791.
[81] eg *L, H and A v UK* App No 9580/81, decision of 13 March 1984; *M-F v UK* App No 11758/85, decision of 16 May 1986. See too Ch 8, at 238–9.
[82] (1988) 10 EHRR 29.
[83] Children Act 1989, s 100.

better.[84] The whole area was reviewed by the Lords in a post-Human Rights Act context in *Re S (Minors) (Care Order: Implementation of Care Plan)*.[85] The Court of Appeal in that case had acted very boldly by widening the discretion given to trial judges to make *interim* care orders and by allowing trial judges to identify and 'star' the essential milestones of a local authority's care plan for children.[86] The Secretary of State appealed to the Lords and succeeded in persuading them that the Court of Appeal had overstepped its remit on both counts. The House held that interim care orders should not be issued as a means of allowing the court to exercise a supervisory role over local authorities, and the 'starring' system was found not to be a legitimate use of the judicial power conferred by section 3 of the Human Rights Act to give effect to legislation in a way which makes it compatible with Convention rights.[87] The 'starring' system amounted to amendment of the Children Act 1989, not just its interpretation, and could not be justified as a 'remedy which the court was allowed to provide under section 8(1) of the Human Rights Act'.[88] The House could find no violation of any of the parents' Article 6 rights on the facts of the two conjoined appeals.

This area of law remains a difficult one,[89] but except in one respect the top court has not since been asked to review its position on the role of the courts. The exception relates to the position of people who believe they are falsely accused of abuse. In a case involving the care of people in nursing homes, the House ruled in *Jain v Trent Strategic Health Authority*[90] that there was a lamentable lack of reasonable safeguards in the Registered Homes Act 1984 to protect the owners of registered nursing homes from being negligently investigated by the local health authority and that, had the Human Rights Act 1998 been in force at the time of this particular authority's application to have a home closed down, the owners of the home in question might have argued successfully that their rights under Article 6 (and of Article 1 of Protocol No 1) had been violated. The decision once again exposed an injustice but, because the Human Rights Act could not be applied retrospectively, the top court was powerless to remedy it. The owners in this case lodged an application in Strasbourg, which the UK government settled on agreed terms.[91]

[84] See *People Like Us*, a review by Sir William Utting of safeguards for children living away from home (1997), and the government's response to that review (1998, Cm 4105). In *Re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489 the Law Lords held that, having made an interim care order in relation to a child, a court had jurisdiction under the Children Act 1989, s 38(6), to direct a residential assessment of the child and its parents even though that sub-section merely authorizes 'the medical or psychiatric examination or other assessment of the child'. Lord Browne-Wilkinson said the 1989 Act was to be construed purposively. But in *In re G (A Minor) (Interim Care Order: Residential Assessment)* [2005] UKHL 68, [2006] 1 AC 576 the House held that the court's power did not extend to authorizing a medical or psychiatric assessment of a child's mother.

[85] [2002] UKHL 10, [2002] 2 AC 291.

[86] [2001] EWCA Civ 757, [2001] 2 FCR 450 (Thorpe, Sedley, and Hale LJJ).

[87] See the discussion of this issue at Ch 3 above, 63–72.

[88] Section 8(1) states: 'In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. An application to Strasbourg also failed: S v UK App No 34593/02, decision of 31 August 2004.

[89] See Stuart and Baines (2004).

[90] [2009] UKHL 4, [2009] AC 853.

[91] *Jain v UK* App No 39598/09, decision of 9 March 2010.

The line between 'civil rights' and other rights or expectations

It is one thing to recognize that everyone must have a right to a court when their human rights are at issue, but what if there is a dispute over whether what is at issue is indeed a human right or something different? In particular, what if the state says that the claim made by the applicant does not involve a right at all but merely a complaint about the exercise by an administrative body of its discretion? Are there certain issues which should be left to administrative bodies to deal with in their role as an arm of the executive, issues which are perhaps closely bound up with policy considerations and ultimately best weighed by expert administrators rather than by judges?

English administrative law still maintains the stance that the role of the courts is not to do the job of administrators but merely to ensure that when administrators do their jobs they comply with certain standards. The decisions of public bodies can be reviewed on procedural grounds—such as that they acted beyond their powers, that they did not properly consider all the relevant information or took into account irrelevant information, or that they misled people into thinking that they would be treated differently—but the decisions cannot be reviewed on their merits. Over the last half-century the 'procedural' basis for review has encroached more and more on the 'merits' area, especially in the wake of the Human Rights Act 1998, which, the House of Lords has recognized, requires the courts to ensure that in situations involving a person's human rights the decision of an administrative body is proportionate to a legitimate aim being pursued by that body.[92] Nevertheless, there are still no-go areas where the responsibility for the merits of a decision are best left to the expertise of administrators and should remain beyond the purview of judges.

Just after the enactment of the Human Rights Act 1998 its effect on administrative law came starkly to the fore in what is known as the *Alconbury* litigation.[93] This was a collection of three disputes over the role of the courts vis-à-vis decisions on planning. In the first case the Secretary of State for the Environment, Transport and the Regions had 'recovered' an application for planning permission from a district council and a county council so that he could determine the application himself;[94] in the second case the Secretary of State had 'called in' an application for planning permission for his determination under a comparable legislative provision;[95] and in the third case a private company had asked the Secretary of State to seek a court ruling on whether he was an appropriate person to decide whether a highway improvement scheme should be improved (given that the proposer of the scheme was a branch of the Secretary of State's own department, the Highways Agency).[96] To the surprise of many, the Divisional Court declared that the various statutory provisions in question were all incompatible with the Human Rights Act 1998 because the Secretary of State was not an independent and impartial tribunal.[97]

[92] *R (Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 2 AC 532.
[93] [2001] UKHL 23, [2003] 2 AC 295. See too Ch 3 above, at 77.
[94] Under the Town and Country Planning Act 1990, Sch 6, para 3.
[95] Ibid, s 77.
[96] Under the Highways Act 1980 and the Acquisition of Land Act 1981.
[97] [2001] 2 All ER 929.

The Secretary of State succeeded in bringing the case to the Lords by way of a leap-frog appeal, by-passing the Court of Appeal, and to the relief of many in Whitehall the Law Lords reversed the Divisional Court and confirmed that, while the disputes did involve the determination of 'civil rights' for the purposes of Article 6, and the Secretary of State was not himself an independent and impartial tribunal, his decisions were not incompatible with Article 6 so long as they could be reviewed by a tribunal which was independent and impartial, such as the High Court in judicial review proceedings. Full account was taken of the jurisprudence of the European Commission and European Court, as required by section 2(1) of the Human Rights Act, but the House demonstrated, in the words of Lord Hoffmann, that:

> Although the route followed by the European Court has been a tortuous one and some of its statements require interpretation…it has never attempted to undermine the principle that policy decisions within the limits imposed by judicial review are a matter for democratically accountable institutions and not for the courts.[98]

Lord Nolan, having noted that the case in hand was one of great practical and constitutional importance for the United Kingdom, and of importance also for the development of human rights law both in the United Kingdom and abroad,[99] agreed with his colleagues and trusted their decision would be seen 'not as in any way inconsistent with [existing Court and Commission decisions], but on the contrary as a contribution to the growth of Convention jurisprudence'.[100]

One of the dissatisfied litigants in *Alconbury* applied to Strasbourg, but the European Court affirmed the position it had adopted in the earlier case of *Bryan v UK*, which the House of Lords had also followed.[101] The Court concluded that, in the context of administrative decisions on planning applications, judicial review did constitute 'subsequent control by a judicial body that has full jurisdiction',[102] despite the fact that in judicial review proceedings the High Court cannot consider the merits of the decision being reviewed.[103] To counter that limitation the Court cited paragraphs from their Lordships' judgments in *Alconbury* which stressed that a reviewing court can quash a decision if it is based on a misunderstanding or ignorance of an established and relevant fact.[104]

However, the dispute over what is ultimately for administrators to decide and what can be decided by the courts has rumbled on. The House of Lords took a long hard look at the issue in the seminal case of *Runa Begum v Tower Hamlets LBC*,[105] where a homeless woman in London argued that her Article 6 rights had been violated because the local housing authority had not ensured that her claim to a home was dealt with by an

[98] [2003] 2 AC 295, [76].
[99] Ibid, [58].
[100] Ibid, [63].
[101] (1996) 21 EHRR 342.
[102] The precondition laid down by the European Court in *Le Compte v Belgium* (1982) 4 EHRR 1.
[103] *Holding and Barnes plc v UK* App No 2352/02, decision of 12 March 2002.
[104] [2003] 2 AC 295, [50] and [53] (per Lord Slynn); [61] (per Lord Nolan); [130] (per Lord Hoffmann); [169] (per Lord Clyde). See, generally, Clayton and Sachdeva (2003).
[105] [2003] UKHL 5, [2003] 2 AC 430.

independent and impartial tribunal (it had asked a local authority officer to conduct an internal review, rather than use its statutory power to direct a review by an independent body). The House of Lords held unanimously that the context did not require the local authority's decision-making to be subjected to a full judicial appeal: the normal judicial review jurisdiction (which in this case was conferred by legislation on the county court[106]) was enough to satisfy Article 6. Lord Bingham, having cited several decisions of the European Court, including *Bryan v UK*, said: 'taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of Article 6(1)'.[107] Lord Hoffmann eloquently explained that the Strasbourg court had, in *Bryan v UK*, arrived 'by the scenic route' at a position which recognized that 'an extension of the scope of Article 6 into administrative decision-making must be linked to a willingness to accept by way of compliance something less than a full review of the administrator's decision'.[108] He added in the next paragraph that the Strasbourg jurisprudence gives adequate recognition to democratic accountability, efficient administration, and the sovereignty of Parliament.

Throughout the *Runa Begum* case the Law Lords *assumed* that the local authority had been determining a 'civil right'. Lords Hoffmann, Millett, and Walker gave the issue some detailed consideration but in the end they each came to no fixed conclusion. A similar reluctance was apparent in *R (A) v London Borough of Croydon*[109] where one of the issues for the Supreme Court was whether the decision by a council to provide accommodation under the Children Act 1989 was a determination of a 'civil right'. On the facts, the Supreme Court found that it was unnecessary to make a definitive ruling on the issue, since in any event the local authority's decision would be subject to judicial review, but four of the five Justices said that they would be reluctant to hold that Article 6 was engaged at the local authority level[110] and Lord Hope specifically doubted whether a civil right was involved. In his analysis he referred to *Tsfayo v UK*,[111] where the case was decided against the United Kingdom because the matter at issue was a simple question of fact (namely, was there a good reason for Ms Tsfayo's delay in making a claim for housing and council tax benefit), unlike in *Bryan* and *Runa Begum*, where the issues 'required a measure of professional knowledge or experience and the exercise of discretion pursuant to wider policy aims'.[112] Lord Hope suggested that to be a 'civil right' a right has to be a public law right which is of a personal and economic nature and does not involve any large measure of official discretion,[113] as opposed to a right

[106] Housing Act 1996, s 204, which allows an applicant who is dissatisfied with a decision taken after an internal review to appeal to the county court on 'any point of law arising from the decision'.

[107] [2003] 2 AC 430, [11].

[108] Ibid, [34].

[109] [2009] UKSC 8, [2009] 1 WLR 2557.

[110] Baroness Hale said that if a civil right was involved in the case 'I would be inclined to hold that it rests at the periphery of such rights': ibid, [45].

[111] (2006) 48 EHRR 18.

[112] [2009] 1 WLR 2557, [60].

[113] Ibid, [59], citing, amongst other cases, *Salesi v Italy* (1993) 16 EHRR 187.

that is 'dependent upon a series of evaluative judgments as to whether the statutory criteria are satisfied and, if so, how the need for it ought to be met'.[114]

Just over a year later, in *Ali v Birmingham City Council*,[115] the Supreme Court endorsed Lord Hope's approach and ruled that an appeal to a county court over whether a housing authority had fulfilled its duty under the Housing Act 1996 to ensure that suitable accommodation was available for homeless people did *not* involve the determination of a 'civil right' for the purposes of Article 6. Giving the lead judgment (with which Baroness Hale and Lord Brown agreed), Lord Hope explained that, although the questions that arose for decision in the case were pure questions of fact (eg had the applicants received letters from the council?), '[t]heir resolution was a stepping stone to a consideration of the much broader question as to whether the accommodation that had been declined was suitable'.[116] He welcomed the fact that the time had come to take a final decision on the important point at issue, since '[t]he present state of uncertainty as to the administration of social welfare benefits, such as those which are available to those who are homeless or threatened with homelessness, is unhealthy'.[117] Lord Collins agreed with Lord Hope but said that he would place less emphasis on the evaluative nature of the local authority's duty and greater emphasis on the nature of the applicant's rights under the Housing Act 1996, in particular on the absence of an individual right in the applicant.[118] He regretted that the Strasbourg Court had not yet enunciated principles allowing a line to be drawn between those rights in public law which are to be regarded as 'civil rights' and those which are not. Lord Kerr added that he did not find it easy to state a principled basis for distinguishing between social security payments and social welfare provision but he pointed to the latter's lack of similarity to a private insurance scheme and its 'dependence on discretionary judgments not only to establish entitlement but also to discharge the state's obligation and the way in which the obligation can be met'.[119]

Taken together, these two decisions in *A* and *Ali* may appear to totally exempt from Convention oversight a whole range of 'social and economic rights'. But this does not necessarily follow, because in the process of taking decisions which are not themselves determinations of civil rights a public body must still ensure that it does not in some way violate other Convention rights. In the context of housing allocations, for example, the public body must avoid violating a person's right to respect for his or her home under Article 8. We shall see in a later chapter that there has been a further prolonged dialogue between the United Kingdom's top court and the Strasbourg court on that issue and, like the dialogue concerning the meaning of 'civil rights', it may not yet be finally resolved.[120]

Judicial, prosecutorial, and police behaviour

We have noted that at common law the judges devised a range of principles enabling them to ensure that trials—and in particular criminal trials—are conducted fairly.

[114] Ibid, [63].
[115] [2010] UKSC 8, [2010] 2 AC 39.
[116] Ibid, [22]. [117] Ibid, [32].
[118] Ibid, [58]. [119] Ibid, [75].
[120] Ch 8 below, at 242–56. See too Latham (2011), and Amos (2012).

Before these common law principles could be fully rationalized and developed, the territory was occupied by the Human Rights Act 1998 which, by importing Article 6 into domestic UK law, required UK judges to take account of Strasbourg jurisprudence when considering claims that there had been an unfair trial.[121] The House's first opportunity to respond to such a claim was in *R v Lambert*.[122] We have already looked at this case in the context of the top court's attitude to the retrospectivity of the Human Rights Act, but the decision is also important as regards the top court's approach to Article 6.

The issue which the House had to address in *Lambert* was whether a person who had been convicted of an offence prior to the implementation of the Human Rights Act 1998 was entitled to rely, in an appeal heard after its commencement, on a breach of his Convention rights. The particular allegation was that the trial court had imposed a legal rather an evidential burden on the defendant when considering whether he was in possession of drugs. It had required the defendant to prove, albeit only on the balance of probabilities, that he did not know that the bag in his possession contained drugs. Four of their Lordships held that the defendant could not rely on the Human Rights Act, although Lord Hope confined his ruling to situations where the alleged breach of Convention rights was *by the trial court*. Lord Steyn, who had always been a strong supporter of the incorporation of the European Convention into domestic English law, dissented. He thought that the ordinary meaning of section 22 of the Human Rights Act was that the Appellate Committee of the House of Lords, after the Act came into force, could on no occasion act incompatibly with Convention rights. He went on to hold that the legislation in this case did interfere disproportionately with the defendant's right to be presumed innocent under Article 6(2) and that therefore it should be 'read down' under section 3 of the Human Rights Act so as to impose on the defendant only an evidential burden, not a legal burden of proof. The majority did not need to consider this point, because of their stance on the retrospectivity issue.

In *R v Kansal (No 2)*,[123] the composition of the bench was the same as in *R v Lambert*,[124] except that Lord Lloyd took the place of Lord Clyde. Unlike in *Lambert*, in *Kansal* the alleged breach of the Convention was perpetrated not by the trial judge but by the prosecutor, who relied at the trial on evidence obtained through compulsory questioning under the Insolvency Act 1986.[125] Their Lordships considered whether they should depart from their earlier decision in *Lambert*, even if it was wrong, but decided unanimously, though for a variety of reasons, not to do so. Lord Hope distinguished the case from *Lambert*, because this time the alleged breach of the defendant's Convention rights was not committed by the trial court,[126] and on the facts he found the prosecutor

[121] Bustone (1999); Ashworth (1999); Steyn (1998).

[122] [2001] UKHL 37, [2002] 2 AC 545. See too Ch 3 above, at 52–3. *R v Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326 was decided before the Human Rights Act came into force.

[123] [2001] UKHL 62, [2002] 2 AC 69. The so-called 'Guinness' appellants, who had won their case in the European Court of Human Rights (*Saunders v UK* (1996) 23 EHRR 313) and whose further appeals to the Court of Appeal were pending, were allowed to intervene in *Kansal*. See further *R v Lyons* [2003] 1 AC 976, mentioned at 225 below.

[124] [2001] UKHL 37, [2002] 2 AC 545.

[125] Section 433.

[126] [2002] 2 AC 69, [107]. Lord Hope also relied on words he used in *R v DPP, ex parte Kebeline* [2000] 2 AC 326, 375D.

had not breached Article 6 as he was giving effect to a provision in primary legislation which could not have been read differently.[127] Of course such an excuse for not applying Article 6 could not wash in the European Court, so it is little wonder that when Mr Kansal brought an application to that Court the judges held unanimously that the United Kingdom had violated Article 6 in that the applicant had been required to incriminate himself, contrary to the right implied into Article 6(3) by the Court.[128]

In *R v Jones (Anthony)*[129] the House of Lords held that it would not be a breach of Article 6 to begin a defendant's trial in his absence, although the utmost care would need to be exercised before adopting such an approach. No application was lodged in Strasbourg after this decision but it is likely that the European Court would have decided the issue in the same way, especially as trials *in absentia* seem to occur much more frequently in civil law countries than in common law countries.

The interaction of judges with juries has also been an Article 6 issue from time to time.[130] In *R v Mushtaq*[131] the question was whether, to comply with Article 6, a judge is required to direct a jury that, if they conclude that an alleged confession was or may have been obtained by oppression, they should disregard it. With Lord Hutton dissenting, the Lords held that there *was* such a judicial duty. To direct the jury that they could nevertheless take the confession into account would be incompatible with the defendant's right against self-incrimination. On the facts of this particular case, however, the conviction was held not to be unsafe because the defendant had given no evidence before the jury (as opposed to during the *voir dire*) in support of his allegations of oppression. In *R v Connor*[132] their Lordships held that the common law rule of jury confidentiality, as well as the statutory provisions prohibiting disclosure of a jury's deliberations, were not a breach of the defendant's right to a fair trial under Article 6. Likewise, in *R v Abdroikov*[133] the Lords held that no issue arose under the Convention when a police officer was allowed to serve on a jury which convicted a man of attempted murder, even though the officer knew some of the police officers involved in the investigation of the crime. The particular defendant did not lodge an application in Strasbourg but a man convicted of murder in a later case has done so and it has been 'communicated' to the UK government.[134] This will give the European Court an opportunity to review the House's approach in *Abdroikov*.

The Lords have also carefully scrutinized accusations of judicial bias, although on the facts of the cases presented to them they have tended to find no breach of the Convention. In *R v Martin (Allan)*[135] the House saw nothing wrong in the fact that

[127] See too Ch 3 above, at 53.

[128] *Kansal v UK* App No 21413/02, judgment of 27 April 2004. The Court thought the case was indistinguishable from *Saunders v UK* (1996) 23 EHRR 313: see n 123 above.

[129] [2002] UKHL 5, [2003] 1 AC 1.

[130] Quinn (2004).

[131] [2005] UKHL 25, [2005] 1 WLR 1513.

[132] [2004] UKHL 2, [2004] 1 AC 1118.

[133] [2007] UKHL 37, [2007] 1 WLR 2679.

[134] *Armstrong v UK* App No 65282/09, available in the 'Pending Cases' section of the European Court's website.

[135] *R v Martin (Alan)* [1998] AC 917. The House expressly rejected common law arguments that the trial was an abuse of process, contrary to the rule of law, or a breach of the defendant's basic human rights.

the 17-year-old civilian son of a corporal who was serving with the British army in Germany should be tried for murder by a court-martial rather than by a civilian court, but in *Martin v UK* the European Court unanimously condemned the lack of appropriate independence in the UK's court-martial system.[136] In *R v Spear*[137] the role of the permanent president in courts-martial was found to be consistent with Article 6, as was the trial of a civil offence by a court-martial in the United Kingdom.[138] Reviewing recent decisions on bias, Masterman notes that they endorse the place of the separation of powers doctrine in the United Kingdom's constitutional arrangements.[139]

In *Venables v UK*,[140] where the Grand Chamber of the European Court unanimously confirmed the House of Lords' condemnation, by three to two,[141] of English law's inflexible approach to the setting of tariff sentences for two young boys convicted of murder, it also ruled (by 16 to one) that the child-unfriendly approach adopted to the trial itself was a breach of Article 6(1), a point which the Lords had not been asked to consider. As in *Martin (Allan)*, we see here a fundamentally different approach to the meaning of 'fairness' between the judges in Strasbourg and those in the House of Lords.[142] While steps have since been taken to adapt the trial process to suit the youthfulness of such defendants, they came too late to prevent the United Kingdom from being condemned once again in this regard in *SC v UK*, where an 11-year-old boy of limited intellectual ability was tried and convicted in the Crown Court in 1999 for the attempted robbery of an elderly lady in the street.[143] The Court of Appeal had seen no issues with the fairness of the proceedings, and had refused leave to appeal against the sentence of two-and-a-half years' custody, but the European Court unanimously disagreed.

Occasionally the top UK court has had to consider the applicability of the Human Rights Act 1998 to matters connected with police work prior to a criminal trial. In *R (R) v Durham Constabulary*[144] a claimant who was just 14 had been suspected of committing indecent assaults on young girls. He admitted the assaults when interviewed by the police in the presence of his stepfather, but the police then administered a statutory warning to him without first explaining the consequences of the warning or obtaining his own or his stepfather's consent.[145] The warning meant that the boy's name would be placed on the Sex Offenders Register and that he would be referred to a local youth offending team which would assess him and prepare a rehabilitative programme designed to tackle the reasons for his offending behaviour. In judicial review proceedings the argument was made that the imposition of these consequences without first obtaining the boy's consent was a violation of his right to a fair trial under

[136] (2007) 44 EHRR 31.
[137] [2002] UKHL 31, [2003] 1 AC 734. In this case there were 12 defendants in 10 separate appeals.
[138] See too *R (Al-Hasan) v Secretary of State for the Home Dept* [2005] UKHL 13, [2005] 1 WLR 688 (mentioned in Ch 6 above, at 183–4). As the facts in that case arose prior to the commencement of the Human Rights Act the Law Lords based their decision only on the common law.
[139] Masterman (2005a), 648.
[140] *V v UK* (2000) 30 EHRR 121.
[141] *R v Secretary of State for the Home Dept, ex parte Venables* [1998] AC 407.
[142] Haydon and Scraton (2000).
[143] (2005) 40 EHRR 10.
[144] [2005] UKHL 21, [2005] 1 WLR 1184.
[145] Under the Crime and Disorder Act 1998, ss 65 and 66.

Article 6. The Divisional Court agreed with this argument and quashed the decision to issue the statutory warning,[146] but on further appeal by the Durham Constabulary and the Home Secretary the House of Lords unanimously held that the police's warning did not even engage Article 6 because it was not 'the determination of a criminal charge'. Baroness Hale and Lord Steyn, while not dissenting, expressed considerable misgivings about this conclusion, and one can see why. It seems to reduce the scope of Article 6 from what it has traditionally been taken to be, although the case law analysis conducted by Lord Bingham in the Lords tries to show that no European Court or House of Lords precedent supports such a tradition. The judgments do not consider the applicability of Article 8 in this situation, presumably because it was not argued by the claimant's lawyers, but the case of *R v G*, discussed above,[147] suggests that it may have been breached on these facts. Baroness Hale, while not finding a violation of the European Convention, did express grave doubts about whether the statutory scheme in question was consistent with UN instruments dealing with children's rights, such as the Convention on the Rights of the Child 1989,[148] the Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines), and the Standard Minimum Rules for the Administration of Juvenile Justice 1995 (the Beijing Rules). Unfortunately, none of her brethren took up these points and Baroness Hale herself did not pursue them to the extent of holding that the statutory scheme was actually in breach of the teenager's rights.

In *R v Looseley*[149] the Lords held that the English law on entrapment complies with Article 6, because it does not allow persons to be convicted if they have been tricked into committing an offence which they would otherwise not have committed. In Lord Nicholls' words: 'I do not discern any appreciable difference between the requirements of Article 6, or the Strasbourg jurisprudence on Article 6, and English law as it has developed in recent years'.[150] Although acknowledging that each case would depend on its own facts, their Lordships tried to provide guidance for future use. For Lord Nicholls, rather than adopting the US Supreme Court's test of whether the defendant was in any event 'predisposed' to commit a crime, English law would do better to ask 'whether the police did no more than present the defendant with an *unexceptional* opportunity to commit a crime'.[151] If the police did no more than others could be expected to do in inciting or instigating a crime then there was no entrapment. In a similar vein, and adopting the words of an Australian judge, Lord Hutton said a prosecution should not be stayed where a police officer has used an inducement which 'is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity'.[152] For Lord Hoffmann the overarching question was 'whether the involvement of the court in the conviction of a defendant who had been subjected to [the behaviour in question] would compromise the integrity of

[146] At 192 and 198.
[147] See the text at nn 16 and 56.
[148] Articles 3(1), 37, and 40.
[149] [2001] UKHL 53, [2001] 1 WLR 2060. See too 192 above.
[150] Ibid, [30].
[151] Ibid, [23](emphasis added). As an illustration of the US test, Lord Nicholls cited *Hampton v US* (1976) 425 US 484.
[152] Ibid, [102] and [112], citing McHugh J in *Ridgeway v The Queen* (1995) 184 CLR 19, 92.

the judicial system'.[153] In the course of their judgments the Law Lords considered the European Court's pronouncements on entrapment in *Teixeira de Castro v Portugal*,[154] pronouncements which counsel for Mr Looseley argued were at odds with the principles used under English law, but each of their Lordships rejected that submission. English law, it is submitted, is still in an uncertain state in this regard.[155] Undercover police officers must often wonder whether their interaction with a suspected criminal will later be held to have crossed the line between, on the one hand, incidental collaboration with a criminal and, on the other, action with compromises the integrity of the judicial system.

The admissibility of evidence, and open justice

The Law Lords and Supreme Court Justices have maintained the position, often asserted by the European Court of Human Rights,[156] that rules of evidence are in very large measure a matter for the national legal system to determine. Decisions which illustrate this principle very clearly include *R v A (No 2)*[157] and *R (D) v Camberwell Green Youth Court*.[158] In the former, the House of Lords controversially applied section 3 of the Human Rights Act 1998 so as to interpret section 41 of the Youth Justice and Criminal Evidence Act 1999 in a way which did not prevent a defendant from cross-examining the woman he had allegedly raped about her previous sexual history. In the latter, the Lords held that another provision in the same Act[159] was compatible with Article 6, even though the section allowed the court to order that evidence at a trial should be given by child witnesses through a video link without first examining whether on the particular facts it was necessary for this to occur. Both decisions are controversial, but neither led to an application to the Court at Strasbourg. As alluded to in Chapter 3, the criticism levelled at *R v A* is of two varieties: some say that it was a blatant attempt on the part of the country's top judges to re-write legislation, which is Parliament's job; others say that in changing the law in a manner which benefits defendants the judges were downplaying the very real interests of victims in maintaining the fairness of the criminal trial process. Such is the consensus around the need to protect children who are caught up in legal proceedings that it is difficult to find anyone who openly disagrees with the Lords' position in the *Camberwell* case.

The Convention itself says nothing about what evidence should or should not be admitted. The most problematic situations are, firstly, where evidence has been admitted from a witness who does not then appear in person to be examined; secondly, where the evidence has been obtained illegally; and thirdly, where the court is asked to consider material in a 'closed procedure'.

[153] Ibid, [71].
[154] (1998) 28 EHRR 101.
[155] Squires (2006); Ashworth (2002).
[156] Though some see the European Court's assertion as 'disingenuous': Jackson and Summers (2012), 365.
[157] [2001] UKHL 25, [2002] 1 AC 45. See too Ch 3 above, at 65–6.
[158] [2005] UKHL 4, [2005] 1 WLR 393.
[159] Section 21(5).

Anonymous and absent witnesses

In the extradition case of *R (Al-Fawwaz) v Governor of Brixton Prison*[160] Lord Rodger dismissed the appellants' argument that the use of a statement by an anonymous witness to support their *arrest* in the United Kingdom was a breach of Article 6 (and also of Article 5(4)). However, in *R v Davis*,[161] where the defendant had been charged with two counts of murder and was convicted primarily on the basis of evidence given by anonymized witnesses, the House of Lords allowed his appeal and held that, where a *conviction* was based solely or to a decisive extent on the testimony of anonymous witnesses,[162] the trial could not be regarded as fair under the common law, whether or not it was fair under the European Convention's standards (another instance where the applicability of the *Ullah* principle[163] was conveniently forgotten). The case was remitted to the Court of Appeal with an invitation to quash the conviction and to decide whether to order a retrial. Parliament, meanwhile, rushed through legislation to authorize the use of evidence supplied by anonymous witnesses in particular circumstances (the Criminal Evidence (Witness Anonymity) Act 2008) and a year later the Coroners and Justice Act 2009 introduced the requirement that, in deciding whether to make a witness anonymity order, a judge must have regard to, amongst other things, whether evidence given by the witness might be the sole or decisive evidence implicating the defendant.[164] The compatibility of this Act with Article 6 of the ECHR has still to be considered in a Supreme Court case.

However, a showdown between the United Kingdom's top court and the European Court in Strasbourg was about to take place in litigation turning on the evidence of *absent* witnesses. The story begins with two decisions by the Court of Appeal of England and Wales. In *R v Al-Khawaja* that court held that admitting in evidence the statement of a complainant who had since died was not a violation of Article 6(3)(d) of the Convention, which gives a person who has been charged with an offence the right to have the witnesses against him or her examined and cross-examined.[165] The court purported to apply *Doorson v The Netherlands*, where the European Court had said that, while 'a conviction should not be based either solely or to a decisive extent on anonymous witnesses',[166] the overall test was whether the proceedings as a whole were fair. In *R v Tahery* the Court of Appeal likewise admitted in evidence the written statement of a witness who said he was too frightened to give evidence in person, as permitted by statute.[167] The disappointed appellants in these two cases then sought leave to appeal further to the House of Lords. Only in the first did the Court of Appeal certify that a point of law of general public importance was involved (an essential prerequisite) but then the Appeal Committee of the House refused leave, presumably because it saw

[160] [2001] UKHL 69, [2001] 1 AC 556.
[161] [2008] UKHL 36, [2008] AC 1128.
[162] This was the test laid down by the European Court of Human Rights in *Doorson v The Netherlands* (1996) 22 EHRR 330.
[163] See Ch 2 above, 39–43.
[164] Section 89(2)(c).
[165] [2005] EWCA Crim 2697, [2006] 1 WLR 1078.
[166] (1996) 22 EHRR 330, para 76.
[167] [2006] EWCA Crim 529. The statutory provision was the Criminal Justice Act 2003, s 116(2)(e) and (4).

nothing exceptional in the Court of Appeal's decision. Meanwhile the two convicted men lodged applications in Strasbourg.

When the Chamber of the European Court considered the applications it proceeded on the basis that the statements of the two absent witnesses were the sole or, at least, the decisive, basis for each applicant's conviction.[168] The representatives of the UK government had conceded this point, although in subsequent litigation they withdrew the concession. The Chamber then concluded unanimously that in both cases the counterbalancing factors relied on by the UK government were not sufficient to remove the taint of unfairness in the trials and awarded each applicant €6,000 by way of compensation. The Court could not, of course, overturn the convictions, but the findings of unfairness threw a dark shadow over English criminal procedure and no doubt gravely worried the senior domestic judges.

The decision certainly provoked the ire of the then Second Senior Law Lord, Lord Hoffmann. Two months prior to his retriement, he took aim at the European Court in a lecture he delivered for the Judicial Studies Board in May 2009. The Chamber's decision in *Al-Khawaja v UK* was one of three examples he gave of cases where the European Court was 'teaching grandmothers to suck eggs':

> It is quite extraordinary that on a question which had received so much consideration in the Law Commission and Parliament, the Strasbourg Court should have taken it upon themselves to say that the Court of Appeal was wrong.[169]

More generally, Lord Hoffmann complained that the European Court was too self-important and not deferential enough to national legal systems:

> In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.[170]

An opportunity to consider the impact of the Chamber's decisions arose two months later when the Court of Appeal dealt with three consolidated appeals against convictions, all of them involving hearsay evidence deriving from people who were not present at the trials to be examined and cross-examined. As a mark of how seriously the Court of Appeal was treating the matter, a bench of five judges was convened. The Court of Appeal's judgment is reported under the name *R v Horncastle*.[171] It concludes that:

> Where the hearsay evidence is demonstrably reliable, or its reliability can properly be tested and assessed, the rights of the defence are respected, there are in the language of the European Court of Human Rights sufficient counterbalancing measures, and the trial is fair.[172]

[168] (2009) 49 EHRR 1, para 39.
[169] Hoffmann (2009), 427. Lord Hoffmann did, however, concede (at 422) that it was perfectly acceptable to adopt the text of the Convention as a UK constitutional instrument through the Human Rights Act 1998.
[170] Ibid, 423–4.
[171] [2009] EWCA Crim 964, [2010] 2 AC 373.
[172] Ibid, [79].

Predictably, the appellants sought and received permission to appeal to the House of Lords. This time a bench of seven judges was convened, including the Senior Law Lord, the Master of the Rolls, and the Lord Chief Justice. The hearing took place in July 2009, when the House was still the final court of appeal, but by the time the judgments were delivered, in December 2009, it had been transmuted into the Supreme Court. The Justices unanimously affirmed the Court of Appeal's conclusions and deliberately refused to apply the European Court's judgment in *Al-Khawaja and Tahery*.[173] It was an early opportunity for the Supreme Court to assert itself.

The lead judgment was given by Lord Phillips, the President of the new court, and all the other judges agreed with it, while Lord Brown penned a few supplementary paragraphs. Very unusually, four annexes were added to Lord Phillips' judgment. Annex 1, prepared by Lord Mance, analysed the position on criminal hearsay evidence in three other common law jurisdictions—Canada, Australia, and New Zealand; Annex 2, by Lord Phillips himself, set out the details of the cases in Strasbourg where the seeds of 'the sole or decisive rule' were sown; Annex 3, also by Lord Phillips, analysed *Doorson v The Netherlands* and subsequent Strasbourg cases to try to identify the principle underlying the sole or decisive rule; and Annex 4, prepared by Lord Judge CJ, further analysed numerous Strasbourg cases with a view to assessing whether they would have been decided in the same way under English common law principles. The Supreme Court's efforts in this case are therefore the most determined ever made by the United Kingdom's top court to convince the European Court of Human Rights that it must not find a principle of English law to be in violation of the Convention. It was a conscious attempt to enter into a dialogue with the Strasbourg Court, although to some it may have seemed more like a salvo in a shouting-match. At the end of his judgment Lord Phillips states:

> I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the [Criminal Justice Act 2003], interpreted in accordance with their natural meaning . . . In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.[174]

Three months after the Supreme Court's pronouncement, a panel of five judges in Strasbourg decided to refer the Chamber's decision in *Al-Khawaja and Tahery* to the Grand Chamber. There was no further oral hearing and two years later, in 2011, the Grand Chamber announced that it accepted the analysis conducted by the UK Supreme Court: the blanket nature of 'the sole and decisive rule' was toned down and in the first of the two applications the decision of the Chamber was reversed.[175]

The Grand Chamber's judgment is notable, first, for the attention it pays to 'relevant comparative law'. No fewer than 125 paragraphs are devoted to the law in eight other common law jurisdictions—Scotland, Ireland, Australia, Canada, Hong Kong,

[173] [2009] UKSC 14, [2010] 2 AC 373; Bjorge (2011).
[174] Ibid [108].
[175] (2012) 54 EHRR 23.

New Zealand, South Africa, and the United States. Next, the judgment carefully deals with the four principal objections which the UK government had raised to the 'sole and decisive test' rule, but rejects them all. It also points out that in *R v Davis*, as recently as 2008,[176] the House of Lords had been quite willing to apply the sole and decisive test in the context of anonymous witnesses (two of the Law Lords in that case, Lords Brown and Mance, also sat in *R v Horncastle*). And it adds that, when applying Article 6(3), the European Court 'has always interpreted [the Article] in the context of an overall examination of the fairness of the proceedings',[177] giving as examples cases where inferences are drawn from a defendant's silence in the face of questioning, cases where evidence has been withheld from the defence in order to protect police sources, and cases where the defendant has been denied access to legal assistance. Then, without conceding that it had previously given too much weight to 'the sole and decisive rule' in the context of hearsay evidence, the Grand Chamber summed up its position thus:

> It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence… To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.
>
> The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6(1). At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny… The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.[178]

The reasons given for not changing the Chamber's conclusion in the *Tahery* application were that the absent witness's evidence was not strongly corroborated by any other evidence, the victim's own evidence was only circumstantial, the defendant had a right not to give evidence himself to contradict the absent witness's evidence, the defence could not find any other witness to contradict that evidence, and the judge's warning to the jury was by itself of insufficient weight to counter the danger of relying only on the absent witness's statement. The Grand Chamber affirmed the Chamber's decision to award Mr Tahery €6,000 by way of compensation.

It is worth noting that Judge Bratza, the UK judge, who of course participated in both the Chamber and the Grand Chamber decisions,[179] added a short concurring opinion

[176] See n 212 above.
[177] (2012) 54 EHRR 23, para 143.
[178] Ibid, paras 146–7.
[179] He was the only judge to do so.

in the Grand Chamber indicating that '[t]he present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention'.[180] He essentially admitted to having changed his mind during the course of the litigation and to having accepted the need to apply 'the sole and decisive rule' flexibly. However, two of Judge Bratza's colleagues—Judge Sajó from Hungary and Judge Karakaş from Turkey, strongly dissented from this viewpoint. In their eyes the European Court should have continued to apply the sole and decisive test in a rigid way:

> The adoption of the counterbalancing approach means that a rule that was intended to safeguard human rights is replaced with the uncertainties of counterbalancing. To our knowledge this is the first time ever that this Court, in the absence of a specific new and compelling reason, has diminished the level of protection. This is a matter of gravest concern for the future of the judicial protection of human rights in Europe.[181]

Clearly the Supreme Court's message to the European Court was not received warmly. Even in the judgment of the 15 judges who formed the majority, there is little indication of a willingness to 'roll over' in the face of the Justices' comments. The European Court made the smallest concession it needed to make in order to accommodate the views of the UK Supreme Court and it specifically rejected the four main objections which the Justices had made to the 'sole and decisive test'. A stand-off was avoided, but the tension in the air when representatives of the two courts later met must have been almost palpable.

Illegally obtained evidence

We have already seen in Chapter 5 that the United Kingdom's top court, in the second *Belmarsh* case,[182] set its face against accepting the admissibility in evidence of information obtained by torture. But one reason why there was ever some doubt as to whether the House of Lords would be so adamant in that regard (not that questions do not still remain over issues such as the burden of proof) is that the general principle at common law is that evidence is admissible regardless of any illegality used in obtaining it. Lord Bingham, who alone amongst the Law Lords in the second *Belmarsh* case analysed relevant jurisprudence of the European Court, intimated that that Court had always insisted on its responsibility to ensure that judicial proceedings, viewed overall on the particular facts, were fair.[183] The way in which evidence has been obtained or used is clearly one factor which may render the proceedings unfair. Lord Bingham pointed to a very recent decision of the European Court where it asked the state concerned for more information before ruling on whether a confession supposedly obtained by coercion rendered the subsequent trial unfair.[184]

[180] Paragraph 2 of his concurring opinion. See too Bratza (2011).
[181] Paragraph 0-II28 of the joint dissenting opinion.
[182] *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 AC 221. See 136–42 above.
[183] Ibid, [26].
[184] *Harutyunyan v Armenia* (2009) 49 EHRR 9.

The House of Lords had itself fallen foul of the European approach to fairness some 15–20 years earlier. In *R v Khan*,[185] where the police had attached a listening device to the outside wall of a person's home and recorded private conversations occurring inside the home, the House ruled unanimously, affirming the decision of the Court of Appeal and the Crown Court, that to admit the recordings would not be unfair within the terms of section 78 of the Police and Criminal Evidence Act 1984. The Law Lords said that this was so even if the police had violated the home-owner's right to a private life (under Article 8 of the European Convention) by attaching the listening device without his consent. What outweighed any sense of unfairness here were the slightness of the trespass involved, the seriousness of the defendant's alleged criminal behaviour (drug trafficking), and the public interest in the detection of crime. Although the defendant's counsel did try to convince their Lordships that the bugging of the conversations was not 'in accordance with the law' as required by Article 8, that argument was not directly addressed in the Law Lords' opinions. When the case reached Strasbourg, however, that was the key flaw in the eyes of the Chamber of the European Court, which held unanimously that Article 8 had been violated.[186] The judges highlighted Lord Nolan's assertion that 'under English law, there is in general nothing unlawful about a breach of privacy',[187] a fatally revealing admission.

What is even more interesting is that by six to one the European Court held that there had been no violation of Article 6 on the facts of the case. This was primarily because the applicant had at no point challenged the authenticity of the tape recording, simply its use as evidence against him. The Court was satisfied that, 'had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of the Police and Criminal Evidence Act 1984'.[188] This is tantamount to saying that if UK judges do not think there has been any unfairness then the judges in the European Court will not second-guess that assessment. The judge who dissented on Article 6 was Judge Loucaides from Cyprus, who during his time on the Court acquired a significant reputation for dissenting, particularly in applications brought against the United Kingdom. Here he adopted the rather extreme position according to which a trial cannot be fair if a person's guilt is established through evidence obtained in breach of any of the human rights guaranteed by the Convention, especially if that is the only evidence against the accused.[189] It is submitted that neither the majority's position nor that of Judge Loucaides is the preferable one in this context. What would be better would be a clearer statement from the European Court as to its criteria of fairness, especially in relation to police conduct which violates other Convention rights. It was partly the failure to be more precise in its standards that made it so difficult for the House of Lords in the second *Belmarsh* case to find clear authority in the Strasbourg jurisprudence for holding that evidence obtained by torture is always inadmissible.

[185] *R v Khan (Sultan)* [1997] AC 558.

[186] (2001) 31 EHRR 45. By that time Parliament had intervened to regulate the use of surveillance devices: see the Police Act 1997, Pt III (ss 91–108).

[187] [1997] AC 558, 581G.

[188] (2001) 31 EHRR 45, para 39.

[189] Ibid, paras O-14 and O-16.

Closed material procedures

Faced with two contrasting principles—that evidence obtained by torture is inadmissible in UK law but that otherwise the use of illegally obtained evidence will not necessarily affect the fairness of proceedings—there is obviously room for argument over what position the law should adopt regarding situations falling between these two poles. One such situation arises when evidence has been obtained not through torture but through inhuman or degrading treatment. Another is when the government wishes to impose restrictions on a person's movement, not because he or she has been found guilty of (or even accused of) a criminal offence but because he or she is deemed to be a danger to society. In *Secretary of State for the Home Department v MB and AF*,[190] for example, the House decided in 2007 that determining whether a control order issued under the Prevention of Terrorism Act 2005 had been lawfully issued was not the determination of a 'criminal charge' for the purposes of Article 6(1) but that, nevertheless, the higher duties required for criminal cases by Article 6 should be applied in that context. The House went on to hold (by four to one) that requiring such controlees to be represented during challenges to control orders by 'special advocates', who could not reveal to the controlees what they had been told about the case against the controlees, was a breach of Article 6 (Lord Hoffmann dissenting). The appeals were referred back to the High Court with a direction to read down the relevant statutory provisions in the light of section 3 of the Human Rights Act 1998. In fact, the subsequent hearing in the High Court continued to dissatisfy *AF* and eventually the case made its way back to the Lords in 2009, as *Secretary of State for the Home Department v AF (No 3)*.[191]

Before that second House of Lords hearing could take place there was an important development at Strasbourg when the European Court issued its judgment relating to the collection of applications lodged in the wake of the two *Belmarsh* cases. It will be recalled that, although the applicants 'won' when the House of Lords dealt with the first *Belmarsh* case,[192] they were not released from detention: the House of Lords declared the statutory provision which authorized their detention to be incompatible with the European Convention, but it had no power to 'disapply' that provision or to order the detainees' release. The applicants remained in detention for three months, until the relevant section of the Anti-terrorism, Crime and Security Act 2001 lapsed and was replaced by the control order provisions in the Prevention of Terrorism Act 2005. The detainees lodged applications in Strasbourg and in *A v UK* the European Court considered, amongst other points, a complaint by nine applicants that the procedure used by the Special Immigration Appeals Commission (SIAC), when deciding appeals against the Home Secretary's decision to 'certify' each of them to be a reasonably suspected terrorist,[193] was in violation of Articles 6(1) and (2) of the Convention. The applicants pointed to the fact that, alongside 'open material', SIAC had considered 'closed material', which was not disclosed to the complaints or their legal advisers but only to 'special advocates' appointed for each detainee by the Solicitor General. The

[190] [2007] UKHL 46, [2008] AC 440.
[191] [2009] UKHL 28, [2010] 2 AC 269. See Kavanagh (2010).
[192] See Ch 6 above, at 167–71.
[193] Under the Anti-terrorism, Crime and Security Act 2001, s 25.

special advocates could make submissions on behalf of the detainees concerning this closed material but could not discuss the material with those detainees or have any further contact with the detainees or their lawyers unless the court gave its permission for that to occur.[194] At the end of each appeal SIAC would issue both an 'open judgment' and a 'closed judgment', the latter not being made public.

The European Court did not in the end give separate consideration to Article 6 because it found that in this context the standards required by Article 5(4) of the Convention (which guarantees the right to judicial review of the lawfulness of detention) were the same as those required by Article 6. In cases where detainees were on remand in custody, the Court said:

> [S]ince the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him.[195]

The Court explained that it might sometimes be lawful to withhold certain evidence from the defence on public interest grounds. It cited *Jasper v UK* as a case where it had been satisfied that the limitations on the rights of the defence had been sufficiently counterbalanced,[196] and contrasted it with *Edwards v UK*, where no such counterbalancing factors existed.[197] But *A v UK* was the European Court's first opportunity to decide whether the use of special advocates as a means of counterbalancing potential unfairness was compatible with Articles 5(4) or 6. While it had looked favourably upon a comparable scheme in Canada, to which it had been referred in *Chahal v UK*,[198] it had not previously taken a definite position on the phenomenon. It went on to conclude that, while 'the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings', the advocate could not perform this function in any useful way 'unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.[199] In cases where the 'open material' played the dominant role in SIAC's determination, or where, even if it did not play that role, the open material contained sufficiently specific allegations, the applicant could instruct his or her legal advisers how to refute the points. But where the open material was general in nature and SIAC's determination was based 'solely or to a decisive degree' on the closed material, then the requirements of Article 5(4), and *ex hypothesi* Article 6, would not be satisfied. Applying these criteria to the applications before them, the Court found no violation of Article 5(4) in relation to five of the applicants but a violation in relation to the other four.

[194] For discussions of the role of special advocates, see Nicolaou (2011) and Ip (2008).
[195] Paragraph 204, citing *Beccie v Moldova* (2007) 45 EHRR 11, paras 68–72.
[196] (2000) 30 EHRR 441.
[197] (2005) 40 EHRR 24.
[198] (1996) 23 EHRR 413.
[199] (2009) 49 EHRR 29, para 220.

Less than four months later the House had the opportunity to consider the European Court's judgment when, in *Secretary of State for the Home Department v AF (No 3)*,[200] it was asked to decide if the Convention's fairness standards had been properly applied in relation to the particular controlee whose case had already come before their Lordships. On this occasion nine Law Lords were asked to sit in the case, including Lord Hoffmann, who had dissented in the previous appeal.[201] In the event, they all applied the European Court's approach and found that the applicant's Article 6 rights had been violated. While the Law Lords must have been gratified that in *A v UK* the Strasbourg Court had so strongly endorsed the House's views in the two *Belmarsh* cases, they must also have felt chastened in relation to the fair trial points.[202] Clearly, Strasbourg's understanding of what 'fairness' required went some way beyond that of the Lords. But this was not to be an issue on which the Law Lords were prepared to take a stand, as they were to do six months later in *R v Horncastle* on the topic of hearsay evidence in criminal cases.[203] It may, however, have contributed to their Lordships' growing exasperation with the Strasbourg Court's apparent support for an inflexible approach based on a 'sole and decisive factor' test.

Lord Phillips, who had been involved in the *AF* case at the level of the Court of Appeal but not when it was before the House on the first occasion, seemed quite content to apply the guidance issued by the European Court. Lord Hope, who had not sat in the earlier case at all, actually said that to him the approach adopted by the Grand Chamber was not surprising and that a principled approach could not do other than adopt the basic rule laid out there.[204] Most pointedly, and in words that hark back to Lord Hoffmann's *cri de coeur* in the first *Belmarsh* case, he added:

> [T]he slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle.[205]

Lord Scott, likewise, was in respectful agreement with the Grand Chamber's judgment and he even added (though without quoting authorities) that the common law would have led to the same conclusion. He chided the government for not facing up to the political consequences of issuing a derogation notice to justify the control order system. Lords Rodger and Walker agreed with Lord Phillips, with the former famously summing up his position by saying '*Argentoratum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed'.[206] Baroness Hale was in the hot seat because she did deliver an opinion when *AF* was first before the House and now had to admit that she had been 'far too sanguine' about how possible it would be to conduct a fair hearing under the special advocate procedure.[207] Likewise, Lord Brown, who also sat in the earlier appeal, thought that the Grand Chamber had gone beyond what the majority

[200] Above n 191.
[201] *Secretary of State for the Home Dept v MB and AF* [2007] UKHL 46, [2008] 1 AC 440.
[202] For more on the United Kingdom's laws on terrorism and Convention rights see Fenwick (2010a).
[203] [2009] UKHL14, [2010] 2 AC 373. See 214 above.
[204] [2010] 2 AC 269, [83] and [84].
[205] Ibid, [84]. For Lord Hoffmann's remarks, see Ch 6 above, at 169.
[206] Ibid, [98].
[207] Ibid, [101].

of Law Lords in the first appeal had said was required, but he reminded us that, unlike in criminal cases, it was still not necessary in a control order case to reveal the identity of the witness, or even his or her evidence, provided the controlee is made aware of the substance of the essential allegation founding the Secretary of State's reasonable suspicion.[208] Lord Hoffmann was not so willing. He bluntly said that he was allowing the appeals before him on the basis of the European Court's judgment 'with very considerable regret, because I think that the decision of [the European Court] was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism'.[209] He denigrated the European Court for imposing 'a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is "based solely or to a decisive degree" on closed material'.[210] Nevertheless, he thought the House had 'no choice but to submit'.[211] He could see no advantage in putting the United Kingdom in breach of the international obligation it accepted when it ratified the Convention. Lord Carswell's short judgment was not as direct as Lord Hoffmann's, but he did not completely disguise his distaste for the Grand Chamber's 'absolute rule'.[212]

The frustration of some of the Law Lords in the *AF* case may have been exacerbated by the fact that the House had very recently recognized the importance of Article 6's guarantee of the right to know the allegations one is facing before one suffers some significant detriment, albeit in a different setting which did not involve national security. This was in *R (Wright) v Secretary of State for Health*[213] where the House declared that section 82(4)(b) of the Care Standards Act 2000, which makes provision for keeping a list of people who are considered unsuitable to be working with vulnerable adults, was incompatible with Article 6 (as well as Article 8) because it did not provide for first according such people a hearing. The House specifically held, contrary to the Court of Appeal,[214] that the legislative provision could not be 'read down' under section 3 of the Human Rights Act 1998 so as to be completely compatible with the Convention. The defect in the Care Standards Act 2000 was supposedly remedied with the enactment of the Safeguarding Vulnerable Groups Act 2006,[215] but the Parliamentary Joint Committee on Human Rights expressed its reservations over whether the new law takes full account of the Article 6 and Article 8 rights of people who, under the new Act, are automatically placed on a 'barred list'.[216]

We have already noted in Chapter 5 that in *Al-Rawi v Security Service* the Supreme Court Justices refused to countenance, albeit by a majority of five to three, the use of a closed material procedure in civil cases.[217] The majority held that there was no common

[208] Ibid, [120].
[209] Ibid, [70].
[210] Ibid, [71], emphasis in the original. This presages the controversy in *R v Horncastle*, 213–4 above.
[211] Ibid, [70].
[212] Ibid, [108].
[213] [2009] UKHL 3, [2009] AC 739.
[214] [2007] EWCA Civ 999, [2008] QB 422.
[215] Section 2 and Sch 3.
[216] Joint Committee (2006a), paras 1.1–1.15. See too Joint Committee (2006b), paras 1.1–1.54. The Committee suspended its judgment until it had sight of the regulations still to be made under the Act.
[217] [2011] UKSC 34, [2012] 1 AC 531.

law power to create such a procedure, since it contradicted the basic principle of open justice. In the words of Lord Dyson, 'the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power'.[218] In *Al Rawi* no reliance was placed on the European Convention, but on the same day the same bench ruled in a cognate case, *Tariq v Home Office*,[219] that existing rules allowing for the use of what amounts to a closed material procedure in employment tribunals[220] *are* compatible with both European Convention law and EU law. The only dissenting voice was that of Lord Kerr, who held that it would be a breach of Article 6 to deny sufficient information to a claimant in an employment tribunal which would allow the claimant to give effective instructions to legal representatives in relation to the allegations made by the respondent. In coming to this conclusion Lord Kerr relied upon a judgment of the European Court of Human Rights which his colleagues on the Supreme Court either ignored or sought to distinguish.[221] He also found that such a procedure breaches the fundamental common law right to a fair trial.[222] Meanwhile, the government is proceeding with legislation which will permit the sorts of rules used in employment tribunals to be developed for other civil claims.[223] As noted by Anthony, this may in due course require the Supreme Court to decide if rules made under that legislation—or even the primary legislative provisions themselves—are compatible with basic common law values.[224]

The question also sometimes arises whether deporting or extraditing someone to a foreign country may be unlawful if he or she is likely to suffer a breach of Article 6 rights in that jurisdiction. We have already seen that in *Othman v UK*, the case involving the radical Islamic cleric Abu Qatada, the European Court again disapproved of the House of Lords' stance[225] and held, for the first time, that if Abu Qatada were to be deported to Jordan he would there suffer a *flagrant* denial of his right to a fair trial (because evidence used against him would be likely to come from someone who had been tortured).[226] This judgment will no doubt alert the Supreme Court to be even more mindful than before of the need to have regard to Article 6 rights when considering a person's deportation or extradition.

Confiscation and post-conviction issues

The provisions on confiscation orders in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 have been said to be compatible with Article 6, albeit in *obiter*

[218] Ibid, [35]. See too [71] and [74] (per Lord Hope); [83] (per Lord Brown), who also suggested that the sort of claim advanced in this case may be 'quite simply untriable by any remotely conventional open court process' ([86]), a view with which Lord Kerr expressed some agreement ([99]).

[219] [2011] UKSC 35, [2012] 1 AC 452.

[220] Employment Tribunals (Constitution and Rules of Procedure) Regs 2004 (SI 2004/1861), Sch 1, r 54 and Sch 2, r 8.

[221] *Užukauskas v Lithuania* App No 16965/04, judgment of 6 July 2010. See [2012] 1 AC 452, [134]–[135].

[222] [2012] 1 AC 452, [108].

[223] Justice and Security Bill, Pt 2.

[224] Anthony (2013).

[225] *RB (Algeria) v Secretary of State for the Home Dept* [2009] UKHL 10, [2009] 2 AC 110. See Ch 5 above, at 147–8.

[226] *Othman v UK* (2012) 55 EHRR 1.

dicta.[227] And in *Government of the USA v Montgomery*[228] the statutory registration of a US judgment confiscating the defendant applicant's assets in the United Kingdom[229] was held not to be contrary to her right to a fair trial under Article 6 of the Convention, even though the US judgment was based on the 'fugitive disentitlement doctrine': the requisite 'extreme degree of unfairness' had not been established. In *R v Biggs-Price*[230] the House 'read down' a provision in the Drug Trafficking Act 1994[231] so that, if the prosecution wants the court to make a confiscation order in respect of benefits derived from drug trafficking other than that of which the defendant has been convicted, it has to prove beyond a reasonable doubt (not just on the balance of probabilities, despite the provision's reference to 'the standard applicable in civil proceedings') that the defendant has benefited from drug trafficking. But such proof could still consist of the fact that the accused has been convicted of other drug trafficking offences, and there is then no breach of the presumption of innocence guaranteed by Article 6(2) of the Convention.

As we saw in Chapter 3, in *R (Anderson) v Secretary of State for the Home Department*[232] the Lords issued a declaration of incompatibility regarding legislation which gave the Home Secretary a role in the sentencing of offenders.[233] Although the section said nothing about how, in practice, a tariff was to be set for a life prisoner (at the time, the trial judge and the Lord Chief Justice made recommendations to the Home Secretary), Lord Bingham was clear that it gave to the Home Secretary a power over release dates which was incompatible with the prisoner's right under Article 6 of the European Convention to have a sentence imposed by an independent and impartial tribunal. What mainly drove him to this conclusion was the decision of the European Court of Human Rights in *Stafford v UK*,[234] where that Court departed from one of its previous decisions and held in favour of a mandatory life sentence prisoner.[235] Without referring to the fact that he was doing so, Lord Bingham effectively refused to follow statements made in three previous, and quite recent, decisions of the House of Lords in which the House had accepted the legality of the Home Secretary's role in fixing the sentence of a mandatory life prisoner.[236] What made the difference was that since then Article 6 of the European Convention had become part of domestic law. Largely to take account of that the devolved administrations in both Scotland and Northern Ireland had already altered their legislation in this area accordingly.[237] The decision in *Anderson* is one of the best examples yet of the House of Lords 'taking account' of decisions of the European

[227] *R v Rezvi* [2002] UKHL 1, [2002] 1 All ER 801 and *R v Benjafield* [2002] UKHL 2, [2003] 1 AC 1099.
[228] [2004] UKHL 37, [2004] 1 WLR 2241.
[229] Under the Criminal Justice Act 1988, s 97.
[230] [2009] UKHL 19, [2009] 1 AC 1026.
[231] Section 2(8)(a).
[232] [2002] UKHL 46, [2003] 1 AC 837.
[233] Crime (Sentences) Act 1997, s 29.
[234] (2002) 35 EHRR 32.
[235] *Wynne v UK* (1994) 19 EHRR 333. See too *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, where the House was again influenced by a recent *volte face* in European Court jurisprudence concerning the rights of transsexuals.
[236] In *R v Secretary of State for the Home Dept, ex parte Doody* [1994] 1 AC 531; *R v Secretary of State for the Home Dept, ex parte Stafford* [1999] 2 AC 38; and *R v Secretary of State for the Home Dept, ex parte Hindley* [2001] 1 AC 410.
[237] By provisions in the Convention Rights (Compliance) Act (Scotland) 2001 and the Life Sentences (NI) Order 2001 respectively. On the latter, see *Re King's Application* [2002] NICA 48, [2003] NI 43.

Court of Human Rights, as it is bound to do by section 2(1) of the Human Rights Act 1998.[238]

In *R (Hammond) v Secretary of State for the Home Department*[239] the Lords held that paragraph 11(1) of Schedule 2 to the Criminal Justice Act 2003,[240] which requires a High Court judge to review the tariff imposed on a mandatory life sentenced prisoner *without an oral hearing*, was, on its face, incompatible with Article 6 of the Convention but that it should be read subject to an implied condition that the judge had a discretion to order an oral hearing where fairness required it. This was really an example of the application of the interpretative duty imposed on courts by section 3 of the Human Rights Act. In *R (Dudson) v Secretary of State for the Home Department*,[241] however, the House held that the appellant, who as a juvenile had been convicted of murder, did not have a right under Article 6(1) to have an oral hearing before the Lord Chief Justice whenever this judge was *reviewing* (as opposed to setting) the tariff in his case.

In *R (Smith) v Parole Board (No 2)*[242] it was held that the Parole Board had not breached the Article 6 (or Article 5) Convention rights of two prisoners who, having been recalled to prison under section 39 of the Criminal Justice Act 1991 for breaching the conditions of their release on licence, had been denied an oral hearing by the Parole Board when it was considering whether to revoke their licences. However, the prisoners' appeals were allowed because there had been a breach of the common law duty of procedural fairness—a stark example of how, on occasions, existing English law goes further to protect human rights than the European Convention requires.

In one final case involving a sentenced prisoner, *R (Greenfield) v Secretary of State for the Home Department*,[243] the Lords ruled that even though a prisoner had been wrongfully denied legal representation during an adjudication in a prison for an alleged drugs offence, he should not be awarded damages. Lord Bingham, with whom the other four Law Lords concurred, relied heavily on the fact that the European Court itself would be unlikely to grant damages in such a situation. It is strange, though, that no reference was made to common law cases on the liability of police and prison authorities for not upholding the rights of detainees and prisoners. Lord Bingham himself, while dissenting, made a powerful argument for the award of such damages in the comparable case of *Cullen v Chief Constable of the Royal Ulster Constabulary*.[244]

The consequences of a breach of Article 6

One of the most important of all the cases decided by the top court on Article 6, because it relates to the consequences of holding that there has been a breach of the article on grounds of unreasonable delay, is undoubtedly *Attorney General's Reference (No 2 of*

[238] See too Ch 3 above, at 67–8 and 73.
[239] [2005] UKHL 69, [2006] 1 AC 603.
[240] This was a transitional provision. Section 269 of the same Act provides that, for murders occurring after 18 December 2003, the trial judge must determine the minimum term which the adult murderer must serve in the same way as would be determined in the case of any other convicted defendant.
[241] [2005] UKHL 52, [2006] 1 AC 245.
[242] [2005] UKHL 1, [2005] 1 WLR 350. See too Ch 6 above, at 187.
[243] [2005] UKHL 14, [2005] 1 WLR 673. See too Ch 3 above, at 91.
[244] [2003] UKHL 39, [2003] 1 WLR 1763.

2001).[245] For the first time since the creation of the Appellate Committee in 1876 their Lordships convened as a bench of nine Law Lords.[246] Part of the reason for appointing such a large bench was that a difference of opinion had emerged in Privy Council cases between English and Scottish Law Lords on the point at issue. A normal bench of five judges would not have been enough to allow a majority of *all* the Law Lords to reach a final conclusion on the matter (although a bench of seven would have sufficed, if they had all agreed). In the event, the seven English Law Lords in the case held that when there has been an unreasonable delay in the trial of criminal charges, but no prejudice has arisen from the delay, the proceedings should be stayed only if a fair hearing would no longer be possible or if for any compelling reason it would be unfair to try the defendant: a stay would never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right. The two Scottish judges, Lord Hope and Lord Rodger, dissented, holding that there should always be a stay in such circumstances.

In the well-known case of *R v Lyons*[247] the Lords made it clear that just because there has been a breach of Article 6, even one announced by the European Court of Human Rights,[248] this does not automatically mean that the conviction resulting from the trial is unsafe, thereby necessitating the defendant's acquittal. Similarly, in one of the first cases decided by the UK Supreme Court, *Allison v HM Advocate*,[249] it was held that a Scottish court had been correct to find that the Crown's failure to disclose the previous convictions of, and outstanding charges against, a Crown witness did breach the accused's rights under Article 6 but that it had not resulted in an unfair trial and a miscarriage of justice. The Supreme Court was not satisfied that the jury would have come to a different verdict if it had been made aware not only of the witness's previous convictions but also of the outstanding charges against him. These two decisions illustrate the point that when the Supreme Court and the European Court are considering Article 6 they are doing so for different purposes. The European Court is seeking to determine only whether there has been an unfair trial, whereas the Supreme Court is determining whether, if there has been unfairness in the overall trial process, it affects the reliability of the defendant's conviction. The European Court has no criminal jurisdiction as such. If it finds that someone has been convicted after receiving an unfair trial it is open to the Court to suggest what steps the Member State should take to remedy the situation, but it is very unlikely indeed to recommend the applicant's release from prison, or even his or her re-trial. It will be up to the Council of Europe's Committee of Ministers to decide whether the Court's judgment has been satisfactorily implemented by the Member State. Notwithstanding the tendency of the European Court of Human Rights to confer on itself ever greater adjudicative power, it remains very unlikely that it will want to start delivering judgments which trespass so intrusively on a national legal system's prerogative to determine the guilt or innocence of criminal suspects.

[245] [2003] UKHL 68, [2004] 2 AC 72. See too Ch 3 above, at 93.

[246] A nine-judge bench had been convened in *R v Ball* [1911] AC 47, at a time when there was no statutory mechanism for dealing with legal appeals in a criminal context.

[247] [2002] UKHL 44, [2003] 1 AC 976. This involved defendants in the so-called 'Guinness' trial.

[248] In *IJL v UK* (2000) 33 EHRR 225 and in *Saunders v UK* (1996) 23 EHRR 313.

[249] [2010] UKSC 6, 2010 SC (UKSC) 19.

Conclusion

Article 6 remains the most frequently invoked of all Convention rights, but it is one of the Convention's provisions in respect of which the European Court still permits Member States a fairly wide margin of appreciation in many contexts. The UK Supreme Court appears to be conscious of this and is therefore prepared to be more assertive in this field than in others. In two 'dialogues' between the United Kingdom's highest domestic court and the European Court, over the police's susceptibility to being sued by victims or witnesses and the admissibility of evidence from an absent witness in criminal cases, the UK court has come out on top. This is also a field in which the common law was already strong before the enactment of the Human Rights Act. On one or two occasions since the commencement of the Act the top domestic judges have been able to develop the common law in ways which protect the right to a fair trial beyond those already adopted by the Strasbourg court. In one respect at least—that of the admissibility of evidence that may have been obtained through torture—the UK court has positively prompted the European Court to establish a clear rule which now applies throughout Europe, although in other respects, such as the use of 'special advocates' and 'closed material procedures', it is the Strasbourg Court which has had to remind the UK court of some fundamental values.

8

The Right to a Private and Family Life

Introduction

Of all the articles in the European Convention on Human Rights, Article 8 is the one which has given the United Kingdom's top court the most difficulty. This is partly because of the Article's 'sprawling' reach[1] but also because of the common law's traditional antipathy to the protection of any right to privacy. If there is one area more than others which most clearly highlights the difference in approach to human rights displayed by the House of Lords and Supreme Court on the one hand and the European Court of Human Rights on the other it is this one. The gap in thinking is perhaps best illustrated by referring straight away to the heartbreaking case of Diane Pretty, a 42-year-old woman suffering from motor neurone disease who sought to get legal clearance for any help her husband might give her when she wished to end her life at a moment of her own choosing. It was always unlikely that the House of Lords would grant such clearance, because of the slippery slope argument whereby if permission for such assistance were given in this case it might allow countless others to commit euthanasia in different circumstances. But it was surely not expected that the House would deny that the right to a private life was even engaged in this situation.[2] Lord Bingham, without citing any clear authority for the proposition, stated that 'Article 8 is expressed in terms directed to protection of personal autonomy while individuals are living their lives, and there is nothing to suggest that the article has reference to the choice to live no longer'.[3] Lord Steyn, surprisingly, was equally cursory in his dismissal of the claimant's argument,[4] and Lords Hobhouse and Scott did not add anything at all on this aspect of the case. Only Lord Hope dealt with the issue in a way that truly appreciated Mrs Pretty's dilemma, even though he did not expressly dissent from what his fellow judges had said:

> Respect for a person's 'private life', which is the only part of Article 8(1) that is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has a right of self-determination. In that sense, her private life is engaged even where in the face of terminal illness she seeks to choose death rather than life.[5]

[1] Wadham et al (2011), 196.

[2] [2001] UKHL 61, [2002] 1 AC 800. See too Ch 3 above, at 115–8. In fact the European Commission had already suggested in *R v UK* (1983) 33 DR 270, para 13, that assisting a suicide 'might be thought to touch directly on the private lives of those who sought to commit suicide'.

[3] [2002] 1 AC 800, [23].

[4] Ibid, [61].

[5] Ibid, [100].

When the case reached the European Court (where it was processed in an expedited fashion, given the seriousness of Mrs Pretty's condition[6]) the seven judges unanimously referred to Lord Hope's statement with approval and went on to hold that Article 8(1) *was* engaged. Drawing an analogy with situations where the law does not prevent people from taking part in life-threatening activities (or from helping others to do so), it based its conclusion on the following principles:

> The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of quality of life take on significance. In an era of growing medial sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.[7]

While some might argue that this discrepancy between the conservatism of the United Kingdom's top court and the radicalism of the European Court is inevitable, given that it is the latter court which has the ultimate responsibility for ensuring the effective implementation of the Convention throughout Europe,[8] the House's reluctance even to accept the applicability of Article 8 to so crucial an issue as the right to assisted suicide is surely regrettable.

This chapter proceeds by further examining the attitudes struck by the House of Lords and Supreme Court regarding each of the four constituent elements of Article 8: the right to respect for private life, family life, home, and correspondence. We shall see that in relation to each of them the top domestic court has been unduly restrained.

Respect for private life

Differences in approach between a top national court and the European Court do not matter so much if the national court is prepared to take appropriate account of what the European Court says on the issue in question. And that is what occurred when the issue of assisted suicide came back before the House in the case of Deborah Purdy in 2009. She too was seeking reassurance that her partner would not be prosecuted if he helped her to commit suicide; she suffers from multiple sclerosis, not so serious a condition as motor neurone disease, but still an illness which often leads to great physical helplessness. In what was deliberately chosen as the final set of judgments ever issued in the House—before the United Kingdom's top court became the Supreme Court—the Law Lords noted the criticism made of them by the European Court in *Pretty v UK* and acknowledged in *R (Purdy) v DPP* that Article 8(1) *was* engaged on the facts of

[6] The European Court's judgment was issued on 29 April 2002, five months after the House's decision. Mrs Pretty died on 11 May 2002.

[7] (2002) 35 EHRR 1, para 65.

[8] Where Belgium, Luxembourg, the Netherlands, and Switzerland already permit assisted suicides under strictly controlled conditions.

the case.[9] Lord Hope, the only Law Lord to sit in both cases,[10] was happy to apply the Practice Statement of 1966 in order to justify the departure.[11] But the decision in *Purdy* also went beyond *Pretty* in that their Lordships agreed that there was a need for greater clarity in the law. They therefore issued a mandatory order requiring the Director of Public Prosecutions to 'formulate (to the extent, if any, that he has not yet done so) and publish a policy, which sets out what he would generally regard as the aggravating factors and mitigating factors when deciding whether to sanction a prosecution under section 2 of the [Suicide Act 1961]'.[12] This was the House of Lords signing off in activist mode, demonstrating to the nation that top judges *can* play a useful part in ensuring that the law of the land is kept modern. The DPP did subsequently issue draft guidelines for consultation, and published final guidelines in 2010.[13]

Homosexuality

There are several other instances of the Law Lords' views on the right to respect for a private life being re-assessed by the European Court. Some of these re-assessments agreed with the House's approach, others did not. In the former category one can place the litigation concerning homosexual sado-masochistic practices, where both courts have been rather conservative. In *R v Brown* the Law Lords refused to allow the defence of consent to men who had been prosecuted for assault in these circumstances.[14] Their Lordships were split three to two on the issue, but in the European Court there was unanimity (nine to none).[15] The European judges felt that the Law Lords had given relevant and sufficient reasons for the interference with the right to a private life, which on this occasion was based on the need to protect health.

It is worth recalling, however, that in July 2000 the European Court held in *ADT v UK* that a UK court *had* violated the right to a private life when it convicted a homosexual man of gross indecency after he had been found in possession of video-recordings which showed him engaging in acts of oral sex and mutual masturbation with up to four other consenting men within the privacy of his own bedroom.[16] While the Sexual Offences Act 1967 decriminalized homosexual acts between consenting men in private, it made it clear that acts of gross indecency between men, whether in public or private, remained criminal.[17] There was no legislation regulating private homosexual acts between consenting women, nor private heterosexual acts between consenting men and women if more than two people were present. Strangely, given that in *Laskey, Jaggard and Brown v UK* it had conceded that there was an interference with the applicants' right to a

[9] [2009] UKHL 45, [2010] 1 AC 345.

[10] Although Baroness Hale, who sat in the House of Lords in *Purdy*, had also heard *Pretty* when she sat in the Divisional Court: [2001] EWHC Admin 788.

[11] [2010] 1 AC 345, [34] and [39]. See too Baroness Hale [60]–[62] and Lord Neuberger [95].

[12] Ibid, [101] (per Lord Neuberger).

[13] <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> (last accessed 2 December 2012).

[14] *R v Brown* [1994] 1 AC 212.

[15] *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39.

[16] (2001) 31 EHRR 33.

[17] Under the Sexual Offences Act 1956, s 16.

private life (albeit a justifiable one), in *ADT v UK* the UK government tried to maintain that there had been no such interference. But the European Court gave that argument short shrift and concluded that there was no justification for the interference in question: given the absence of any public health considerations, the purely private nature of the behaviour, and the fact that the convictions were not based on the video-recording of the activities, the legislation in question, as well as the prosecution and conviction, could not be deemed compatible with Article 8.

The Law Lords also missed an opportunity to enhance the rights of homosexuals when, in 1996, they denied members of the armed forces the chance to appeal against the Court of Appeal's ruling in *R v Ministry of Defence, ex parte Smith*.[18] According to that ruling, the Ministry of Defence's policy of administratively discharging personnel in the armed services who were known to be homosexual was not 'irrational' under the then standards of English administrative law. The leading judgment was delivered by Sir Thomas Bingham MR, as he then was, and the court affirmed the decision of the Divisional Court, where the leading judgment had been given by Simon Brown LJ (later Lord Brown of Eaton-under-Heywood). Sir Thomas made it clear that, as the European Convention was not yet part of English domestic law, an appellate court could not usefully consider whether English law would be found to be in breach of the Convention. He did agree—and this is what gave the decision at least the appearance of being a comparatively liberal one—that in an application for judicial review of a decision made by an administrative body in the context of human rights, such as this case was, the court would require the decision-maker to provide greater justification for the decision taken. He cited in support some comments made by Lord Bridge in *R v Secretary of State for the Home Department, ex parte Bugdaycay*[19] and by Lord Templeman in *R v Secretary of State for the Home Department, ex parte Brind*,[20] but these did not go as far as the test suggested by David Pannick QC and approved by the Court of Appeal: 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable'.[21] Notwithstanding this liberalization of the approach in judicial review cases, the Court of Appeal concluded that the threshold of irrationality was a high one and that it had not been crossed in this case. Sir Thomas pointed in particular to the fact that both Houses of Parliament had recently supported the Ministry's policy, that the policy accorded with the advice of the professionals to whom the government rightly looked for advice, and that changes to the policy in other countries had been made too recently for it yet to be clear what effect they had had. The whole tenor of the judgment was that courts should not be too willing to interfere with decisions that are 'policy-laden, esoteric or security-based'.[22] The idea that the right to a private life should be the centre of attention was nowhere considered: human rights in general, and the right to a private life in particular, were not core common law values which had to be given priority, or the interference with which had to specifically justified.

[18] [1996] QB 517. The Appeal Committee of the House refused leave to appeal on 19 March 1996.
[19] [1987] AC 514, 531. See also Ch 4 above, at 100–1.
[20] [1991] 1 AC 696, 748–9. See also Ch 10 below, at 300.
[21] [1996] QB 517, 554F.
[22] Ibid, 556C (per Sir Thomas Bingham MR).

The decision by the House led to four applications in Strasbourg and two separate judgments by the European Court.[23] The UK government was unable to persuade any of the judges in Strasbourg that the interferences with private life were 'necessary in a democratic society'. Rather than stop at the House of Lords' approach based on proportionate scrutiny, the Court, citing *Dudgeon v UK*,[24] said that:

> [W]hen the relevant restrictions concern 'a most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8(2) of the Convention.[25]

Here the Court could find no 'particularly serious reasons'. It saw no concrete evidence to support the suggestion that the presence of homosexuals in the armed forces would have a substantial negative effect on their morale, fighting power, and operational effectiveness.[26] It also noted that the armed forces already had codes of conduct concerning race and gender issues and could not see why a similar code could not be devised for sexuality issues.

Inevitably the European Court's decision did not go down well with the UK government of the day, even though the Labour Party had wrested power from the Conservative Party at the 1997 election. There was some resentment that the deliberate will of Parliament had been subverted by a foreign court.[27] But such views failed to understand that since conceding the right of individual petition in 1966 the UK government had consented to such foreign pronouncements.[28] The fact that the European Court could pass judgment on UK laws and policies in a way which even the United Kingdom's top court could not do was a product of the failure to incorporate Convention rights directly into UK law. By 1999, of course, Parliament had already enacted the Human Rights Act 1998, but the legislation was still awaiting full commencement pending the training of judges and others in its implications. The European Court's judgments in *Smith and Grady* and *Lustig-Prean and Beckett* became excellent case studies for use in such training courses.

As noted elsewhere,[29] the high-water mark for the top court's recognition of the rights of homosexuals came in *HJ (Iran) v Secretary of State for the Home Department*,[30] where the Supreme Court held that homosexuals could claim asylum in the United Kingdom if they could show that they had a well-founded fear or persecution in their home country unless they hid their sexuality.

[23] *Smith and Grady v UK* (2000) 29 EHRR 493 and *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548. In the former case the applicants relied upon Art 3 as well as Arts 8 and 14.

[24] (1982) 4 EHRR 149. This is where the European Court held that the criminalization of male homosexual conduct in Northern Ireland was a violation of Art 8 of the Convention.

[25] (2000) 29 EHRR 493, para 89; see too (2000) 29 EHRR 548, para 82.

[26] Ibid, para 110.

[27] <http://news.bbc.co.uk/1/hi/uk/458842.stm> (last accessed 2 December 2012). A Conservative shadow defence spokesman supported former NATO Commader-in-Chief Sir Anthony Farrar-Hockley's statement that the decision was 'ridiculous' and struck at the root of discipline and morale.

[28] For the story behind this concession, see Lester (1999).

[29] See Ch 3 above, at 65. See too Hale (2004b).

[30] [2010] UKSC 31, [2011] 1 AC 596.

Transsexualism

The difference made by the Human Rights Act 1998 regarding the right to respect for private life is perhaps best illustrated by the approach adopted by the House of Lords to the issue of transsexualism, which came before it in *Bellinger v Bellinger*.[31] The precise issue was whether the statutory requirement that a marriage be between two people who had had separate genders since birth[32] was incompatible with Article 8. The Law Lords held that it was. They relied heavily on the judgment of the European Court in *Goodwin v UK*, where in 2002 the Grand Chamber reversed the Court's previous approach in several cases taken against the United Kingdom[33] and held that a person who changed gender was entitled to have that new gender fully recognized in the context of marriage. The Grand Chamber unanimously held that the United Kingdom had violated both Article 8 and Article 12 (which guarantees the right to marry), even though the applicant (a post-operative male to female transsexual) had made no specific complaint about her inability to marry as a woman. That decision had been issued in Strasbourg after the decision of the Court of Appeal in *Bellinger v Bellinger*[34] but before an appeal was heard in the Lords. It marked the end of the United Kingdom's margin of appreciation in this context and counsel for the Lord Chancellor (who had been permitted to intervene in the appeal to the House) conceded that English law on who could marry was now incompatible with the Convention. Essentially the only question for their Lordships was what remedy to grant to Mrs Bellinger. In the end they opted for a declaration of incompatibility. They did not declare that the 'marriage' she had entered to in 1981 with Mr Bellinger was now valid, nor that under section 3 of the Human Rights Act 1998 the terms 'male' and 'female' in the statute dealing with marriage should from then on be interpreted as including males and females who were previously females and males, respectively. Amongst the reasons given for not taking these steps was the complexity attendant on determining when exactly a person of one gender becomes a person of another gender. As a Bill dealing with the issue was already before Parliament, it was deemed more appropriate to allow that forum to work out the details of the required reform. Lord Hope noted that the EU's Charter of Fundamental Rights even opens the door to same-sex marriages by providing simply that 'the right to marry' shall be guaranteed.[35]

The right to privacy

By way of contrast to its position on homosexuality and transsexualism, the top court's position concerning the impact of the Human Rights Act on the right to privacy in

[31] [2003] UKHL 21, [2003] 2 AC 467. See too Ch 3, at 67–8 and 74.

[32] Imposed by the Matrimonial Causes Act 1973, s 11(c). This remained unaffected by the Sex Discrimination (Gender Reassignment) Regs 1999 (SI 1999/1102), which prohibited discrimination against transsexuals in some other contexts; they resulted from the decision of the European Court of Justice in *P v S* [1996] ICR 795.

[33] eg *Rees v UK* (1987) 9 EHRR 56; *Cossey v UK* (1991) 13 EHRR 622; *Sheffield and Horsham v UK* (1999) 27 EHRR 163.

[34] [2001] EWCA Civ 1140, [2002] Fam 150 (Dame Elizabeth Butler-Sloss P and Robert Walker LJ; Thorpe LJ dissenting).

[35] [2003] UKHL 21, [2003] 2 AC 467, [69]. See too Ch 3 above, at 36–9. Article 9 of the Charter reads: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.

English law (as opposed to the right to a private life) has in general been antipathetic. The plainest advocate for that stance was Lord Hoffmann, who strenuously voiced his opinion in *Wainwright v Home Office*, a case where the facts occurred before the commencement of the Human Rights Act 1998 and which was therefore decided under the common law. A mother, together with her physically and mentally disabled 21-year-old son, were visiting another of her sons in prison when they were subjected to a strip-search to see if they were carrying drugs. The search was not carried out in accordance with the Prison Rules and both mother and son were accordingly humiliated and distressed. While they won their claim for damages (for the tort of trespass to the person) at Leeds County Court, the Home Office successfully appealed to the Court of Appeal[36] and succeeded again in the House of Lords.[37] The Law Lords' conclusion was that there was no common law tort called breach of privacy. More than that, no such tort needed to be created just because Article 8 of the European Convention had become part of domestic UK law. Lord Hoffmann was quite prepared to accept that the protection of privacy was a value running through domestic law, but he did not think it required the creation of a specific legal rule:

> There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values—principles only in the broadest sense—which direct its development…But no one has suggested that [for example] freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.[38]

For Lord Scott, the important issue of principle was not whether English common law recognizes a tort of invasion of privacy but the narrower question of 'whether the infliction of humiliation and distress by conduct calculated to humiliate and cause distress, is without more, tortious at common law'.[39] He did not think that it was, nor that it should be.

These statements remind us of the assertion made by Lord Nolan in *R v Khan*, shortly before the enactment of the Human Rights Act 1998, that 'under English law, there is in general nothing unlawful about a breach of privacy',[40] an admission which led to a finding by the European Court that there had been a violation of Article 8. But in *Wainwright* their Lordships went further because they said (albeit *obiter*) that the common law position was not altered by the Human Rights Act 1998. In answer to a submission by counsel for the Wainwrights that, unless English law were extended to create a tort covering the facts of the case before the House, it was inevitable that the European Court would find the United Kingdom to be in breach of its obligations under Articles 8 and 13 of the Convention, Lord Hoffmann was 'not so sure'.[41] He added:

[36] [2001] EWCA Civ 2081, [2002] QB 1334.
[37] [2003] UKHL 53, [2004] 2 AC 406.
[38] Ibid, [31]. Lords Bingham, Hope, and Hutton all concurred with Lord Hoffmann.
[39] Ibid, [62].
[40] [1997] AC 558, 581G. See Ch 7 above, at 217. See too Buxton (2009).
[41] [2003] UKHL 53, [2004] 2 AC 406, [51].

> Article 8 may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow that a merely negligent act should, contrary to general principle, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety.[42]

Lord Scott saw it as unnecessary to express a view on this broader question. Even before the correctness of these views could be considered in Strasbourg, the House—including Lord Hoffmann—had a further opportunity to discuss the matter.

This was in *Campbell v MGN Ltd*, where the super-model Naomi Campbell sued the *Daily Mirror* for publishing an article and photographs which disclosed her drug addiction and attendance at therapy sessions. She based her claim on the tort of breach of confidentiality and argued that, while she could not object to the disclosure of her drug addiction and the fact that she was receiving treatment for it, the details of her therapy and the covertly taken photographs were a breach of her right to have certain private information kept confidential. She persuaded the High Court of the justness of her claim,[43] but not the Court of Appeal (which included Lord Phillips MR).[44] In the House of Lords she won by a bare majority (three to two).[45] Lord Hope, Baroness Hale, and Lord Carswell were supportive, while Lord Nicholls and Lord Hoffmann were not. Lord Hope pointed out that the House of Lords, in *Attorney General v Guardian Newspapers Ltd (No 2)*, had already accepted the general principle that a duty of confidence arises when confidential information comes to the knowledge of a person who has notice that the information is confidential.[46] He went on to say that, with the coming into operation of the Human Rights Act 1998, '[t]he language has changed . . . We now talk about the right to a private life . . .'.[47] On the facts, he thought that the approach of the Court of Appeal was 'quite unreal'.[48] Baroness Hale agreed that Ms Campbell should win her claim, but made it clear that this was because she could rely on an existing cause of action in English common law, namely breach of confidentiality. She contrasted Ms Campbell's position with that of the Wainwrights: she thought (presciently) that the Wainwrights would win their claim if Convention rights were taken into account, but not under the common law: 'That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy'.[49] Lord Carswell agreed with both Lord Hope and Baroness Hale.

[42] Ibid. He exemplified the difference he was making by saying: 'It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs' (ibid). A distinction between 'intentional' and 'negligent' violations of the right to life was also suggested by lawyers for the UK government in *Osman v UK* (2000) 29 EHRR 245, but the European Court rejected it then too.

[43] [2002] EWHC 499.

[44] [2002] EWCA Civ 1372, [2003] QB 633.

[45] [2004] UKHL 22, [2004] 2 AC 457.

[46] Ibid, [85], citing Lord Goff in the earlier case at [1990] 1 AC 109, 282 (this was the House's second consideration of the *Spycatcher* case: see Ch 10 below, at 283–6). Lord Hope also cited Lord Woolf CJ's judgment in *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, 207.

[47] Ibid, [86].

[48] Ibid, [99].

[49] Ibid, [133]. This is surely an exaggerated and unnecessarily self-denying claim. See too Arden (2010).

On the dissenting side, Lord Nicholls accepted that in England and Wales 'there is no over-arching, all-embracing cause of action for "invasion of privacy"',[50] citing the House's decision in the *Wainwright* case, but he went on to say, strangely, that strip searches *are* an example of the invasion of an individual's privacy and that 'the development of the common law has been in harmony with' Articles 8 and 10 of the Convention.[51] Lord Hoffmann repeated that in *Wainwright* the House decided that 'there is no general tort of invasion of privacy',[52] but he added that 'the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy'.[53] He maintained that their Lordships in *Campbell* were not divided over any principle, only on whether the *Daily Mail* had gone too far in publishing associated facts about the claimant's private life. In light of the disclosures which Ms Campbell's counsel had conceded to be legitimate, Lord Hoffmann agreed with Lord Nicholls that the journalists had not exceeded the latitude allowed to them. And far from the Court of Appeal's approach being 'quite unreal' (in not equating the information that Ms Campbell was receiving therapy from Narcotics Anonymous with disclosure of clinical details of medical treatment), he thought that this was 'no more than common sense'. We see here that, even if there was no significant difference between the way in which the majority and minority judges stated the relevant legal principles, there was certainly a significant difference in the way they applied those principles.[54]

When *Wainwright* reached Strasbourg the reaction was all too predictable. The Court said that the requirement to submit to a strip-search would generally constitute an interference with the right to respect for one's private life in Article 8(1) and would therefore have to be justified within the terms of Article 8(2). Here the UK government had not convinced the Court that the searches were proportionate to their legitimate aim and so Article 8(2) had not been satisfied. More importantly, the Court also held, again unanimously, that there had been a violation of Article 13 (the right to an effective remedy):

> [T]he Court observes that the House of Lords found that negligent action disclosed by the prison officers did not ground any civil liability, in particular as there was no general tort of invasion of privacy. In these circumstances, the Court finds that the applicants did not have available to them a means of obtaining redress for the interference with their rights under Article 8 of the Convention.[55]

This was a clear indication that the United Kingdom's top court was out of step with the European Court's thinking on an important aspect of the European Convention. English common law again came up short on the human rights front.

[50] Ibid, [11].
[51] Ibid, [16]. Here he cited his own words to that effect in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 203–4.
[52] Ibid, [43].
[53] Ibid.
[54] For a discussion of further 'close calls' in the House of Lords in cases dealing with the Human Rights Act or torts, see Dickson (2011b), 290–301.
[55] (2007) 44 EHRR 40, para 55.

There is one more egregious example of the United Kingdom's top court being on a different wavelength from the European Court as regards the right to a private life. It concerns the database of fingerprints and DNA material maintained by the police. The disparity is starkly illustrated by the fact that the House of Lords ruled unanimously (five to none) that current English law on the matter[56] was not in violation of the right to a private life,[57] yet the Grand Chamber of the European Court, also unanimously (17 to none), held exactly the reverse. Contrary to the view expressed by each of the judges in the Court of Appeal, all but one of their Lordships (Baroness Hale being the dissenter) held that Article 8 was not even engaged by the retention of such information. The tenor of the Law Lords' judgments was, with great respect, somewhat reminiscent of the attitude of King Canute: it was if they were blithely trying to resist the inevitable by making relatively weak and out-of-date pronouncements which did not fully take account of the potential powerfulness of the databases about which they were talking. Lord Steyn invoked the *Ullah* principle to justify deciding the case on the basis of statements made by the European Commission in 1981 and 1996,[58] ignoring in the process a decision by the European Court in 1987 which went the other way.[59] He was persuaded by expert evidence which suggested that the databases have no impact on private lives because sophisticated equipment and matching samples are needed to make use of them. Lords Rodger, Carswell, and Brown fully agreed with everything said by Lord Steyn, with Lord Brown adding: 'My concern is simply to indicate how very clear a case this seems to me to be. Indeed my only real problem now…is in discerning any coherent basis on which the challenge can be sustained'.[60] It was left to Baroness Hale to restore some sense of realism to the debate by reminding us that 'there can be little, if anything, more private to the individual than the knowledge of his genetic make-up'.[61] Yet even she then continued by saying that the state could 'readily' justify the retention and storage of the information in question here.[62]

The judgment of the Grand Chamber reads completely differently from that of the House. It asserts early on that '[t]he mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8',[63] citing *Leander v Sweden*,[64] which the majority in the House of Lords had failed to mention. It then follows its own ruling of two years earlier to the effect the retention of DNA samples is an interference with private life,[65] and adds that because DNA profiles can be used to detect familial relationships or ethnic origins (as the UK government conceded) their

[56] As enshrined in the Police and Criminal Evidence Act 1984, s 64(1A).

[57] *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196. The Divisional Court (Rose LJ and Leveson J) [2002] EWHC 478 (Admin) and the Court of Appeal (Lord Woolf CJ, Waller and Sedley LJ) [2002] EWCA Civ 1275, [2002] 1 WLR 3223 had each come to the same conclusion.

[58] [2004] 1 WLR 2196, [25] and [27]. He cited *McVeigh v UK* (1981) 25 DR 15 and *Kinnunen v Finland* App No 24950/94, decision of 15 May 1996. Lord Rodger, at [66], also invoked *Ullah*. See too Ch 2 above, at 39–43.

[59] *Leander v Sweden* (1987) 9 EHRR 433. This was cited only by Baroness Hale.

[60] [2004] 1 WLR 2196, [85].

[61] Ibid, [71].

[62] Ibid, [78].

[63] (2009) 48 EHRR 50, para 67.

[64] See n 59 above.

[65] *Van der Velden v The Netherlands* App No 29514/05, judgment of 7 December 2006.

retention also interferes with private life.[66] As regards fingerprints, the Court chose to treat them in the same way as photographs or voice recordings, ruling that their retention again caused concerns.[67] Having established that an interference with private life had occurred, the Court went on to decide that the degree of interference allowed by English law could not be justified as necessary in a democratic society. In doing so it relied heavily on the fact that one of the core principles underpinning the Council of Europe's Data Protection Convention 1981, now ratified by 44 states, is that the retention of data has to be proportionate in relation to the purpose of its collection.[68] It then noted that there was a consensus amongst European states, including in Scotland, that limits had to be placed on the retention of data concerning people who had been acquitted or not charged with an offence: England, Wales, and Northern Ireland were 'the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence'.[69] This strong consensus narrowed the margin of appreciation left to the United Kingdom.[70] Such comparativism was completely absent from the House of Lords' analysis. The European Court was struck by the blanket and indiscriminate nature of the powers of retention, and by its effect on young people in particular, and so found that they did not strike a fair balance between the competing public and private interests.[71]

Rarely has there been such a large divergence of opinion between the United Kingdom's top court and the Strasbourg Court. It did not, however, raise the kind of domestic political storm which has ensued over matters such as votes for prisoners, the registration of sex offenders, or the shooting of suspected terrorists. The then Labour government responded to the European Court's decision by amending the law through the Crime and Security Act 2010,[72] reducing the maximum data detention period to six years, but those provisions were never brought into force because of the change of government that year. The new government has secured the enactment of more liberal measures in the Protection of Freedoms Act 2012,[73] largely based on the Scottish approach.[74] The Supreme Court had its own opportunity to react to *S and Marper v UK* in a leapfrog appeal brought to it by two individuals whose data were still being retained indefinitely under the old law. In *R (GC) v Commissioner of Police of the Metropolis* the Justices held that, pending the introduction of the new law, the old law could be read down under section 3 of the Human Rights Act in a way which complied with the European Court's judgment.[75] Remarkably, no comments at all were made on the huge difference of opinion which had emerged between the two courts, even though Lord Rodger, Lord Brown, and Lady Hale had delivered opinions in *S and Marper*: all of the

[66] (2009) 48 EHRR 50, paras 70–7.
[67] Ibid, para 81. [68] Ibid, para 107.
[69] Ibid, para 110. See too Dzehtsiarou (2011). [70] Ibid, para 112. [71] Ibid, para 125.
[72] Section 14. This followed the publication of a Home Office consultation paper in 2009, *Keeping the Right People on the DNA Database: Science and Public Protection*.
[73] Part 1 (ss 1–28).
[74] Lipscombe (2012). For the Scottish position see the Criminal Procedure (Scotland) Act 1995, inserted by the Police, Public Order and Criminal Justice (Scotland) Act 2006, ss 83(2) and 104.
[75] [2011] UKSC 21, [2011] 1 WLR 1230.

Justices simply got on with the new task in hand, namely how to interpret the current law pending its reform. As it happens, two of the seven Justices, Lord Rodger and Lord Brown, were not prepared to utilize the section 3 power because they felt that it would go against the seminal principle laid down nearly 50 years ago by the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food*,[76] namely that if Parliament has conferred a discretion with the intention that it should be used to promote certain policies then that discretion can be validly exercised only in ways which advance those policies. With respect, this is a somewhat disingenuous and overly-restrained view, because the Human Rights Act is quite explicit in requiring law enforcers to give effect to primary legislation in a Convention-compatible manner 'so far as it is possible to do so'. Moreover, such a proposed restriction on the use of the section 3 power had never before featured in the top court's consideration of the matter.[77]

The reluctance of the United Kingdom's top court to embrace the right to privacy has meant that in other contexts it has had to be corrected by the European Court. In *Gillan*,[78] for instance, the Law Lords focused almost entirely on Article 5 of the European Convention when considering the legality of a stop and search power. Having held unanimously that it did not violate Article 5, the Law Lords added summarily that it also did not violate Article 8.[79] In Strasbourg the opposite approach was adopted: because the European Court unanimously found a violation of Article 8, it did not see the need to come to a firm conclusion on Article 5.[80] The right to a private life also sometimes needs to be considered in the context of claims otherwise based on Article 6. In *R v G*, as we have seen in the previous chapter, the Law Lords almost found a violation of Article 8 when a 15-year-old boy was charged with statutory rape, even though, as it transpired, the European Court later expressed the view there had been no such violation.[81]

Respect for family life

For a time, the House of Lords was not particularly supportive of the concept of 'family life' in this context. As alluded to in Chapter 7,[82] one of its decisions, *A v Liverpool City Council*, was especially obstructive in that it held that when Parliament conferred upon local authorities the power to take decisions as to the welfare of children in their care, it had not left the courts with any power to review the merits of those decisions, whether in the exercise of wardship jurisdiction or otherwise.[83] Many attempts to challenge this ruling in Strasbourg ended with the applications being declared inadmissible by the

[76] [1968] AC 997.

[77] See Ch 3 above, at 63–72.

[78] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307. See too Ch 6 above, at 160–1.

[79] Ibid, [27]–[9] (per Lord Bingham). He inclined to the view 'that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example', could scarcely be said to reach the level of seriousness required to engage Art 8.

[80] *Gillan and Quinton v UK* (2010) 50 EHHR 45.

[81] [2008] UKHL 37, [2009] AC 92. Lords Hope and Carswell would have found a violation. See Ch 7 above, at 182 and 192.

[82] See 201–2.

[83] [1982] AC 363. Needless to say, no reference was made to the European Convention during this case.

European Commission of Human Rights, because states were considered to have a considerable choice as to how exactly to guarantee the right to a family life.[84] The domestic law situation was partly rectified by the Health and Social Services and Social Security Adjudications Act 1983,[85] which provided that a local authority could not terminate arrangements for access to a child in care by the child's parent, guardian, or custodian without first giving notice to that person, who could then apply to a court for an access order.[86] In deciding whether to issue such an order the court had to regard the welfare of the child as the first and paramount consideration.[87] The Family Law Reform Act 1987 also widened the availability of parental rights orders to unmarried fathers,[88] and the Children Act 1989 further clarified the law concerning wardship jurisdiction.[89] It was only in the group of cases *O, H, W, B and R v UK*[90] that the European Court finally disapproved of the House of Lords' decision in *A v Liverpool City Council*, ruling that some procedural requirements had to be read into Article 8:

> The relevant considerations to be weighed by a local authority in reaching decisions on children in its care include the views and interests of the natural parents . . . [W]hat therefore has to be determined is whether . . . the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests.[91]

Today, it appears that the House of Lords and Supreme Court have gone even further than the European Court in protecting the right to family life under Article 8. In the context of homosexual unions, for example, the House held in *Fitzpatrick v Sterling Housing Association Ltd* that a gay partner could qualify as a member of a deceased tenant's 'family' for the purposes of succeeding to a tenancy under the Rent Act 1977,[92] and five years later (when the Human Rights Act 1998 was in force) their Lordships went beyond this in *Ghaidan v Godin-Mendoza* when ruling that a gay partner could qualify as a deceased tenant's 'spouse' in this context, even if the tenancy was a purely private one.[93] The latter decision was taken in exercise of the interpretative duty imposed on the courts by section 3(1) of the Human Rights Act 1998—to give effect to legislation in a way which is compatible with the Convention rights 'so far as it is possible to do so'.

The context of adoption is another area where the top UK court has jumped ahead of the European Court, the irony being that the judge who was mainly responsible for this is Lord Hoffmann, better known for his view that the Strasbourg Court has gone too far in recognizing claims as human rights. In *In re G* a cohabiting, but unmarried,

[84] eg *L, H and A v UK* App No 9580/81, decision of 13 March 1984; *M-F v UK* App No 11758/85, decision of 16 May 1986. In the latter case the European Court recognized that English law still permitted wardship applications to be made in certain situations, citing *In re H (A Minor) (Wardship: Jurisdiction)* [1978] Fam 65.

[85] Section 6 and Sch 1, inserting a new Pt 1A into the Child Care Act 1980.

[86] Section 6 and Sch 1, para 1, inserting a new s 12B into the Child Care Act 1980.

[87] Ibid, s 12F(1).

[88] Section 4.

[89] Section 100.

[90] (1998) 10 EHRR 82, 95, 29, 87, and 74 respectively.

[91] *W v UK* (1988) 10 EHRR 29, paras 63 and 64.

[92] [2001] 1 AC 27.

[93] [2004] UKHL 30, [2004] 2 AC 557. See too Ch 3 above, at 66–8.

heterosexual couple in Northern Ireland wanted to jointly adopt a child. The problem they faced was that under the Adoption (NI) Order 1987 the only joint adoptions allowed were those by married couples.[94] The Court of Appeal in Northern Ireland did not think the Order was incompatible with the Convention, given that states had a margin of appreciation as to the scope of family life and that the UK Parliament had deliberately framed the law in Northern Ireland so as to restrict joint adoptions to married couples, believing this to be in the best interests of the children involved.[95] But in the House of Lords a different view prevailed.[96] Although the Convention does not explicitly confer a right to adopt a child—and the European Court has never implied such a right—the House held that the 'ambit' of Article 8 included adoption, so to discriminate between applicants for adoption on the basis of their marital status was a violation of Article 14 of the Convention read in conjunction with Article 8. In the words of Lord Hoffmann:

> It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience.[97]

As recently as 2002 the European Court had held by four to three, in *Fretté v France*, that it was within France's margin of appreciation to prevent a homosexual man from adopting a child.[98] However, just six years later the Court ruled in a further case against France, *EB v France*, that by denying a female homosexual couple the right to apply for adoption France was violating Article 14 read with Article 8.[99] Having reviewed the recent cases Lord Hoffmann deduced that the trend in Strasbourg was towards the disapproval of blanket rules preventing all people of a particular status from applying to adopt a child. But in any event he did not think the House should be inhibited by the thought that it might be going further than the Strasbourg Court. He got round the *Ullah* principle (that UK courts should keep pace with the European Court, but go no further)[100] by saying that Lord Bingham had framed it in a case where there was no national margin of appreciation available. He added that there is no obligation to follow Strasbourg 'in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that the question is within the margin of appreciation'.[101] Lord Hoffmann therefore concluded that it was unlawful in the United Kingdom to reject joint applicants for the adoption of a child purely on the ground that they are not married to each other.[102]

[94] Article 14. In addition, at least one member of the couple must be 21 years of age or older.

[95] *Sub nom In re P (A Child) (Adoption: Unmarried Couples)* [2007] NICA 20, [2007] NI 251.

[96] *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173. Lord Walker dissented.

[97] Ibid, [18]. See too, generally, Harris-Short (2008).

[98] (2002) 38 EHRR 21.

[99] (2008) 47 EHRR 21. See too Letsas (2008).

[100] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [20] (per Lord Bingham). See too Ch 2 above, at 39–43.

[101] [2008] UKHL 38, [2009] 1 AC 173, [36].

[102] The law had already been altered by statute for England and Wales (Adoption and Children Act 2002, s 50) and for Scotland (Adoption and Children (Scotland) Act 2007, s 29). In Northern Ireland the Human Rights Commission successfully challenged the Northern Ireland Executive's failure to alter Northern Ireland's law in the light of the House's decision in *In re G*: see *Re Northern Ireland Human Rights Commission's Application* [2012] NIQB 77.

The right to a family life in the context of illegal immigrants has been a matter of some political controversy in recent years, with the current Home Secretary alleging at the Conservative Party's Annual Conference in 2011 that an illegal immigrant's deportation had been prevented because of the relationship he had meanwhile developed with his pet cat![103] The problem facing the courts has been that the Immigration Rules do not themselves give clear guidance on when a person's right to a family life makes a difference to whether he or she should be allowed to remain in the United Kingdom. In *Huang v Secretary of State for the Home Department* the House of Lords stressed that immigration adjudicators cannot rely only upon the Immigration Rules when deciding if Article 8 has been complied with: they need to consider each individual case on its own merits.[104] Nor have the Rules been amended over the years to reflect the developing case law. The House of Lords and Supreme Court have not developed a firm set of criteria against which to assess such claims to a right to family life, and arguably it was never their job to do so. The consequence has been a growing uncertainty in the law.

Thus, in *Huang* itself the House remitted two cases to the Immigration and Asylum Tribunal because the previous adjudicators had, it seemed, applied the wrong test when considering the two applications to remain in the United Kingdom. The adjudicators had asked themselves whether the cases met a test of 'exceptionality', relying on a dictum by Lord Bingham in *R (Razgar) v Secretary of State for the Home Department*.[105] In *Huang* the Law Lords (including Lord Bingham) said that this dictum 'was not purporting to lay down a legal test'.[106] To be honest, the opinion of the House in *Huang* is not the clearest of documents[107] and does not adequately convey the significance of the ruling. On one level, due to the emphasis it places on the need for appellate bodies to decide for themselves whether Convention rights have been protected, it seems to fit with the 'outcome not process' approach,[108] which the House apparently favoured in *R (Shabina Begum) v Governors of Denbigh High School*[109] and *Belfast City Council v Miss Behavin' Ltd*.[110] What matters is not so much how the decision in question was reached but whether the decision ultimately violates Convention rights. But at a different level *Huang* suggests that public authorities which are not themselves adjudicators of disputes need not pay as much attention as adjudicators to the human rights at play in the issues they are dealing with. In any event, the government was unhappy with the legacy of *Huang* and in 2012 the Home Secretary obtained Parliament's approval for a new approach to the right to family life in immigration cases as set out in new Immigration Rules.[111] These new Rules 'state how the balance should be struck between the public

[103] See <http://www.guardian.co.uk/politics/2011/oct/04/theresa-may-clashes-judges-cat> (last accessed 2 December 2012).

[104] [2007] UKHL 11, [2007] 2 AC 167. See too Ch 2 above, at 46–7.

[105] [2004] UKHL 27, [2004] 2 AC 368, [20].

[106] [2007] 2 AC 167, [20].

[107] This is also the view of Amos (2007).

[108] Ch 2 above, at 43–8.

[109] [2006] UKHL 15, [2007] 1 AC 100.

[110] [2007] UKHL 19, [2007] 1 WLR 1420.

[111] Immigration Rules on Family and Private Life, HC 194, summarized at <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/july/15-family-mig> (last accessed 2 December 2012). See too Lucy Mair at <http://www.guardian.co.uk/law/2012/jul/18/supreme-court-immigration-rules> (last accessed 2 December 2012).

interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process'.[112] For cases involving children, the Rules also set out 'a clear framework for weighing the best interests of the child against the wider public interest in removal cases'.[113] The government acknowledges that courts will still have the freedom to consider the Rules, or the way they are applied in practice, to be 'disproportionate', but it hopes to increase the courts' acceptance of the democratic legitimacy of the government, with Parliament's approval, setting out how it thinks the test of proportionality should be applied. Time will tell.

Respect for home

The degree to which there is a right to have one's home respected has been the subject of a series of cases before both the UK courts and the Court in Strasbourg, most of the applicants being gypsies, tenants of social housing, or homeless people.[114] There has certainly been a 'dialogue' between the top domestic court and the European Court. At the moment it seems that there is considerable consensus as to the extent of the Convention rights in this sphere, but the story of how this position has been achieved is a long and interesting one.

Claims by gypsies and travellers

England's law concerning gypsies has never been particularly generous. In 1968 the Caravan Sites Act gave local authorities the power to create gypsy sites, where gypsies could park their mobile homes, but the downside was that the gypsies' contractual right to be there could be terminated by the local authority giving only four weeks' notice. That was enough for the authority to obtain a court order for eviction; it did not have to prove that there had been a breach of the licence agreement. While the Mobile Homes Act 1983 conferred greater protection on persons living in mobile homes if that was their only or main residence (by allowing eviction only if the licence agreement had been breached), this entitlement did not extend to land which was set aside by a local authority as a caravan site for gypsies. In *Greenwich London Borough Council v Powell* the House of Lords held that, under the 1983 Act, a site provided for gypsies was not a protected site even if gypsies lived at the site for most or all of the year.[115] The gypsies who lost in this case lodged an application in Strasbourg complaining of breaches of Articles 6, 8, and 14 of the Convention, but the Commission of Human Rights declared the application to be manifestly ill-founded.[116]

Through the Criminal Justice and Public Order Act 1994[117] the power which the 1968 Act conferred on local authorities to provide funding for gypsy sites was abolished, the view of the Labour government being that enough public money had already

[112] HC 194, para 20.
[113] Ibid, para 26.
[114] Harris et al (2009), 376–80. See too Spencer (2005); Loveland (2011), (2009) and (2003).
[115] [1989] AC 995. Lord Bridge delivered the only substantial opinion in this case.
[116] *P v UK* App No 14751/89, decision of 12 December 1990.
[117] Section 80.

been spent on the provision of sites for gypsies (about 46 per cent of whom were thus provided for) and that gypsies should now be encouraged to establish their own sites under the ordinary planning system which applied to everyone else in society and was governed by the Town and Country Planning Act 1990. After the enactment of the Human Rights Act 1998, attempts were made to persuade domestic courts that the continuing lack of security of tenure affecting gypsies was a violation of Article 8 of the European Convention, and also of Article 14 (the non-discrimination provision), but they failed.[118]

In *Buckley v UK* the applicant was a gypsy who lived with her three children in caravans parked on land which she herself owned.[119] However, she did not have planning permission for those caravans (her retrospective application for such permission was refused by South Cambridgeshire District Council) and she was issued with an enforcement notice requiring her to remove the caravans within a month. She unsuccessfully appealed against this notice to the Secretary of State for the Environment but did not appeal further to the High Court because she was advised that the law was against her on the matter. In her application to the European Commission of Human Rights she complained of a breach of Articles 8 and 14. By seven to five the Commission upheld Mrs Buckley's complaints,[120] but in the European Court the judges held by six to three that there had been no violation of Article 8 and by eight to one that there had been no violation of Article 14.

The judges agreed that this was indeed a case about an applicant's 'home', even though it had been set up in contravention of domestic law. There had also clearly been an interference with the applicant's right to respect for her home, and it was in pursuit of a legitimate aim (which the judges did not specify but grouped together as public safety, the economic well-being of the country, the protection of health, and the protection of the rights of others[121]). The controversial question was whether the interference was 'necessary in a democratic society': did English law strike an acceptable balance between the interests of society as a whole and the applicant's right to respect for her home? All the judges appeared to accept that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation'.[122] But they differed on the weight to be given to the nature of the gypsy way of life. The majority were content to hold that the applicant had been given sufficient opportunity to influence the decision whether or not she should be evicted, and that the inspector involved had taken into account the special needs of gypsies following a traditional lifestyle, but the minority (who gave three separate dissenting

[118] *Somerset County Council v Isaacs* [2002] EWHC 1014 and *R (Smith) v Barking and Dagenham LBC* [2002] EWHC 2400. In *Sheffield City Council v Smart* [2002] EWCA Civ 4, [2002] LGR 467 the Court of Appeal came to the same conclusion regarding local authority housing for the homeless which fell outside the security of tenure provisions.

[119] (1997) 23 EHRR 101. This was the first time the European Court had had to consider a case concerning the rights of a member of the gypsy minority or of a 'traveller'.

[120] Report of 11 January 1995; the UK Commissioner formed part of the majority.

[121] This list covers four of the six grounds listed in Art 8(2), the others being national security and the prevention of disorder or crime.

[122] (1997) 23 EHRR 101, para 75.

opinions) did not think that the interference with Mrs Buckley's right was proportionate. Judge Pettiti from France was particularly emotive in this context, invoking the fact that during the Second World War gypsies had been the victims of genocide; he saw this case as an opportunity for the European Court to apply the Convention in a positive way that would help to atone for past injustices. It was he who thought that Article 14 had been violated here, as well as Article 8.

Another series of cases involving gypsies who were thwarted by the United Kingdom's planning system was taken to the European Court a few years later, judgments being issued early in 2001. Representative of them is *Chapman v UK*,[123] where the applicant had breached the planning laws by placing her caravans on land situated within the 'green belt'. She claimed, in effect, special exemption from the planning rules that applied to everyone else. As well as alleging breaches of Articles 8 and 14, this application raised questions about Article 6 and Article 1 of Protocol No 1. The applicant argued that, apart from judicial review, she had no access to a court in order to have the merits of her claim determined and that, through being evicted from her own land, she had not been allowed peaceful enjoyment of her possessions. She was supported by an intervention from the European Roma Rights Centre, which argued that a growing consensus was emerging amongst international organizations about the need to take specific measures to address the position of Roma (whose lifestyle is comparable to that of gypsies). Reliance was also placed on the Council of Europe's Framework Convention for the Protection of National Minorities 1994. The decision in *Chapman* and the other cases in this group were taken by the Grand Chamber. This time the split on Article 8 was 10 to seven against the applicant; the judges unanimously held that none of the other articles had been violated.

The Court was pressed to depart from the conclusion it had reached in *Buckley v UK*, but the majority opted not to do so, saying that 'while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that [the Court] should not depart, without good reason, from precedents laid down in previous cases'.[124] The Court also accepted that the European Framework Convention set out principles and goals for the protection of minorities but it did not think there was yet a sufficiently concrete consensus from which it could derive guidance as to what standards to apply in particular situations.[125] In this context it wanted to preserve a strictly non-activist stance:

> [T]he complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court's role a strictly supervisory one.[126]

It also recognized that its role in the social and economic sphere is limited:

> While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting

[123] (2001) 33 EHRR 18. See too *Beard v UK* (2001) 33 EHRR 19; *Coster v UK* (2001) 33 EHRR 20; *Lee v UK* (2001) 33 EHRR 29; and *Smith v UK* (2001) 33 EHRR 30.
[124] Ibid, para 70. [125] Ibid, para 90. [126] Ibid, para 94.

> States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.[127]

The minority judges in *Chapman v UK*, in a joint dissenting opinion, voted to depart from the approach adopted in *Buckley v UK*.[128] They noted that that decision had been taken by a Chamber of the Court four years previously, on a vote of six to three, before the reforms to the Court brought about in 1998 by Protocol No 11 to the Convention. They thought that the Grand Chamber had a duty to review the approach in *Buckley* and, after doing so themselves, concluded that the interferences were *not* necessary in a democratic society. They believed that the majority's view did not reflect 'the clearly recognised need of gypsies to protection of their effective enjoyment of their rights and perpetuates their vulnerability as a minority with different needs and values from the general community'.[129] In addition, the minority stressed that the government had not shown that there was any other lawful, alternative site reasonably open to the applicant.[130] They noted that in at least one previous case[131] the Court had accepted that there could be circumstances where the authorities' refusal to take steps to assist in housing problems could disclose a problem under Article 8. Given that domestic English law gave the homeless a right to be provided with accommodation,[132] the minority's view that the Convention imposes a positive obligation on the state to ensure that gypsies have a practical and effective opportunity to enjoy their Article 8 rights in accordance with their traditional lifestyle was 'not a startling innovation'.[133] Judge Bonello, one of the dissenters, added that the council in question could not complain about the applicant's breach of planning law when it itself had earlier been found in breach of its duty to make adequate provision for gypsies in the area (albeit in 1985).[134]

The next stage in the saga occurred when a case was brought to Strasbourg by Mr Connors, a gypsy who in August 2000, along with his family, was evicted by Leeds City Council from a site they had occupied with the Council's permission for some 14 years (with one short break). He and his wife had health problems, and their children's education was disrupted by the eviction. Mr Connors was refused leave to apply for judicial review of the Council's decision to issue possession proceedings and the county court duly granted a possession order. No further domestic proceedings took place. The European Court reviewed the margin of appreciation which exists when a state is determining its welfare and economic policies, but added that:

> The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing its regulatory framework, remained within its margin of appreciation. In particular, the Court must examine

[127] Ibid, para 99.

[128] In *Mabey v UK* (1996) 22 EHRR CD123, decided in May 1996 while *Buckley* was pending before the Court, the Commission distinguished its own approach in *Buckley* by pointing out that neither the applicant nor his parents had actually led a gypsy lifestyle; by a majority the Commission held the application to be inadmissible.

[129] (2001) 33 EHRR 18, para 0-I4.

[130] Ibid, para 0-I11.

[131] *Marzari v Italy* (1999) 28 EHRR CD175.

[132] Under the Housing Act 1996, Pt VII.

[133] (2001) 33 EHRR 18, para 0-I15.

[134] Ibid, para 0-II5.

> whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.
>
> The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases. To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.[135]

Here the Court was unimpressed by the procedural safeguards in place in English law. Judicial review was available, but such proceedings could not deal with factual disputes such as whether the applicant or some third party was responsible for the anti-social behaviour which had prompted the Council to act. In sum:

> [T]he power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community… [It] consequently cannot be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued.[136]

The Court found it unnecessary, given its unanimous conclusion that there was a violation of Article 8, to give any further attention to the alleged violations of Articles 6, 13, 14, or Article 1 of Protocol No 1. In response to *Connors*, legislation was enacted for England and Wales allowing county courts to suspend, for periods of up to 12 months, a possession order regarding a local authority caravan site.[137]

Prior to the decision in *Connors v UK* the House of Lords had held unanimously in *South Bucks District Council v Porter*[138] that, when a court is dealing with applications by local planning authorities for injunctions to stop gypsies living in mobile homes and caravans stationed on their own land, it *must* consider the personal circumstances of the gypsies, including their rights under Article 8 of the Convention, because section 6(1) of the Human Rights Act 1998 requires courts, as public authorities, to act compatibly with Convention rights. Furthermore, the Housing and Regeneration Act 2008[139] amended section 5(1) of the Mobile Homes Act 1983 so as to extend to gypsies the statutory protection conferred by the 1983 Act. To continue the story it is now necessary to consider the position of tenants other than gypsies and travellers.

Eviction of tenants from social housing

While the United Kingdom's top court has scarcely touched upon the human rights of gypsies and travellers with regard to housing issues, it has been closely involved in developing domestic law on the right of tenants of social housing to respect for their

[135] *Connors v UK* (2005) 40 EHRR 9, paras 83–4 (footnotes omitted, but the Court referred to both *Buckley v UK* and *Chapman v UK*, nn 119 and 123 above).

[136] Ibid, paras 94–5.

[137] Housing Act 2004, s 211, amending the Caravan Sites Act 1968, s 4.

[138] [2003] UKHL 26, [2003] 2 AC 558. The judges involved were Lords Bingham, Steyn, Clyde, Hutton, and Scott, all of whom delivered separate speeches.

[139] Section 318.

home. In the post-Human Rights Act era the House of Lords first grappled with this issue in *Harrow London Borough Council v Qazi*.[140] A married couple, who had enjoyed a secure joint tenancy of a council house since 1992, split up in 1999. The wife notified the local housing authority that she was leaving the house, and after four weeks this notice terminated the tenancy. The authority did not wish the husband to continue living in the house by himself, since it was family-sized accommodation which would be suitable for a family in need of a better home. Did the husband have a right under Article 8 not to be evicted from his home? By three to two the House of Lords held that he did not. Their Lordships all agreed that the claimant's 'home' was at issue, but the majority decided that there had been no interference with his right to respect for it because under domestic law he had lost any proprietary and contractual rights to possess the house once his wife's notice to quit had expired. Cowan and Hunter describe this as 'the high watermark of the judicial preference for property rights'.[141]

Lord Hope noted that Mr Qazi was not relying on Article 6 or on Article 1 of Protocol No 1, only on Article 8. He cited *Ure v UK*[142] and *Wood v UK*,[143] in both of which the European Commission had strongly suggested that if the right to respect for one's home is interfered with in accordance with domestic law there can be no breach of Article 8. Lord Millett agreed, and cited *Larkos v Cyprus*[144] as further support for the majority's position: the evicted tenant in that case won his claim only because he was able to show that he had been discriminated against in the process of the eviction. Lord Scott also gave a detailed judgment. In his view:

> [T]o hold that Article 8 can vest property rights in the tenant and diminish the landlord's contractual and property rights, would be to attribute to Article 8 an effect that it was never intended to have. Article 8 was intended to deal with the arbitrary intrusion by state or public authorities into a citizen's home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact.[145]

The two judges in the minority were Lords Bingham and Steyn. They interpreted the tenor of the relevant Strasbourg jurisprudence differently from the majority. Indeed, Lord Steyn said:

> It would be surprising if the views of the majority … withstood European scrutiny … It is contrary to a purposive interpretation of Article 8 read against the structure of the Convention … [I]t empties Article 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights and interests, to colour the interpretation of Article 8(1). The decision of today does not fit into the new landscape created by the Human Rights Act 1998.[146]

[140] [2003] UKHL 43, [2004] 1 AC 983.
[141] Cowan and Hunter (2012), 79. The majority judges did not refer to the *South Bucks* case, n 138 above.
[142] Application No 28027/95, decision of 27 November 1996.
[143] (1997) 24 EHRR CD69.
[144] (1990) 30 EHRR 597.
[145] [2004] 1 AC 983, [125].
[146] Ibid, [27]. He and Lord Bingham expressly approved of the approach adopted by Laws LJ in *Sheffield City Council v Smart* [2002] EWCA Civ 4, [2002] LGR 467.

These were strong words—Lord Steyn always spoke his mind in a forthright manner—and they *ultimately* proved prophetic. Indeed, even as the *Qazi* case was proceeding through the House of Lords the case of *Connors v UK*,[147] discussed above, was wending its way through the Strasbourg system. But it must be stressed that when Mr Qazi himself lodged an application in Strasbourg, it was found to be inadmissible. The Court's reasons for that decision may have been influenced by the likelihood that, even if the county court had considered the applicant's Article 8 rights, this would not have made any difference to the final result.[148] In any event, the *Qazi* case was not relied upon by counsel in the *Connors* case, and nor did the European Court refer to *Qazi* in its judgment in *Connors*.[149]

It was not long before the House had a further opportunity to consider whether the line it was adopting was indeed consistent with that of the European Court. In conjoined appeals, reported under the name *Kay v Lambeth London Borough Council*, seven Law Lords were asked to deal with one case involving gypsies and with another involving occupiers of social housing.[150] In each of them they had to decide whether domestic English property law should automatically take priority over the Article 8 right to respect for one's home. Tellingly, the Secretary of State was allowed to intervene to argue that the House's decision in *Qazi* was inconsistent with the European Court's decision in *Connors* and that therefore the domestic law needed to be modified accordingly. It was the suggestion that *Qazi* should be overruled that prompted the appointment of a bench of seven Law Lords.

In the gypsy case, where the local authority was seeking to evict from a council-owned recreation ground caravans which had been stationed there for two days without its consent, the Law Lords all agreed that the eviction could in no way be seen as a disproportionate interference with the applicant's Article 8 rights, either because no 'home' had been established or because, if it had, the eviction had the legitimate aim of allowing public authorities to restore public land to public use. The facts were therefore distinguishable from those in *Connors*. In the social housing case, there was also agreement as to the result of the appeal: the appellants had not provided any evidence to show why they should have a special right to remain in premises from which they had been lawfully evicted; this was so, even though the appellants may have thought they were secure tenants (a status which the House of Lords itself had confirmed in earlier litigation[151]) and did not know that that status was subject to the terms of the lease of the properties which had been granted to a housing trust by the local authority, one of which allowed the local authority to terminate the lease by giving six months' notice. But their Lordships were split four to three on whether domestic property law should automatically override Article 8 rights.

The majority (led by Lord Hope, supported by Lord Scott, Baroness Hale, and Lord Brown) felt that the fact that the European Court had declared Mr Qazi's application

[147] Discussed at 245–6 above.

[148] This is how Lord Bingham tried to explain away the decision (see *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, [23]).

[149] This was pointed out by Lord Scott in *Kay v Lambeth LBC*, ibid, [167].

[150] [2006] 2 AC 465. The appeal involving gypsies was *Leeds City Council v Price*.

[151] *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, a decision to which, of the Law Lords sitting in *Kay*, only Lord Hope was party.

to be inadmissible showed that the requirements of Article 8(2) had been so obviously met by domestic law in that case that there was no balance left to strike.[152] As Lord Millett had put it in *Qazi* itself: 'no such balancing exercise need be conducted where its outcome is a foregone conclusion… There was simply no balance to be struck'.[153] In *Kay* Lord Hope said that judges in the county court, when dealing with possession cases, should presume that domestic law already strikes a fair balance between an occupier's Article 8 rights and society's more general interests; to require the judge to consider Article 8 in every case would breach the *Ullah* principle (which he referred to as 'Lord Bingham's "no more and no less" rule').[154] Lord Hope ruled that a defence which is based only on the occupier's personal circumstances and does not challenge the domestic law's general incompatibility with Article 8 should be struck out.[155] Lord Scott added that another type of case in which the contractual or proprietary right of the owner of the property may not prevail is 'where the procedural means available to the home occupier for challenging the decision by the owner of the property to evict him are inadequate'.[156] But the minority judges (Lords Bingham, Nicholls, and Walker) were of the opinion that, in every case where a public authority wishes to evict a person from his or her home, that person must be given an opportunity to argue that the eviction is not justified under Article 8(2).[157] They admitted that it would only be in 'highly exceptional circumstances'[158] or in an 'exceedingly rare case'[159] that Article 8(2) would not be satisfied, but did not enumerate these. Lord Walker admitted that in an earlier draft of his speech he had tried to envisage some of the circumstances, but he had decided not to do so because the exercise would be 'speculative and unhelpful'.[160] Lord Brown, one of the majority judges, said he had a difficulty in understanding what sort of highly exceptional circumstances would qualify.[161]

The decision in *Kay* once again raised fundamental questions about the extent to which international human rights obligations should be allowed to interfere with socio-economic decisions taken by national legal systems,[162] and also about the division of labour between politicians and judges. Baroness Hale, for example, reminded us that 'the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide'[163] (ie they are not restricted to individuals' human rights), and that Article 8 'does not confer any right to health or welfare benefits or to housing… The extent to which any member state assumes responsibility for supplying these is very much a matter for that member state'.[164] She added: 'In this politically contentious area of social and economic policy, any court should think long and hard before intervening in the balance currently struck by the elected

[152] *Kay v Lambeth LBC* [2006] 2 AC 465, [107] (per Lord Hope), [154] (per Lord Scott).
[153] [2004] 1 AC 983, [103].
[154] [2006] 2 AC 465, [109]. See too Ch 2 above, at 39–43.
[155] Ibid, [110].
[156] Ibid, [168]. See too Baroness Hale [182]–[188] and Lord Brown [203].
[157] Ibid, [29] (per Lord Bingham).
[158] Ibid, [36] and [38] (per Lord Bingham).
[159] Ibid, [54] (per Lord Nicholls); he also used the phrase 'highly exceptional circumstances': [56].
[160] Ibid, [176]. [161] Ibid, [204].
[162] Ibid, [187]. [163] Ibid, [190]. [164] Ibid, [191].

legislature'. Lord Bingham seems to have taken a broader view of international human rights law, basing himself on the principle that 'inherent in the whole of the Convention is a search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying any absolute right to prevail over the other'.[165] The decision in *Kay* also forefronted the fact that the Human Rights Act 1998 applies only to public authorities, with more than one of their Lordships remarking that what they were saying carried no implications for private owners of property.[166] Lord Nicholls, however, noted that courts are themselves public authorities and, as such, are 'bound to conduct their affairs in a way which is compatible with Convention rights'.[167] He expressly left for another day the question whether the courts' obligation so to act should affect the substantive law to be applied by the courts when they are adjudicating disputes between private parties.[168]

No doubt their Lordships all took it for granted that the losing applicants in the *Kay* case would seek a vindication of their position in Strasbourg, and that is indeed what they did. But before the European Court could pronounce on that case it was given an opportunity to address the issue in a separate case, *McCann v UK*,[169] one which had not gone as far as the House of Lords in the domestic legal system.[170] The facts were comparable to those in *Qazi*, and indeed the Court of Appeal delayed its decision in *McCann* until the House of Lords' decision in *Qazi* was announced, so naturally the latter decision was carefully scrutinized by the European judges in *McCann*. The seven judges concluded unanimously that there had been a violation of Article 8 because the applicant (against whom there had been allegations of domestic violence) had not been afforded an adequate opportunity to have his personal circumstances considered before he was evicted. The European Court was partly influenced by the fact that the housing authority involved, Birmingham City Council, rather than relying on the common law notice to quit the tenancy which the wife in the case had submitted,[171] could have used a different ground upon which to seek possession of the house, one which would have allowed the county court to consider the reasonableness of the eviction.[172] Without reference to the fact that the European Court had itself held Mr Qazi's application to be manifestly ill-founded, the same Court ruled that the principle it had laid down in *Connors* was not confined to cases involving the eviction of gypsies or where the compatibility of the domestic law with the Convention was raised:

> The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle

[165] Ibid, [32].
[166] Ibid, [28] (per Lord Bingham), [61] (per Lord Nicholls), [64] (per Lord Hope). But Lord Hope did think that if the minority were right then private tenancies might be affected by the ruling as well: [64].
[167] Ibid, [61].
[168] This is the horizontality question, addressed in Ch 3 above, at 85–8.
[169] (2008) 47 EHRR 40.
[170] The applicant challenged his eviction as far as the Court of Appeal: [2003] EWCA Civ 1783.
[171] Under the common law, and unless there is an express term in the lease to the contrary, a joint tenancy can be terminated by a notice to quit given by one of the tenants even if the other tenant does not consent to it.
[172] Under the Housing Act 1985, s 84.

> be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.

The possibility of taking judicial review proceedings did not plug the gap in domestic law because those proceedings could not consider the proportionality of the measure taken.[173]

Meanwhile, yet another case was making its way to the House of Lords involving gypsies: *Doherty v Birmingham City Council*.[174] It had been prompted by the decision of the European Court in *Connors*, which had been issued on the very day that Birmingham City Council had begun possession proceedings against a family who had been resident on a site, under licence from the council, for the previous 17 years. The facts presented their Lordships with a stark dilemma: should they continue with the position favoured by the majority in *Qazi* and *Kay*, or should they give preference to the views of the European Court as expressed in *Connors* and *McCann*? The majority (Lords Hope, Walker, and Rodger) tried to do both. In Lord Hope's words, his solution 'is as consistent as domestic law allows us to be with what in both *Connors* and *McCann* the [European Court] held was required to avoid a violation of Article 8 of the Convention'.[175] Lord Hope believed that in *McCann* the European Court did not fully appreciate 'the very real problems that are likely to be caused if we were to depart from the majority view in *Kay* in favour of that of the minority'.[176] He stressed that the Court's approach in *McCann* provides no objective criterion by which to decide whether an arguable case has been made for saying that an occupier's eviction was not proportionate under Article 8(2): 'Until the Strasbourg court has developed principles on which we can rely for general application the only safe course is to take the decision in each case as it arises'.[177] Lord Hope went on to suggest that on the facts of this case the legislation in force at the time (since amended[178]) *was* incompatible with Article 8, but that (because of the amendment) it was no longer necessary to issue a declaration of incompatibility to that effect. However, he also ruled that the claimant could argue, in judicial review proceedings, that the council had acted unreasonably in evicting the family of gypsies, having regard to the council's reasons for the eviction and the length of time that the claimant's family had lived on the site. He and his four colleagues ordered the case to be remitted to the High Court for this determination to be made.

Lord Walker agreed with Lord Hope, even though he himself had been part of the minority grouping in *Kay*. His judgment focused on the fact that this case raised for the first time in the House difficult issues concerning the application of the Human Rights Act 1998 to an infringement of human rights arising from the common law.[179]

[173] But this is of course questionable in view of the House of Lords' ruling in *R (Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 1 AC 532.

[174] [2008] UKHL 57, [2009] AC 367.

[175] Ibid, [19].

[176] Ibid, [20]. Lord Walker, too, thought the House should take account of *McCann*, but should not depart from the precedent laid down in *Kay*: ibid, [115].

[177] Ibid.

[178] By the Housing and Regeneration Act 2008, s 318. See ibid, [51].

[179] [2009] AC 367, [90].

While he accepted, having been a party to the minority view in *Kay*, that the majority's view must now be followed, he confessed that he did not understand why the majority thought that a housing authority's decision to take possession proceedings against a tenant could be challenged on traditional grounds but not on grounds based on the Human Rights Act 1998.[180] He summarized the difference between the approaches of the majority and minority in *Kay* as being one between those who want public authorities to take account of human rights as an 'exotic introduction' and those who want them to take account of human rights as a normal part of their functions.[181] He knew he was bound to follow the majority in *Kay*, but, in so far as the majority's reasoning was implicitly based on precedents concerning the discretion of public authorities when acting under legislation which cannot be read compatibly with Convention rights,[182] he was 'not at all sure that the same reasoning can sensibly be applied to a housing authority's general powers of management of its stock of social housing'.[183] After all, Birmingham City Council was not compelled by legislation to take proceedings for possession in this case: it could have tried to achieve the same goal in other ways. He added that, even if a housing authority can hide behind legislation which cannot be read as Convention-compliant, 'the decision-making process leading up to the commencement of proceedings ought to be Convention-compliant'.[184]

Two Law Lords in *Doherty* were not so consensus-oriented as Lords Hope, Walker, and Rodger.[185] Lord Scott, who like Lord Hope had been part of the majority in *Kay*, asserted that it would be unacceptable for a bench of five judges to overrule a committee of seven in *Kay*,[186] but he agreed that *Kay* could not affect the rights of private owners.[187] He stressed that the difference between the majority and minority in *Kay* had not been all that great[188] and, although he admits to having read Lord Walker's judgment in draft, he does not agree that there is 'disharmony' between traditional judicial review grounds and the applicability of Article 8.[189] He thought the European Court's judgment in *McCann* was based on a misunderstanding of how possession proceedings allow Article 8 points to be taken into consideration and he expressed astonishment that the European Court, on the facts of *McCann* (which he detailed), could have concluded that the local housing authority had given no consideration to Mr McCann's Article 8 rights.[190] Lord Mance adopted a similar line to that of Lord Scott but was more specific in saying that the case should be remitted to the High Court so that the council's decision to issue a notice to quit could be reviewed on Convention grounds as well as on traditional judicial review grounds.[191] He left open the question whether, more generally, traditional judicial review and Convention review could be 'further

[180] Ibid, [110]. [181] Ibid, [109].
[182] *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681; see too Ch 3 above, at 84; *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718.
[183] [2009] AC 367, [113].
[184] Ibid, [121].
[185] Lord Rodger agreed with the judgments of both Lord Walker and Lord Hope.
[186] [2009] AC 367, [61] and [82].
[187] Ibid, [69]. [188] Ibid, [70].
[189] Ibid, [76]. [190] Ibid, [86]–[87].
[191] Ibid, [161], a paragraph drawing conclusions from [155]–[160].

assimilated' so that, for example, proportionality could have a role in traditional judicial review.[192]

The next development came in the form of the European Court's judgment in *Kay v UK*, which was issued in September 2010.[193] While the Court welcomed 'the increasing tendency of the domestic courts to develop and expand conventional [ie traditional] judicial review grounds in the light of Article 8', and noted that, in *Doherty*, Lords Hope, Scott, and Mance had alluded to the possibility that challenges on conventional judicial review grounds in cases such as the applicants' could encompass more than just traditional *Wednesbury* grounds, it nevertheless felt constrained to hold unanimously that in *Kay* it had not been possible for the applicants 'to challenge the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances'.[194] There had therefore been a violation of Article 8. The judgment was comparatively short, and did not engage with the House of Lords' criticisms of the European Court's decision in *McCann*, which the House thought was based on a misunderstanding of the way in which possession proceedings operate in practice in England and Wales. The Court quoted from the Law Lords' judgments at length, but did not comment on them. The net result, as far as the Law Lords were concerned, was probably one of frustration and semi-bewilderment.

The European Court's judgment in *Kay* was issued after the next relevant case to come before the United Kingdom's top court was argued, but before judgments in it were delivered. The time for a showdown had arrived. In *Manchester City Council v Pinnock*[195] a bench of nine judges in the Supreme Court, including several who had been involved in earlier cases on this issue, such as Lords Hope, Walker, Brown, and Mance and Baroness Hale, effectively capitulated to the pressure that had been consistently applied by the European Court through its decisions in *Connors*, *McCann*, and *Kay*. They unanimously ruled that the House of Lords' decisions in *Qazi*, *Kay*, and *Doherty* should *not* be followed. A single 'judgment of the court', to which all nine Justices had contributed, was delivered by Lord Neuberger MR, a former Law Lord who had opted to return to the Court of Appeal in 2009 as Master of the Rolls (and who was to become President of the Supreme Court in October 2012 in succession to Lord Phillips). The decision is very significant, firstly, in helping to establish the image which the relatively new Supreme Court wanted to project and, secondly, in clarifying the nature of the relationship between the top domestic court and the European Court.

Pinnock concerned what is known as a 'demoted tenancy', that is, a secure tenancy granted by a local housing authority in which the security of tenure has been temporarily downgraded on account of housing-related anti-social conduct engaged in by the tenant or by someone living with the tenant. During the one-year 'demotion', the housing authority can bring possession proceedings against the demoted tenant and the court must grant possession to the authority unless it thinks that the authority has not served a proper notice on the tenant, given reasons for the action, and informed him or

[192] Ibid, [135]
[193] (2012) 54 EHRR 30.
[194] Ibid, para 74.
[195] [2010] UKSC 45, [2011] 2 AC 104. See too ch 3 above, at 58; also Neuberger (2011c); Goymour (2011).

her of the right to request a review of the decision and where to get legal advice.[196] The main question for the Supreme Court was whether, in such court proceedings, Article 8 required the court to have the power to consider if the possession order was a proportionate means of achieving a legitimate aim. The answer to this was an unequivocal 'yes', although the Justices were at pains to point out that in the vast majority of cases the proportionality requirement would be satisfied:

> Where a person has no right in domestic law to remain in occupation of the home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing.[197]

The Supreme Court preferred not to endorse Lord Bingham's proposition that it would only be in 'very exceptional circumstances' that it would be appropriate for a court to consider proportionality, but it did approve his suggestion that to require the housing authority to plead from the outset in every case that a possession order is justified would be 'burdensome and futile'.[198]

The judgment also makes it clear that in possession proceedings the county court (and the High Court in judicial review applications) should have the power to consider not just whether the statutory conditions for the making of a possession order have been satisfied but also whether the order would otherwise be lawful, in terms of Article 8 for example. The Supreme Court 'read down' section 143D(2) of the Housing Act 1996, using its power to do so under section 3 of the Human Rights Act 1998,[199] but it also based its conclusion on section 7(1) of the 1998 Act, which provides that 'a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may… (b) rely on the Convention right or rights concerned in any legal proceedings'.[200] This effectively removed the distinction between traditional (or 'conventional' or 'domestic') judicial review grounds on the one hand and Convention-based review grounds on the other, and meant that the county court (or High Court) could itself take decisions on the relevant facts in the case (eg as to whether the person responsible for anti-social behaviour was living with the tenant at the time). This complied with the dictum of Viscount Simonds in the *Pyx Granite* case in 1959 that a person's 'recourse to Her Majesty's courts for the determination of his rights is not to be excluded [by Parliament] except by clear words'.[201] It also meant that

[196] Housing Act 1996, ss 143D and E.
[197] [2011] 2 AC 104, [52].
[198] Ibid, [54]. [199] Ibid, [70]. [200] Ibid, [78].
[201] *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286.

the local authority could not hide behind section 6(2) of the Human Rights Act 1998 by arguing that it was obliged by primary or secondary legislation to act as it did.[202] However, the judges did once again stress that nothing in their collective judgment 'is intended to bear on cases where the person seeking the order for possession is a private landowner'.[203] That scenario is one which doubtless will come before the Supreme Court sooner rather than later.

On the relationship between the Supreme Court and the European Court the judgment in *Pinnock* provides the clearest guidance yet as to the attitude the former will take to the latter's jurisprudence. While stressing that it is never *bound* to follow the European Court's judgments, even those of the Grand Chamber, the Justices said:

> Where, however, there is a clear and consistent line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.[204]

Rather disingenuously, the judgment then proceeds to say that '[e]ven before the decision in *Kay v UK*, we would, in any event, have been of the opinion that this court should now accept and apply the minority view of the House of Lords' in *Qazi* and *Kay*. That had not been the view of Lords Hope, Rodger, and Walker in *Doherty*. The Supreme Court did, however, rely on three further judgments of the European Court in non-UK cases decided after the House's decision in *Doherty*. They all pointed to the same conclusion as the Supreme Court wanted to reach.[205]

As mentioned in *Pinnock*, there was a further set of conjoined appeals pending in the Supreme Court which concerned other aspects of the housing legislation, namely the provisions on homelessness and so-called introductory tenancies (which are tenancies granted to new tenants without conferring on them full security of tenure: before becoming secure tenants they have to show that they were responsible tenants during the 'probationary' period). The judgment in these appeals was issued in 2011 under the name *Hounslow London Borough Council v Powell*.[206] This time seven Justices sat to hear the appeals, all of whom had been party to the nine-judge decision in *Pinnock*. But there were two judgments delivered, by Lord Hope and by Lord Phillips, with both of which the other five Justices concurred. The Court held unanimously that there was nothing in the legislation governing homelessness[207] which prevented a court from refusing to make an order of possession if it considered that such an order would not be proportionate under Article 8 of the Convention. Likewise, they held that the provision which allowed a landlord to bring an introductory tenancy to an end,[208] like the provision at issue in *Pinnock*, *could* be read compatibly with the Human Rights Act

[202] [2011] 2 AC 104, [93]–[103]. On this issue see Ch 3 above, at 83–5.
[203] Ibid, [50].
[204] Ibid, [48]. See too Ch 3 above, at 56–9.
[205] *Cosić v Croatia* (2011) 52 EHRR 39; *Zehentner v Austria* (2011) 52 EHRR 22; *Paulić v Croatia* App No 3572/06, judgment of 22 October 2009.
[206] [2011] UKSC 8, [2011] 2 AC 186.
[207] Housing Act 1996, Pt VII.
[208] Ibid, s 127(2).

1998 by invoking both section 3 and section 7(1).[209] The Court also considered, *obiter*, whether it should read down another statutory provision which precludes a court from postponing the execution of a possession order in cases of non-secured tenancies for more than six weeks.[210] But it felt that the language was too clear to allow for that interpretation (to use section 3 of the Human Rights Act 1998 in this case would 'cross the constitutional boundary [that section] seeks to demarcate and preserve'[211]). This meant asking whether a declaration of incompatibility should be issued instead. The Supreme Court decided that such a course of action was not necessary because, on the face of it, a six-week delay in executing a possession order would not be too short to comply with Article 8 of the Convention.[212] It remains to be seen whether Mr Frisby, the appellant in the third case, whose appeal was dismissed on this basis, will take his case to Strasbourg.

In one final twist to this saga the European Court issued a judgment in September 2012 in which it held that the eviction of a gypsy from a site in Wales in 2005—at the behest of her landlord, the Gypsy Council—had again violated the Convention in that Ms Buckland's Article 8 right to a home had not been given due consideration.[213] Although the Caravan Sites Act 1968 had been amended to allow for the suspension of a possession order for up to a year,[214] that was not enough to justify the interference with Article 8(1). The European Court disapproved of the Court of Appeal's judgment in the case, which had relied heavily on the suspension point. The House of Lords had refused leave to appeal in February 2008, so was presumably content that the Court of Appeal had not made a grave mistake. Presumably the top court's later pronouncements in *Pinnock* and *Powell*, which the European Court took note of in *Buckland*, show that it has learned the error of its ways.

This long and complicated story of how the top UK court has amended its views on the law relating to the eviction of gypsies and social tenants in the light of opinions expressed in Strasbourg is the best example yet of the 'dialogue', or prolonged exchange of views, that is supposed to take place between national judges and the European Court. It appears that, without rancour or any insistence on eating too much humble pie, English law was eventually reformed to the satisfaction of all concerned. Huge sums have had to be paid to lawyers in order to get the law to this position, but at least the process has demonstrated that international judicial harmony can prevail if arguments are made persuasively and objectively. The end result is that human rights have acquired a more prominent role in the re-allocation of social housing within the United Kingdom.

[209] [2011] UKSC 8, [2011] 2 AC 186, [56] (per Lord Hope), [99] (per Lord Phillips).

[210] Housing Act 1996, s 89.

[211] The words of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [33], referred to here by Lord Hope: [62]. Lord Phillips suggested that, under s 3, the words 'provided that Article 8 is not infringed' could be implied into the Housing Act 1996, s 127(2): [98].

[212] [2011] 2 AC 186, [11]. At [103] Lord Phillips noted that it cannot have been Parliament's intention that the effect of s 89 could be effectively negated by the judge simply refusing to make a possession order at all. This suggests that Parliament might need to amend the section.

[213] *Buckland v UK* App No 40060/08, judgment of 18 September 2012.

[214] By the Housing Act 2004, s 211; see too the text at n 137 above.

Respect for correspondence

The first judgment issued by the European Court of Human Rights which went against the UK government was in a case involving the correspondence rights of a prisoner, *Golder v UK*,[215] and shortly afterwards a further such judgment was delivered in *Campbell and Cosans v UK*.[216] But neither case had previously been heard by the House of Lords. Nor had the case which led to the application which became *Malone v UK*, on the right of authorities to intercept communications.[217] In addition, two Law Lords, Lord Diplock and Lord Bridge, who each served extra-judicially as reviewers of the way in which warrants authorizing interceptions are issued by the Home Secretary, do not appear to have drawn possible non-compliance with the European Convention to the attention of the government.[218] But the European Court's decision in *Malone v UK* resulted in the passing of the Interception of Communications Act 1985, and the House of Lords *was* then called upon to interpret its application on a number of occasions, and senior judges were consecutively appointed as the Commissioner for Interception of Communications.[219]

In *R v Preston*[220] the main question was whether the pre-trial destruction of material obtained from authorized intercepts—and their resulting unavailability for disclosure to the defence—was a material irregularity which made convictions in the subsequent trial unsafe for the purposes of the Criminal Appeal Act 1968.[221] The House held that it was not. Their Lordships stressed that, when providing for the authorization of warrants of interception in the 1985 Act, Parliament had intended such intercepts to be used only to prevent or detect serious crime, not to prosecute it but, as Lord Mustill put it:

> The need for surveillance and the need to keep it secret are undeniable. So also is the need to protect to the feasible maximum the privacy of those whose conversations are overheard without their consent… These policies are in flat contradiction to current opinions on the 'transparency' of the trial process. Something has to give way, and the history, structure and terms of the statute leave me in little doubt that this must be the duty to give complete disclosure of unused materials.[222]

Significantly, the House did not exclude from the evidence information about the frequency of the defendants' use of their telephones, which was admissible under section

[215] (1979–80) 1 EHRR 524. The judgment was issued on 21 February 1975.
[216] (1982) 2 EHRR 293.
[217] (1985) 7 EHRR 14.
[218] Diplock (1981); Ewing and Gearty (1990), Ch 3.
[219] Lloyd LJ (later Lord Lloyd) was the first appointee; he was succeeded by Lord Bingham (1992–94), Lord Nolan (1994–2000), Sir Swinton Thomas (formerly Thomas LJ) (2000–06), and Sir Paul Kennedy (formerly Kennedy LJ) (2006–12).
[220] [1994] 2 AC 130.
[221] Section 2(1)(c). The 'material irregularity' ground for allowing an appeal was abolished when a new s 2(1) was inserted into the 1968 Act by the Criminal Appeal Act 1995, s 2(1).
[222] [1994] 2 AC 130, 168H–169A (per Lord Mustill). This conclusion was reinforced by the wording of s 6(3) of the 1985 Act: 'The requirements of this subsection are satisfied in relation to any intercepted material if each copy made of any of that material is destroyed as soon as its retention is no longer necessary as mentioned in section 2(2) above.'

45(2)(b) of the 1985 Act (either because its disclosure was in the interests of national security or because it was pursuant to a court order).[223] Their Lordships again stood up for transparency in another respect, when they ruled that the trial judge had been wrong to exclude the defendants and their solicitors from the legal argument *in camera* concerning the disclosure of the intercepted material and to prevent their barristers from informing their clients about what had gone on during that argument. Such exclusions *were* material irregularities, although not serious enough to cast doubt on the safety of the convictions.[224]

The House's approach in *Preston*, which was premised on the basis that the purpose of the 1985 Act was to protect the integrity of public communications (and not, for example, to protect individuals' rights to respect for their private correspondence), was reaffirmed in *Morgans v DPP*,[225] where the House overruled earlier Court of Appeal decisions concerning the circumstances in which information obtained by intercepts (whether under a warrant or not) could, by way of an exception to section 9 of the 1985 Act, be admitted as evidence. To their credit, the Law Lords adopted a strict interpretation of that section, meaning that information will be rarely admissible. That meant that in the case before it, where information had been obtained by the police through placing a call logger on the defendant's telephone line without a warrant, the data collected should not have been admitted as evidence against him. The House, particularly Lord Hope, pointed out that it would be anomalous if information obtained when no warrant had been issued was admissible but would not have been admissible if a warrant had been obtained: 'Therein would lie the seeds of temptation for the unscrupulous'.[226]

Needless to say, for it was typical even of the early 1990s, no mention is made by the Law Lords of the human rights of the defendants, still less of the specific requirements of Article 8 of the European Convention. Nor was this so in *R v Effik*,[227] where the House ruled that, although the 1985 Act made it an offence (unless a warrant had been issued by the Secretary of State) to intentionally intercept a communication in the course of its transmission by means of a public communication system,[228] this did not affect the interception of communications made to or from a cordless phone, even though the phone's base unit was plugged into a socket through which the public phone system operated, because the cordless phone was manufactured by a private company and was not part of the public communication system then run by a nationalized company, British Telecommunications. The police were held to have intercepted electronic impulses transmitted between the base unit of the cordless phone and the handset, not impulses transmitted by a public telecommunication system, so they had not committed a crime under the 1985 Act and the information obtained through the intercepts was admissible as evidence.

The House did not observe that the interception which had taken place in *Effik* was not regulated by law, despite that being the ground on which the European Court had

[223] Ibid, 151E (per Lord Mustill).
[224] Ibid, 170H–172B (per Lord Mustill).
[225] [2001] 1 AC 315.
[226] Ibid, 337F.
[227] [1995] 1 AC 309.
[228] Section 1(1).

condemned UK law in *Malone v UK*.[229] The point was highlighted again three years later when the European Court of Human Rights unanimously held that the interception of calls made by the applicant on her office phones by her own employer, Merseyside Police, was a violation of her Article 8 right to respect for her correspondence (and also her private life) even though the calls were made on an internal telephone network. The Court noted that:

> [T]he 1985 Act does not apply to internal communications systems operated by public authorities, such as that at Merseyside Police Headquarters, and … there is no other provision in domestic law to regulate interceptions of telephone calls made on such systems. It cannot therefore be said that the interference was 'in accordance with the law' for the purposes of Article 8(2) of the Convention …[230]

Of course in *Effik* the private telephone system was not operated by a public authority, but the point remains that UK law was defective in not legally regulating interference with people's correspondence.

In *McE v Prison Service of Northern Ireland*, a challenge was raised in three separate appeals to the power of the police to conduct covert surveillance of communications between persons in police custody and their legal or medical advisers, despite such communications being professionally privileged under the common law.[231] When the case reached the House of Lords the legality of such surveillance was confirmed, provided it complied with the requirements of the Regulation of Investigatory Powers Act 2000 and with the Code of Practice issued under that Act. On the facts of these appeals, it did not so comply, because authorization for it had not been given at an enhanced level.[232] Only Lord Phillips had doubts about the legality of the surveillance more generally: he could not reconcile covert surveillance with the *statutory* right conferred on persons in custody to consult their solicitor in private.[233] Of course it has to be remembered that the Lords were not being asked whether any information obtained through such surveillance would be admissible in later court proceedings; Lord Hope indicated that it was likely it would not be.[234] So far as is known, none of the appellants in *McE* later lodged applications in Strasbourg.

The most recent case to have been decided by the European Court of Human Rights in relation to alleged interceptions of communications in the United Kingdom, *Kennedy v UK*,[235] is not one which was previously considered by the top UK court, or even by the Court of Appeal. The applicant alleged a violation of Articles 6, 8 and 13 in that he could not ascertain whether his phone calls and mail were being intercepted by state authorities. He took a complaint to the Investigatory Powers Tribunal but was told in

[229] (1985) 7 EHRR 14.
[230] *Halford v UK* (1997) 24 EHRR 523, para 51.
[231] [2009] UKHL 15, [2009] 1 AC 908.
[232] So far as is known, the Home Secretary has not since made an order authorizing this kind of intrusive surveillance.
[233] [2009] UKHL 15, [2009] 1 AC 908, [25]–[26]. Baroness Hale said the conclusion she was reaching was 'unpalatable' but was one to which she was driven by the plain words of the 2000 Act and the history of legislation on the subject.
[234] Ibid, [66].
[235] (2011) 52 EHRR 4.

due course that the Tribunal could see no breach of the law in his case. The European Court admitted his application on the basis that, if he had proceeded through the higher UK courts and established an illegality, he would not have been able to obtain an effective remedy because those courts could not have invalidated the primary legislation in question[236] and a declaration of incompatibility issued under the Human Rights Act would not have affected the legislation's continuing validity. The Court went on to find, however, that the procedures in place to allow persons such as Mr Kennedy to discover if they were the subject of lawful surveillance were wholly compliant with the European Convention.

Conclusion

This chapter has sought to highlight four key features of the approach of the United Kingdom's top court to Article 8 of the European Convention. Firstly, while it has been prompted by the European Court of Human Rights to recognize the right to private lives enjoyed by people who are homosexual or transsexual, it has remained stubbornly opposed to developing a full-blown right to privacy in English law. Lord Hoffmann has been particularly unsupportive of any such development. Secondly, and somewhat paradoxically, the top court has been very open to acknowledging the right to family life in a housing context, an adoption context, and an immigration context, so much so that it has provoked the government into issuing new Immigration Rules designed to curb the protection previously available under this heading. Thirdly, the House of Lords and Supreme Court have engaged in an extensive dialogue with the Strasbourg Court over the rights of gypsies and tenants of social housing to have their right to a home respected, with the Supreme Court eventually adapting its position to accommodate the attitude insisted upon in Strasbourg; no fewer than seven decisions in London and six in Strasbourg have had to be issued in order to arrive at the current stance. Fourthly, the United Kingdom's top court has been slow to adopt a generous approach to claims to the right to correspondence, whether by traditional mail or in more modern forms. It has upheld the right only when clearly directed to do so by Parliament. All in all, Article 8 has required the United Kingdom's top judges to climb a steep learning curve. They may not yet be at the summit.

[236] Ibid, para 109. The primary legislation was the Regulation of Investigatory Powers Act 2000 (eg s 68). The applicant also unsuccessfully challenged various rules in the Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) (eg rr 6(2)–(5), 9 and 13).

9

Believing, Associating, Marrying

Introduction

To date the top UK court has not been much troubled by appeals that have required consideration of the rights to freedom of belief, to freedom of assembly and association, and to marry and found a family—the subject of Articles 9, 11, and 12 of the European Convention respectively. To a great extent the first two of these rights are still governed by the common law, but many of the relevant precedents are decisions of lower courts and are of considerable vintage. The impact of the Human Rights Act on this pre-existing law has not been significant, except in so far as it confirms that if the state wishes to interfere with these rights it must have very good reasons for doing so. The common law's doctrine whereby public authorities must not act *ultra vires*, or irrationally, goes a long way towards satisfying the Convention-derived requirements concerning restrictions on rights that are 'prescribed by law' and 'necessary in a democratic society'. But new threats to all three of these rights do emerge from time to time—in education law, employment law, and immigration law, for example—and it is therefore essential that our top judges attune themselves to the internationally accepted approaches to such threats. Particularly in the context of the right to freedom of assembly and association, and especially so as regards issues arising within the workforce, those judges will at times be called upon to make difficult choices between conflicting policy interests.

Believing

On the few occasions on which the House of Lords or Supreme Court has had to consider Article 9—the right to freedom of belief—it has been able to deal with the points without dissent and on no occasion has such a decision been challenged successfully in Strasbourg. This says much for the religious tolerance which characterizes modern Britain but also for the positive value which our courts place on diversity of opinion outside of the religious sphere. Coinciding with this tolerance has been a growing diminution in the special protection afforded to Christianity. Cases involving Article 9 are usually ones where the issue is whether the limitations placed on a particular belief or opinion are justifiable within the terms of paragraph 2 of the Article. So far the United Kingdom's top judges have resisted the temptation to confer protection on opinions which there are good social reasons for rejecting. Nor have they had occasion to rely to any significant extent on section 13 of the Human Rights Act 1998, which was the focus of strong lobbying by many religious organizations when the legislation was going through Parliament. That section provides that: 'If a court's determination of

any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.[1]

When the editor and publisher of *Gay News* were subjected to a successful private prosecution for blasphemous libel initiated by Mary Whitehouse in 1979 they did not raise as part of their defence their right to freedom of opinion. The poem and picture in question were certainly very insulting to Christianity, probably just as much as the cartoons about Mohamed which caused such consternation amongst Muslims when published by a Danish newspaper in 2005. In the House of Lords the only legal issue arising in *R v Lemon* was the kind of intention which the prosecution had to prove on the defendants' part: the majority held that it was enough to prove that they intended to publish the poem and picture, without having to prove as well that they intended to commit a blasphemous libel.[2] When the convicted defendants applied to Strasbourg their application was declared inadmissible by the European Commission on the basis that the restrictions imposed on them were justifiable because they pursued the lawful aim of protecting the rights of others, in this case the right of others not to have their religious beliefs offended. Moreover, the manner in which that aim was pursued was both necessary and proportionate, although it has to be admitted that the Commission's analysis on this point is rather shallow (not to say illogical):

> If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.[3]

It was not until 2001 that the House of Lords had to confront head-on an argument based on Article 9, in the case of *R (Pretty) v DPP*.[4] As outlined in Chapter 8 above, Mrs Pretty was dying of motor neurone disease and she argued that her belief in the right to assisted suicide meant that she should be entitled to the assistance of her husband when she was committing suicide without his having to fear being prosecuted.[5] But the Law Lords held that Article 9 was not even engaged on these facts, because there was too much distance between Mrs Pretty's belief and what she said the consequences of that belief should be. As Lord Steyn put it: 'This article was never intended to give individuals the right to perform any acts in pursuance of whatever beliefs they may hold, eg to attack places where experiments are conducted on animals'.[6] Even if Article 9 was engaged, added the Law Lords, the restrictions would have been justifiable under Article 9(2), in the same way as Mrs Pretty's argument based on Article 8 (the right to a private life) was defeated by the restrictions allowed by Article 8(2).[7]

[1] See Wadham et al (2011), 214–24; Clayton and Tomlinson (2009a), paras 14.03–14.86 and 16.06–16.73; Donald et al (2012).

[2] [1979] AC 517.

[3] *X Ltd and Y v UK* App No 8710/79, decision of 7 May 1982; 28 DR 77, 'The Law', para 12.

[4] [2001] UKHL 61, [2002] 1 AC 800.

[5] Assisting a suicide is a crime under the Suicide Act 1961, s 1(2). See Ch 4 above, at 115, n 90.

[6] [2002] 1 AC 800, [63]. See too [31] (per Lord Bingham) and [101] (per Lord Hope).

[7] See Ch 8 above, at 227–8.

The European Court was equally dismissive of Mrs Pretty's claim under Article 9 (and also those under Articles 2, 3, 8, and 14):

> The Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9(1) of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. As found by the Commission, the term 'practice' as employed in Article 9(1) does not cover each act which is motivated or influenced by a religion or belief'.[8]

Later in 2001 the Law Lords had to consider whether the leader and deputy leader of Westminster City Council had acted lawfully when they promoted and implemented a house sales policy which would give electoral advantage to the Conservative Party at future council elections. As far as Convention rights were concerned, only Article 6 was discussed (and found not to have been violated),[9] but when Dame Shirley Porter lodged an application with the European Court she also relied upon her Article 9 rights. She suggested that to punish her with criminal sanctions merely for pursuing her political beliefs was unacceptable. But the European Court held that Article 9 was not even engaged.[10] It once again stressed the limitations on the term 'practice':

> It does not appear to the Court that the applicant's conduct in pursuing housing sales geared to boost her parties' votes can be regarded as either a 'practice' or part of her personal beliefs in the sense protected by Article 9.[11]

Religious belief and expulsion from the United Kingdom

The right to freedom of religion was at the heart of the *Ullah* case, in which Lord Bingham set out the famous 'mirror' principle.[12] This is the idea that UK courts should protect Convention rights to the same extent as the European Court of Human Rights does so—no more and no less. The principle was enunciated as an *obiter dictum*, because the central issue facing the Lords was whether two applicants, whose claims for asylum had been rejected, could lawfully be returned to countries—Pakistan and Vietnam—where they would not be able to practise their religious beliefs without restrictions: one was an Ahmadi preacher and the other a Roman Catholic. Lord Bingham founded his judgment on the distinction between 'domestic' cases and 'foreign' cases, the former being concerned with alleged human rights violations within the United Kingdom, the latter with alleged human rights violations elsewhere.[13] He proceeded to rely heavily on the European Court's judgment in *Soering v UK*, where it had ruled that extraditing

[8] (2002) 35 EHRR 1, para 82. In support of its statement about 'practice' the Court cited the European Commission's view in *Arrowsmith v UK* (1981) 3 EHRR 218.

[9] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

[10] *Porter v UK* App No 15814/02, decision of 8 April 2003.

[11] This time the Court cited its own decision in *Zaoui v Switzerland* App No 41615/98, decision of 18 January 2001, and the Commission case law cited therein.

[12] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. See Ch 2 above, at 39–43.

[13] Ibid, [8]–[9].

a person to the United States, where he or she might be required to stay on death row for a considerable period of time, may be a violation of the right under Article 3 not to be subjected to inhuman or degrading treatment or punishment. The responsibility of the extraditing state would be engaged 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[14] A few years later, in *Chahal v UK*, this principle was applied by the European Court when ruling that it would be a violation of Article 3 for the United Kingdom to expel Mr Chahal to India, where he was at real risk of being ill-treated on account of his support for and action on behalf of Sikh separatism.[15] The Court observed that: '[t]he protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees'.[16] In *Ullah* the question was whether the *Soering* principle applied in situations where the right at risk in the foreign country was the right to freedom of religious belief. Strangely, there was no clear authority on that point within Strasbourg jurisprudence, the only pertinent case being one where the European Court had appeared to hold that on the facts there was no serious risk of a violation of Article 9.[17] Lord Bingham concluded that the European Court had not ruled out the possibility of the *Soering* principle being applied in an Article 9 situation but he held that the arguments put to the House in the case before him 'fall far short of showing facts capable of supporting such a claim'.[18] The test he approved for deciding whether the alleged violation in the foreign country would be enough to prevent expulsion from the United Kingdom was one which the Immigration Appeal Tribunal had formulated in 2003: 'it is only . . . where the right will be completely denied or nullified in the destination country that it can be said that removal will breach the treaty obligations of the [expelling] state'.[19]

Lord Carswell, after admitting that the Human Rights Act 1998 had made a profound difference to the way asylum appeals have to be dealt with by the courts,[20] agreed that the test set out by the Immigration Appeal Tribunal was an appropriate one. He likened it to the concept of fundamental breach in contract law ('with which courts in this jurisdiction are familiar'), while admitting the difficulty in applying the concept of a 'flagrant breach', which reminded him of the problems domestic courts had

[14] (1989) 11 EHRR 439, para 91.

[15] (1996) 23 EHRR 413.

[16] Ibid, para 80. Article 32(1) reads: 'The Contracting States shall not expel a refugee lawfully in their territory save on the grounds of national security or public order'. Article 33 reads: (1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. For a recent Supreme Court decisions concerning Art 33(2), see *Al-Sirri v Secretary of State for Justice* [2010] UKSC 54, [2012] 3 WLR 1263.

[17] *Razaghi v Sweden* App No 64599/01, judgment of 11 March 2003. The applicant was resisting expulsion to Iran, where he feared ill-treatment on account of his adultery and conversion to Christianity.

[18] [2004] UKHL 26, [2004] 2 AC 323, [25].

[19] *Devaseelan v Secretary of State for the Home Dept* [2003] Imm AR 1, para 111.

[20] [2004] 2 AC 323, [54]. See too Carswell (1999), 254–5.

experienced with the idea of 'gross negligence'.[21] He added that he found it difficult to envisage a case in which there could be a sufficient interference with Article 9 rights that did not also breach Article 3 rights and he regretted that the European Court had apparently opted to create separate threshold tests depending on the Convention right in question:

> One might have preferred…to see the exception expressed in terms of general humanitarian considerations, which could be applied flexibly throughout the states which are parties to the Convention, rather than being tied to specific articles of the Convention…It is to be hoped that the courts which have to apply the principles will be able to retain a substantial degree of flexibility in order to fulfil the humanitarian objectives of the Convention in such cases, while upholding the proper rights of states to decline to admit aliens.[22]

This is a rare but welcome example of a top UK judge expressing a view as to how the European Court should formulate its legal principles. The reference to 'humanitarian considerations' in this statement is no doubt a deliberate attempt to develop for these 'foreign' cases a set of standards which, while not co-terminous with those applying in 'domestic' cases, nevertheless go some way towards protecting people against human rights violations abroad. It recognizes the reality that, despite the duties of non-discrimination and co-operation imposed on states by the UN's international covenants on human rights,[23] a state cannot base its immigration laws on whether an applicant for entry comes from a state in which some of his or her human rights have been or may be violated, especially if it is one which has not ratified the European Convention. To that extent it is almost inevitable, in the current state of international law, for a *relative* approach to be adopted to the protection of human rights: national courts will inevitably protect human rights in their own country to a higher standard than they protect human rights in other countries. A universalist approach to human rights is very appropriate at the level of regional or global courts, but not in national courts.

Religious belief and education

A further opportunity was granted to the House of Lords to apply Article 9 in 2005, in *R (Williamson) v Secretary of State for Education and Employment*.[24] The applicants were parents and teachers who believed in the use of mild corporate punishment for children attending school. They argued that this belief was based on Christianity as set out in the Bible and they sought a declaration that their right to manifest this religious belief was breached by a statutory provision which said that corporal punishment could not be justified in any school in England and Wales 'on the ground that it was given in pursuance of a right exercisable by the member of staff by virtue of his position

[21] Ibid, [69].
[22] Ibid, [66].
[23] International Covenant on Civil and Political Rights 1966, Art 2(1); International Covenant on Economic, Social and Cultural Rights 1966, Art 2(1).
[24] [2005] UKHL 15, [2005] 2 AC 246.

as such'.[25] The parents added that their common law right to discipline their children survived the enactment of this provision and that they could delegate it to a teacher, who would then not be acting as a teacher 'as such'. But the Law Lords rejected such a contention because it would defeat the purpose of the provision. It would make the ban on corporal punishment optional, at the choice of the parents.[26] Lord Nicholls went on to delineate what features a belief needs to have in order to qualify for protection under Article 9 and he did so, impressively, without relying on a series of European Court dicta. He said that the belief must 'be consistent with basic standards of human dignity or integrity', 'relate to matters more than merely trivial', 'possess an adequate degree of seriousness and importance', 'be a belief on a fundamental problem', and 'be coherent in the sense of being intelligible and capable of being understood'.[27] Applying these criteria, the learned judge held that a belief in a mild form of corporal punishment of children was a belief that engaged Article 9's protection, but although the right was interfered with by the statutory ban the interference was justified because it pursued a legitimate aim and was necessary and proportionate. Again, though, we see a tendency to elide the exploration of the 'necessity' and 'proportionality' criteria: how can an absolute ban be 'proportionate'? And we see how judicial deference to Parliament plays a role in influencing the judges' assessment of what is 'necessary'. Lord Nicholls said that the means chosen were not disproportionate '*for this reason*: the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable'.[28]

Baroness Hale, in her judgment, goes some way towards plugging the apparent gap in this reasoning by pointing out that sometimes it is necessary to impose a complete ban in order to protect a class which in general is vulnerable, even though particular individuals in the class may not be.[29] In support of the ban Baroness Hale also cited provisions in the UN's Convention on the Rights of the Child and passages in the concluding observations issued by the UN's Committees on the Rights of the Child and on Economic, Social and Cultural Rights.[30] Throughout her judgment Baroness Hale appropriately focused on the rights of children, not the rights of parents or teachers.[31] Lord Walker's judgment in *Williamson* is also very illuminating, not least because it suggests that the European Court has been too restrictive in the range of beliefs it is prepared to protect under Article 9. In particular, Lord Walker was alarmed at the idea that only beliefs which are 'cogent, serious, coherent and important' are worthy of protection, and he added: 'the requirement that an opinion should be "worthy of respect in a 'democratic society'" begs too many questions… [I]n matters of human rights the court should not show liberal tolerance only to tolerant liberals'.[32] This tends

[25] Education Act 1996, s 548(1), as amended by the School Standards and Framework Act 1998.
[26] [2005] 2 AC 246, [13] (per Lord Nicholls).
[27] Ibid, [23].
[28] Ibid, [50] (emphasis added).
[29] Ibid, [80], citing *Pretty v UK* (2002) 35 EHRR 1.
[30] Ibid, [82]–[84].
[31] See too her approach in *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] 1 AC 42, [49].
[32] [2005] 2 AC 246, [60].

to undermine the delineation of 'belief' set out by Lord Nicholls, but it was not a view expressly endorsed by any of Lord Walker's fellow judges.

The losing claimants in *Williamson* do not seem to have lodged an application in Strasbourg. We are still left with the impression, however, that the House of Lords, *pace* the mirror principle, went beyond what it was strictly required to do in this appeal. The Law Lords gave an expansive interpretation to the concept of 'belief' and in effect deferred to the nation's Parliament in a way in which the European Court might not so easily have been able to do under its margin of appreciation doctrine. The House also dismissed the applicants' arguments based on Article 2 of Protocol No 1 to the Convention, which would appear to be *lex specialis* in this context because it explicitly allows parents to have their children educated in accordance with the parents' religious or philosophical convictions.[33]

Religion and education were again both at issue in an appeal which came to the House of Lords concerning a school's policy on uniforms. In *R (SB) v Denbigh High School*[34] the applicant, Shabina Begum, had been denied access to a school because she insisted on wearing a 'jilbab' (a long loose garment which concealed the shape of the female body) rather than a 'shalwar kameeze' (a sleeveless dress, like a smock, coupled with loose trousers). The latter was consistent with the school's uniform policy, whereas the former was not. Again the Lords held that, while the girl's right to freedom of religious belief had been interfered with, the interference was justifiable within Article 9(2). When assessing the proportionality of the interference the House was influenced by the fact that the girl and her parents had deliberately chosen that particular school (even though they lived outside its normal catchment area) and had complied with its uniform policy for two years; it also bore in mind that there were other schools nearby which would have allowed this pupil to attend wearing a jilbab. Baroness Hale was adamant that the interference with Shabina Begum's right to manifest her religion was justified and, perhaps because of a suspicion that Shabina's position was strongly influenced by her older brother, she stressed that what a woman wears must be her choice, 'not something imposed upon her by others'.[35] Likewise, the House found no breach of Article 2 of Protocol No 1. But the case is particularly interesting, as we saw in Chapter 2, for the criticism it made of the 'procedural' approach to human rights protection, which the Court of Appeal had preferred on these facts. Bridge LJ, in particular, had insisted that schools, being emanations of the state, had to go through a formal Convention-based reasoning process before excluding a child. Lord Bingham, approving of academic criticism of the Court of Appeal's approach,[36] said that 'what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'.[37] Lord Hoffmann, who was even more critical of the Court of Appeal, said that it had required the school to set an examination paper for itself, a paper which the Court of Appeal itself would have failed![38] There are downsides to this 'outcome

[33] This provision is further considered in Ch 12 below.
[34] [2006] UKHL 15, [2007] 1 AC 100.
[35] Ibid, [95].
[36] eg Poole (2005a) and Davies (2005).
[37] [2007] 1 AC 100, [31].
[38] Ibid, [66] and [68]. He added, at [68]: 'Head teachers and governors cannot be expected to make such decisions with textbooks on human rights at their elbows'.

not process' approach, as argued in Chapter 2 above, but none of the Law Lords made reference to these.

Associating

Before the enactment of the Human Rights Act 1998, the views of the House of Lords on the right to freedom of assembly and association were challenged three times in Strasbourg. The first two applications were declared inadmissible by the European Commission, but the third was successful all the way to the European Court. Each of the cases involved claims by trade unionists. The House's views on the right to assemble or associate for purposes of public protest, or for some other reason, have been more prominent, especially in the post-Human Rights Act era.

Trade union activities

In *Cheall v Association of Professional Executive Clerical and Computer Staff*[39] the claimant had been expelled from a trade union, APEX, because a disputes committee of the Trade Union Congress had ruled that in recruiting Mr Cheall the union had breached the so-called Bridlington Principles, one of which was that before recruiting a person as a member unions had to inquire of the person's former union whether it objected to the move. In what was one of his earliest decisions as a High Court judge, Bingham J dismissed the action brought against APEX by the disgruntled former member.[40] The claimant won in the Court of Appeal,[41] but the House the Lords was again unanimously in favour of the union. Very unusually for the time (1981–83), all three courts considered the applicability of the European Convention on Human Rights, and all held that the Bridlington Principles did not contravene it. Nor, under the common law, was there anything to prevent unions from making agreements that were in their collective interests even though they might restrict the rights of individuals to join the union of their choice. To boot, the claimant could not rely upon any principle of natural justice so as to claim a right to be heard in person when the TUC's disputes committee was deciding whether a union had breached the Bridlington Principles. If the rights of unions to make collective agreements between themselves were to be restricted on the ground of public policy, that was a matter for Parliament rather than for the courts.

The claimant relied on the European Court's judgments in *Young, James and Webster v UK*, where a closed shop agreement had been found to be a violation of Article 11. Bingham J, however, thought that the facts in that case were 'quite different' and that 'the injustice to the individuals involved was much more pronounced than anything the plaintiff can complain of'.[42] While he accepted that Mr Cheall started with the advantage that the policy of English law was 'in general, where possible and appropriate, to lean in favour of the liberty of the individual', this advantage was 'whittled down somewhat

[39] [1983] 2 AC 180.
[40] [1982] ICR 231.
[41] [1983] QB 126; Lord Denning MR and Slade LJ held for the claimant; Donaldson LJ held for the union. Mark Saville QC, as he then was, and Cherie Booth, acted for the union.
[42] [1982] ICR 231, 255B.

by the countervailing consideration that the law also, in general, leans in favour of upholding contracts'.[43] In the Court of Appeal, by way of contrast, Lord Denning had no compunction about relying directly on the European Convention, and he claimed that Article 11 'only states a basic principle of English law',[44] adding:

> Freedom of association itself has never been doubted. No matter whether it be a social club, a football club or cricket club. Nor whether it be a charitable society for the relief of the poor or the prevention of cruelty. Nor whether it be a political party or for the promotion of political ends. So long as their objects are lawful, everyone in England has a right freely to associate with his fellows.[45]

Lord Denning was then typically eloquent in his support for individual liberty:

> I take my stand on something more fundamental [than the need to keep order in industrial relations]. It is on the freedom of the individual to join a trade union of his choice. He is not to be ordered to join this or that trade union without having a say in the matter. He is not to be treated as a pawn on the chessboard. He is not to be moved across it against his will by one or other of the conflicting parties, or by their disputes committee. It might result, when there is a 'closed shop', in his being deprived of his livelihood. He would be crushed between the upper and nether millstones. Even though it should result in industrial chaos, nevertheless the freedom of each man should prevail over it. There comes a time in peace and war—as recent events show—when a stand must be made on principle, whatever the consequences. Such a stand should be made here today.[46]

Donaldson LJ, who dissented in the case, could find no relevant guidance in *Young, James and Webster v UK* and he thought that for the courts to overturn the policy reflected in the Bridlington Principles would be to 'apply considerations of political rather than public policy'.[47] Slade LJ made no comment on the European Convention, preferring to rest his decision on the point that APEX, when terminating the plaintiff's membership, could not be allowed to take advantage of its own misconduct in consciously and deliberately breaching the Bridlington Principles. In the House of Lords only Lord Diplock delivered a full opinion,[48] but he said little about the European Convention other than to point out that the expulsion of Mr Cheall from APEX had not put his job in jeopardy: all that had happened was that he had left one union to join another but, after four years, had been compelled to leave that other union and had rejected the opportunity to re-join his former union. Lord Diplock said that his human sympathies were for Mr Cheall, but he was in no doubt that the law was against him.[49]

When Mr Cheall took his case to Strasbourg the European Commission distinguished the European Court's judgment in *Young, James and Webster v UK* on the basis that that

[43] Ibid, 253H.

[44] [1983] QB 126, 136C.

[45] Ibid. In support he cited his own judgment in *Nagle v Feilden* [1966] 2 QB 633, where in turn he had cited the *Ipswich Tailors' Case* (1614) 11 Co Rep 53a, 77 ER 1218.

[46] [1983] QB 126, 139G–H. We can only speculate on which 'recent events' Lord Denning had in mind here—the defence of the Falklands in 1982 perhaps, or the miners' strike in 1981?

[47] Ibid, 147E.

[48] Lords Edmund-Davies, Fraser, Brandon, and Templeman simply concurred with Lord Diplock.

[49] [1983] 1 AC 180, 191F.

was a case about the restrictions that can be placed by the state on the right to form and join trade unions, whereas here the question was to what extent Article 11 requires the state to protect a trade union member against measures taken by his own union. The Commission concluded that the right to form trade unions includes the right of trade unions to draw up their own rules, administer their own affairs, and establish and join trade union federations.[50] Those rules and decisions had to be regarded as private activity for which, in principle, the state could not be responsible under the European Convention:

> The right to join a union 'for the protection of his interests' [the phrase used in Article 11(1)] cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union . . . The protection afforded by the provision is primarily against interference by the State.[51]

While the Commission conceded that the state had to protect the individual against any abuse of a dominant position by trade unions (eg where the union's rules were wholly unreasonable or arbitrary, or where the consequences of exclusion or expulsion resulted in exceptional hardship, such as job loss because of a closed shop), the union's rules in this case (and the Bridlington Principles) could not be regarded as unreasonable. So Mr Cheall's expulsion from APEX had to be seen as the act of a private body in the exercise of its Convention rights under Article 11 and did not engage the responsibility of the respondent government. Having lost in the Commission Mr Cheall, at that time, was unable to take the case any further.

The *Cheall* case provides an excellent example of the House of Lords' inter-action with the European Convention prior to the Human Rights Act. It highlights once more the relative absence of any applicable common law principles concerning freedom of association, or at any rate the lack of consensus amongst senior UK judges on what those principles might require. And it shows how the Convention itself (at that time) focused on acts done or not done by state bodies. In the following year, 1984, a much more high-profile case came before the domestic courts before finding its way to Strasbourg, where again the application was declared inadmissible. This is the *GCHQ* case,[52] where Mrs Thatcher, using a Crown prerogative power to regulate the civil service, banned workers at the Government Communications Headquarters from joining national trade unions. Her fear was that such unions could call strikes which would endanger national security.[53] A brave High Court judge, Glidewell J, held the ban to be unlawful because it had not been preceded by consultation with the workers, but in the Court of Appeal[54] and House of Lords all eight judges held for the government. The decision is important primarily because it confirmed that even prerogative powers can

[50] Here the Commission cited Arts 3 and 5 of Convention No 87 of the International Labour Organisation.

[51] *Cheall v UK* (1986) 8 EHRR CD74, 'The Law'.

[52] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[53] Between February 1979 and April 1981 industrial action had been taken at GCHQ on seven occasions, whether as one-day strikes, work-to-rule regimes, or overtime bans, resulting in the loss of more than 10,000 working days.

[54] Lord Lane CJ, Watkins and May LJJ (unreported). The Court of Appeal itself gave leave to appeal to the Lords.

be subjected to judicial review, but also because it found that, as the government's decision had been based on considerations of national security, those considerations could excuse the lack of consultation with the workforce (since the consultation itself could have led to industrial action compromising national security).

Article 11 of the European Convention played no part in the Law Lords' opinions, even though, in a written statement made to the Select Committee on Employment, the Foreign and Commonwealth Office admitted that Article 11(2) had formed an integral part of the government's decision-making process,[55] and counsel for the Council of Civil Service Unions argued that 'no reasonable minister could have formed the view that informal instructions [such as had been issued here] amounted to prescription by law within the meaning of Article 11(2)'.[56] But no case from Strasbourg was cited to, or by, the Law Lords, and nor was any 'authority' cited to show that the government had misconstrued the true nature of its obligations under the International Labour Organization's Convention No 87.[57] In 1984 the ILO's Committee on Freedom of Association and its Governing Body both upheld a complaint from the domestic Trades Union Congress that the action of the UK government in relation to workers at GCHQ was not in conformity with Convention No 87. In 1985 the ILO's Committee of Experts on the Application of Conventions and Recommendations even suggested that the complex legal questions raised should be considered by the International Court of Justice.[58] However, at the European Commission it was held that the restrictions imposed by the UK government were indeed 'prescribed by law', because the statutory framework supported and limited the prerogative power in question; the restrictions were also not arbitrary, because it would have been possible for industrial action to occur again at any moment; and the restrictions were justified under the second sentence of Article 11(2) as being 'lawful restrictions on [Article 11(1)] rights by members . . . of the administration of the State'. The Commission did not therefore consider whether the restrictions were justified under the first sentence of Article 11(2) as 'necessary in a democratic society in the interest of national security'. Paradoxically, therefore, it would have been easier for the domestic courts to have upheld the restrictions in this case if they had been able to rely on the second sentence of Article 11(2) alone. As it was, English common law just did not have the 'rights' vocabulary that was applicable to this scenario. It did have a burgeoning set of principles around judicial review, but these were concerned with how decisions were made by public bodies, not with the merits of those decisions.

The pre-Human Rights Act case in which English law was held to contravene Article 11 was *Associated Newspapers Ltd v Wilson*,[59] where the Lords had held that, on the true construction of the Employment Protection (Consolidation) Act 1978,[60] employers had

[55] See Select Committee report dated 14 February 1984, but the Convention featured hardly at all in a debate in the House of Commons two weeks later: HC Debs, vol 55, cols 25–111, 27 February 1984.

[56] [1985] AC 374, 379E.

[57] In the Court of Appeal, Lord Lane CJ had found that ILO Convention No 87 had not been breached.

[58] For a valuable collection dealing with the range of international procedures for protecting the rights of trade unionists, see Hepple (2002).

[59] [1995] 2 AC 454.

[60] Section 23(1).

not 'taken action' against employees to deter them from belonging to a trade union, despite the fact that they had offered the employees higher salaries if they opted out of basing their contracts on collective bargaining between the employers and the union. Nor had the employers' denial of a pay rise to those employees who had refused to sign new contracts of employment perpetrated an 'omission' that constituted an 'action' for the purposes of the Act.[61] The lawyers for the applicant workers argued, amongst other things, that Article 11 of the European Convention and ILO Conventions Nos 87 and 98, while not protecting collective bargaining, did protect the rights of individual members,[62] but none of the Law Lords referred to this in their opinions. However, seven years later the European Court held unanimously that the United Kingdom had violated its positive obligation to secure the enjoyment of rights guaranteed under Article 11(1).[63] While accepting that '[i]n view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured',[64] the Court ruled that:

> [I]t is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.[65]

Given that UK law permitted employers to treat employees less favourably than other employees if they were not prepared to renounce a freedom that was an essential feature of union membership, this effectively undermined a trade union's ability to strive for the protection of its members' interests. The European Court noted that this aspect of UK law had already been adversely criticized by the Committee of Independent Experts which oversees the European Social Charter and by the Committee on Freedom of Association of the ILO. Thus: 'by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.'[66]

The judgment of the European Court in *Wilson* betrays a deep division between the attitudes of top UK and European judges to the concept of the right of association in a

[61] But Lords Slynn and Lloyd dissented on this point.

[62] [1995] 2 AC 454, 461E–F.

[63] *Wilson, NUJ and others v UK* (2002) 35 EHRR 20, para 48. Article 11(1) reads: 'Everyone has the right to . . . freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.

[64] Ibid, para 44.

[65] Ibid, para 46.

[66] Ibid, para 48. The Court awarded each of the 11 individual applicants €7,730 by way of compensation for their 'justifiable anger, frustration and emotional distress': para 61.

trade union context. The European Court's reluctance to interfere in national approaches to industrial relations evaporated and the principle of effective, non-illusory protection of human rights was brought to the fore. In Ewing's words, the decision went 'a long way to restore confidence in Article 11 of the Convention' and was 'probably the most important labour law decision for at least a generation'.[67]

Other contexts

The only contexts in which the United Kingdom's top court has had to consider Article 11 outside of a trade union dispute are those of the ban on fox-hunting and the policing of public protests.[68] The former provided the background to *R (Countryside Alliance) v Attorney General*,[69] where all but Lord Bingham held that Article 11 was not even engaged by the hunting ban. Lord Bingham said: 'If people only assemble to act in a certain way and that activity is prohibited, the effect in reality is to restrict their right to assemble'.[70] While Lord Hope agreed with that, he also thought that there was a threshold that had to be crossed before Article 11 became applicable: it applies only to assemblies 'whose protection is fundamental to the proper functioning of a modern democracy'[71] and, while the right to form and join a trade union falls into that category of activity, as do meetings in private and in public, it does not protect the right to assemble for purely social purposes.[72] Baroness Hale thought Article 11 might be restricted to assemblies where people 'band together with others in order to share information and ideas and to give voice to them collectively'; it therefore protects the right of hunt supporters to gather together to demonstrate in favour of their sport, but not the right to participate in the sport itself.[73] When the Countryside Alliance lodged an application in Strasbourg, relying only on Article 8 and on Article 1 of Protocol 1, it was declared inadmissible.[74] A further example of a situation where restrictions on a person's political activities were considered by the European Court of Human Rights not to be of the type required to engage Article 11 is provided by *Porter v UK*, mentioned above in relation to freedom of belief, where the former leader of Westminster City Council failed in her attempt to persuade the European Court that the surcharge she had been required to pay amounted to an infringement of her human rights.[75]

At common law the House of Lords has been quite supportive of the right to freedom of assembly. In *DPP v Jones*,[76] albeit by three to two, they held that a peaceful assembly

[67] Ewing (2003), 5 and 20.

[68] The House of Lords refused leave to appeal in *Serco Ltd v Redfearn* [2006] EWCA Civ 659, [2006] ICR 1367, where Mr Redfearn unsuccessfully complained that he had been unfairly dismissed from his job as a driver simply because he was a supporter of the British National Party. He later won his case in Strasbourg, where the Chamber held by four to three that his Art 11 rights had been violated. The UK judge, Sir Nicolas Bratza, was one of the dissenters. See *Redfearn v UK* App No 47335/06, judgment of 6 November 2012.

[69] [2007] UKHL 52, [2008] AC 719.

[70] Ibid, [18].

[71] Ibid, [58].

[72] Ibid.

[73] Ibid, [118]. See too Lord Brown at [143]. Lord Rodger did not touch upon Art 11, but he did in particular agree with the reasons for dismissing the appeal given by Lord Brown.

[74] *Countryside Alliance v UK* (2010) 50 EHRR SE6; see too Ch 3 above, at 81.

[75] Application No 15814/02, decision of 8 April 2003. See 263 instead.

[76] [1999] 2 AC 240. See Fenwick (1999).

on the public highway near Stonehenge did not exceed 'the limits of the public's right of access' to the highway, under the Public Order Act 1986.[77] In the words of Lord Hutton:

> [T]he common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern and I consider that the common law should now recognize that this right, which is one of the fundamental rights of citizens in a democracy, is unduly restricted unless it can be exercised in some circumstances on the public highway.[78]

Lord Irvine LC was equally liberal:

> I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass.[79]

The two dissenting judges were Lord Hope and Lord Slynn. Lord Hope's judgment seems to be a good example of a judge feeling obliged to apply the law as it stands even though he wishes it were different. He concluded that Parliament's intention in the Public Order Act 1986 was 'to rely upon the existing state of the law relating to trespass as between members of the public and the occupiers of land to which members of the public have no right of access, or only a limited right of access'.[80] He was therefore loathe to change the law in a way which affected private landowners even though no private landowner was a party to this case. Lord Slynn's judgment is to the same effect: 'The right of assembly, of demonstration, is of great importance, but in English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored'.[81] All but one of the five judges in *Jones* considered whether, if the European Convention were applicable, it would make any difference to the outcome they had preferred, and none of them said that it would. Lord Irvine LC, who had helped to pilot the Human Rights Act through Parliament six months earlier, concluded that 'our law will not comply with the Convention unless its *starting-point* is that assembly on the highway will not necessarily be unlawful'.[82] Lord Hope and Lord Slynn took refuge in the general statement that Article 11 of the Convention recognizes restrictions to the right to freedom of assembly.[83]

In only one post Human Rights Act case has the House of Lords or Supreme Court focused its attention on whether the English law on public protests is compatible with Article 11 of the Convention. This was in *R (Laporte) v Chief Constable of Gloucestershire Constabulary*,[84] where in 2003 the police had stopped three coaches which were

[77] Section 14A.
[78] [1999] 2 AC 240, 287A. Lord Hutton expanded this point at 287D–288G
[79] Ibid, 257D. Lord Clyde issued a judgment along the same lines as Lord Irvine LC and Lord Hutton.
[80] Ibid, 277B.
[81] Ibid, 263G.
[82] Ibid, 259F (emphasis in the original). See too 281B (per Lord Clyde). Lord Hutton was silent on the Convention.
[83] Ibid, 277H–278C (per Lord Hope) and 265E–F (per Lord Slynn).
[84] [2006] UKHL 55, [2007] 2 AC 105. See too Ch 6 above, 162–3.

approaching an air base at Gloucestershire (having started from London) and insisted that all the passengers be escorted back to London because some of them intended to cause a breach of the peace at the air base. The Divisional Court and Court of Appeal held that the police's decision to prevent the protestors from participating in a demonstration at the air base was lawful, but their detention on the coaches back to London was not. The Law Lords went further, holding that, since there had been no indication that a breach of the peace was likely to occur imminently, the interference with the protestors' right to protest under Article 11 (and also under Article 10) had been violated. While it is a relief to see the Lords correcting errors in the courts below, we should not assume that the House's decision in *Laporte* represents any kind of significant shift in English law.[85] To a large extent it confirms the protection afforded by the common law in this area, although it does also remind us that the use of the concept of 'breach of the peace' must satisfy the various requirements of the European Convention. Moreover, the top court's protection of the right to protest must be seen in the light of its decision just two years later—a decision approved by the European Court—that protestors can be 'kettled' by the police for several hours, effectively depriving them of their right to liberty as well as their right to freedom of assembly.[86]

Marrying

One could be excused for thinking that the right to marry is a relatively uncontroversial human right and that the country's top court will have had little to say about it over the years. That is indeed the case, but on two specific questions the court has had occasion to make important pronouncements. The first is the question whether a marriage has to be between two people of different sexes, and the second is what conditions can be attached to the celebration of a marriage in the United Kingdom between foreigners. Article 12 of the European Convention is commendably short and to the point: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.[87]

The first of the issues arose starkly in *Bellinger v Bellinger*,[88] which has already been referred to in Chapters 3 and 8,[89] and will be mentioned again in Chapter 11 on the right to be free from discrimination.[90] The House unanimously ruled that the current law, embodied in the Matrimonial Causes Act 1973,[91] was incompatible with Article 12 of the European Convention because it insisted on a marriage being between two persons who were male and female at the time of their birth. The Law Lords refrained from using their powers under section 3 of the Human Rights Act 1998 to 'read down' the statutory provision so as to make it compatible with the Convention, preferring instead to issue a declaration of incompatibility and then leave it to Parliament to decide how

[85] See too Mead (2010), 347: 'Let us not overplay *Laporte*'.

[86] *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 1 AC 564; *Austin v UK* (2012) 55 EHRR 14 (GC). See the discussion in Ch 6 above, at 163–5.

[87] For a consideration of the Strasbourg jurisprudence on Art 12, see Reid (2012), 588–93.

[88] [2003] UKHL 21, [2003] 2 AC 467.

[89] See 74 and 232 above.

[90] See Ch 11 below, at 322–3.

[91] Section 11(c).

exactly to reform the law. A month before the appeal hearing in *Bellinger* the government had announced that it would bring forward primary legislation to allow transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in their new acquired gender to marry in that gender. A draft outline Bill on the issue was being prepared, so it was sensible for the Law Lords to resist judicial activism on this occasion. It is interesting, though, that the Lords' approach was heavily influenced by the fact that the European Court of Human Rights had recently changed its stance on this issue, signalling in *Goodwin v UK*[92] that UK law was deficient. *Goodwin* and several previous cases had gone to Strasbourg only because UK law was so resolutely opposed to the notion that transgendered people should be permitted to marry in their new gender. Although unsuccessful on the merits, the previous applications were declared admissible even though in none of them does there appear to have been any previous court proceedings within the United Kingdom.[93] That suggests that the Strasbourg organs always had reservations about denying a remedy to people in this plight.

We can deduce from the Law Lords' opinions in *Bellinger* that each of them was quite content to swallow the notion that a transgendered person, provided he or she is not still married to someone else, should be permitted to marry someone of the opposite gender to that which the transgendered person has acquired. Significantly, Lord Nicholls was 'profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim'[94] and Lord Hope said that the courage of Mr and Mrs Bellinger 'deserve our respect and admiration'.[95] Nevertheless, we should note the unwillingness of their Lordships to interpret the words 'male' and 'female' as embracing, respectively, men who used to be women and women who used to be men. Even Lord Hope, normally a careful and inventive judge, did not see how, 'on the ordinary methods of interpretation, the words "male" and "female" in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals'.[96] Lord Rodger, similarly, thought that the way section 11(c) was worded, compared with other provisions in the same Act, indicated that English law did not envisage that a person's gender could alter. Lords Nicholls and Hobhouse were less literalist in their approach, preferring to stress that extending the meaning of 'male' and 'female' would 'represent a major change in the law, having far reaching ramifications'[97] and that 'the question of transsexualism includes definitional questions of how far the person must go in order to qualify as a transsexual'.[98] None of their Lordships was prepared to follow the lead of the Family Court of Australia which, between the hearing of the appeal and the

[92] (2002) 35 EHRR 18. The European Court's judgment was delivered after the Court of Appeal's decision in *Bellinger* but before the hearing in the House of Lords. The application in *Goodwin* was lodged on 5 June 1995, but the judgment of the Grand Chamber was not issued until 11 July 2002.

[93] Likewise in *Rees v UK* (1986) 9 EHRR 56; *Cossey v UK* (1990) 13 EHRR 622; *X, Y and Z v UK* (1997) 24 EHRR 143 (GC); and *Sheffield and Horsham v UK* (1998) 27 EHRR 163. Strangely, the third of these cases, despite being a Grand Chamber decision, was not cited to or by their Lordships in *Bellinger*.

[94] [2003] 2 AC 467, [34].

[95] Ibid, [56].

[96] Ibid, [64].

[97] Ibid, [37] (per Lord Nicholls).

[98] Ibid, [76] (per Lord Hobhouse).

delivery of the decision in *Bellinger*, had favoured a more modern interpretation of the term 'man' in the equivalent Australian legislation.[99]

The decision in *Bellinger* has given rise to considerable comment, primarily because it is one where the Law Lords refused to do justice to the individual claimant and deferred instead to the need for parliamentary intervention. Hickman and Phillipson are particularly critical, but Bradney perhaps goes too far when he suggests that the approach of the Lords in *Bellinger* 'will considerably weaken the Human Rights Act 1998 as an instrument for creating a human rights culture'.[100] Kavanagh, on the other hand, seems more accepting of the Law Lords' hesitancy to make law in a realm where the consequences of doing so were not easy to determine, even though she does not adopt a similarly conservative position concerning the Law Lords' decision in *Ghaidan v Godin-Mendoza*, where an interpretation was given to the word 'spouse' in one particular piece of legislation that had the potential to have wide-ranging read-across implications for the interpretation of other statues. The fact remains that the Lords' refusal to grant Mrs Bellinger a declaration that the marriage she had celebrated 22 years earlier was valid smacked of timidity, if not downright injustice. It was fortunate that the Gender Recognition Act 2004 was quickly able to plug the remaining uncertainty in the law.[101]

The right to marry next came before the country's top court in *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2)*,[102] where what was at issue was the legality of a regime under which nationals from outside the European Economic Area who wanted to marry in England other than in accordance with the procedures of the Church of England had to obtain from the Home Secretary a certificate of approval to marry. The regime was aimed at preventing marriages of convenience, which are contracted in order to evade immigration controls, but the House of Lords, affirming the Court of Appeal,[103] held that it interfered disproportionately with the right to marry protected by Article 12. Lord Bingham, summarizing the Strasbourg approach to the article, described it as conferring a 'strong right', differing from the four preceding rights in the Convention in that Article 12 has no second paragraph permitting limitations on the right which are necessary in a democratic society.[104] He showed how the European Court considered the right to be 'fundamental' and how national laws must not impair the substance of the right.[105] To him the relevant legislative provisions[106] were largely unobjectionable—the exception related to the £295 fee which was imposed on those seeking a certificate of approval to marry—but the 'Instructions' issued by the Home Office's Immigration Directorates (without express parliamentary endorsement) imposed additional conditions which went beyond the

[99] *In re Kevin (Validity of Marriage of Transsexual)*, decision of 21 February 2003. See Wallbank (2004).
[100] Bradney (2003), 585.
[101] Mrs Bellinger lodged an application in Strasbourg, but later withdrew it after the Act was enacted: *Bellinger v UK* App No 43113/04, decision to strike out, 11 July 2006. For comments on the Bill which became the Act, see Joint Committee (2003b).
[102] [2008] UKHL 53, [2009] AC 287.
[103] [2007] EWCA Civ 478, [2008] QB 143.
[104] Ibid, [13]. [105] Ibid, [14].
[106] Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19, and the Immigration (Procedure for Marriage) Regulations 2005 (SI 2005/15).

aim of ensuring that the proposed marriages were genuine rather than just marriages of convenience. These included the conditions that the applicant must have been granted leave to enter the United Kingdom for more than six months and must have more than three months of that leave period still remaining when applying for a certificate. Although there was a discretionary compassionate exception, this blanket prohibition on certain categories of applicants was a disproportionate interference with the exercise of the right to marry.[107] Baroness Hale was of the same view, which she expressed very pithily:

> The legislation enables the Government to prohibit in advance a great many marriages irrespective of whether or not they are genuine, irrespective of whether or not there is any immigration advantage to be obtained thereby, and without any right of appeal other than judicial review. This strikes at the very heart of the right to marry…[108]

The House did not think it necessary to declare the whole of section 19 of the 2004 Act to be incompatible with the European Convention, as the judge at first instance had ruled,[109] but did agree that section 19(1) was incompatible with Article 12 in so far as it discriminated against people who wanted to marry other than in accordance with the rites of the Church of England, a finding by the lower courts against which the Home Secretary had not sought to appeal.[110] Otherwise their Lordships ruled that, to prevent the issuing of government instructions imposing a blanket prohibition on the exercise of the right to marry by persons in specified categories, the following italicized words should be read into section 19(3)(b):

> …has the written permission of the Secretary of State to marry in the United Kingdom, *such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under Article 12 of the European Convention*.[111]

Although this represents a return to a 'linguistic' approach to section 3 of the Human Rights Act,[112] the House's overall approach in *Baiai* displays both a laudable assertion of basic principle and a commendable degree of practicality as regards the end-result. Without actually explaining that they were doing so, their Lordships relied mostly on section 3 of the Human Rights Act and confined their reliance on section 4 to the legislative provision which was discriminatory on grounds of religious belief.

The Supreme Court touched upon the nature of marriage when it ruled in 2010 that a husband could be held to a pre-nuptial agreement with his wife, because the former rule that agreements for the future separation of parties to a marriage were contrary to

[107] [2009] AC 287, [31].
[108] Ibid, [36].
[109] [2006] EWHC 823 (Admin), [2007] 1 WLR 693.
[110] [2009] AC 287, [26] (per Lord Bingham), [37] (per Baroness Hale). The incompatibility was remedied by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011 (SI 2011/1158).
[111] [2009] AC 287, [32] (per Lord Bingham).
[112] See Ch 3 above, at 67 and 69.

public policy had become obsolete.[113] But no human rights angle was considered in the judgments, even that of Baroness Hale, who was the lone dissenter amongst the nine judges.

Conclusion

This chapter has explored three Convention rights which, so far, have not caused the UK's top court a great deal of difficulty. Only in the field of labour law—specifically industrial relations law—can it be said that the House of Lords under-achieved in terms of protecting human rights. There will, however, be further challenges ahead. As Christians in the United Kingdom become more and more worried that their religious belief is not being given the recognition and special protection which they once took for granted, there may well be litigation challenging relevant policies and laws.[114] And as forms of public protest become more sophisticated and spontaneous (eg through the use of social media channels), there may be further issues concerning how those protests are policed while maintaining respect for the right to freedom of assembly.[115] Court cases over the right of gay men and lesbians to marry are almost bound to occur as well—a right which, as recently as 2010, the European Court said was not guaranteed by the European Convention,[116] although in due course it may decide that an evolutive approach to the Convention compels a different answer. There will doubtless be plenty of opportunities for the Justices of the Supreme Court to air their views and define more acutely the precise boundaries of the relevant human rights.

[113] *Granatino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534. See Harris, George, and Herring (2011).

[114] In *Eweida and others v UK* App No 48420/10, judgment of 15 January 2013, the European Court upheld the right of one applicant to wear a Christian cross at work, but rejected three other applications based on Art 9. The Law Lords had previously refused the successful applicant leave to appeal against the Court of Appeal's decision in *Eweida v British Airways* [2010] EWCA Civ 80.

[115] The 'Occupy Now' movement caused significant legal problems in 2011, especially in relation to the use of the space in front of St Paul's Cathedral in London. The High Court ruled that evicting the protestors would not be unlawful: *City of London v Samede* [2012] EWHC 34 (QB). See <http://www.bbc.co.uk/news/uk-17187180> (last accessed 2 December 2012).

[116] *Schalk and Kopf v Austria* (2011) 53 EHRR 20. The Court held unanimously that Art 12 had not been violated, but only by four to three that Art 14, taken in conjunction with Art 8, had not been violated.

10

The Right to Free Speech

Introduction

Politicians in England and Wales often proclaim that freedom of speech is absolutely fundamental to democracy and are quick to condemn governments abroad for not protecting their citizens' rights in this regard as much as they should. Yet the law of England and Wales does not fully justify such a stance when we analyse the instances in which the judgments of the jurisdiction's top court have failed to satisfy the requirements of international human rights law. Moreover, compared with the views of the US Supreme Court on this topic,[1] the attitude of the House of Lords and UK Supreme Court cannot be regarded as particularly fervent. This must be partly due to the absence of a clear constitutional guarantee in the United Kingdom comparable to that found in Article 1 of the US Bill of Rights,[2] but it is submitted that the attitude is also the result of a strain of conservatism on the part of judges in our top court, most of whom do not seem to view free speech as deserving of extra-special protection.

As noted in Chapter 1, some judges in the United Kingdom have tried to raise the right to free speech to the level of a 'constitutional right' but, as Feldman admits, 'it is hard to pin down what this means, given the amorphous quality of much of the constitution'.[3] Feldman himself claims that the right's special status is manifested by the facts that it is available to everyone, restrictions on its exercise have to be a response to a compelling need, and Parliament can take it away only by using clear and unambiguous words, but those do not seem to be particularly distinctive features. A more accurate depiction of the United Kingdom's prevailing attitude to free speech is, it might be suggested, still conveyed by the Diceyan contention that English lawyers, unlike those operating in countries with a written Constitution, 'can hardly say that one right is more guaranteed than another', because freedoms and rights 'seem to Englishmen all to rest upon the same basis, namely, on the law of the land'.[4] It is certainly undeniable that in English law free speech is still hedged about with numerous restrictions, many of which have been firmly supported, and even extended, by the House of Lords.[5] Dicey himself devotes one of his 15 lectures on the law of the constitution to the extent of those restrictions.[6]

[1] Tedford et al (2009).

[2] 'Congress shall make no law… abridging the freedom of speech, or of the press…'.

[3] Feldman (2009b), para 9.04.

[4] Dicey (1959), 201. Feldman admits that the Diceyan position held sway in 1900 but that by 2000 the United Kingdom had moved 'from a constitutional culture based on liberty… to one based on positive rights': Feldman (2003), 403.

[5] See generally Bradley and Ewing (2011), 374–82 and Ch 23; Barendt (2005).

[6] Dicey (1959), Ch VI.

In this chapter the performance of the United Kingdom's top court in this area is reviewed in a number of different contexts, including contempt of court, anonymity orders, disclosure of journalists' sources, broadcasting and advertising, blasphemy and obscenity, and defamation. In none of these does adherence to a US-style approach to the right to free speech manifest itself. On many occasions the top court has deemed other values to be more significant than that attributable to free speech.[7] The claim has often been made that, when doing this, the top UK judges have only been reflecting what judges in the European Court of Human Rights have said is the correct approach, rulings which one senior British judge has said 'display great sensitivity and wisdom'.[8] The same judge posits that:

> The message from Strasbourg—and it is a very welcome message—is that provided the national courts address at the least all the specified criteria when they balance Articles 8 and 10, all will be well in Strasbourg. There has been a quantum leap here in what we call subsidiarity.[9]

Having considered this chapter, readers must decide for themselves whether the most senior British and European judges have always struck the balance in the same, and most appropriate, ways.[10]

Contempt of court

Until the enactment of the Human Rights Act 1998 the European Court had disapproved of decisions reached by the House of Lords on only three occasions.[11] All three were cases to do with Article 10 of the European Convention, which guarantees the right to freedom of expression,[12] and the first two—the *Sunday Times* and *Spycatcher* cases—concerned contempt of court. It was only because of a friendly settlement in another case that a further contempt of court dispute did not reach the European Court, which the UK government would again almost certainly have lost.[13] When we

[7] See too Robertson (1993), 301: 'It is curious that for all its rhetorical flourish and historic associations…the law makes no presumption in favour of freedom of expression when balancing it against rights of property in information.'

[8] Arden (2012), para 81.

[9] Ibid, para 57.

[10] For a useful survey of the state of English law on many of these issues immediately before the enactment of the Human Rights Act 1998, see Shorts and de Than (1998), Chs 4–6. For the post-Human Rights Act position, see Wadham et al (2011), 225–40; Clayton and Tomlinson (2009a), paras 15.06–15.235; Fenwick and Phillipson (2006). For Convention law see Reid (2012), 464–503.

[11] *Sunday Times v UK* (1979–80) 2 EHRR 245; *Observer and Guardian v UK* (1991) 14 EHRR 153; *Goodwin v UK* (1996) 22 EHRR 123.

[12] It reads: '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[13] *Harman v UK* (1984) 38 DR 53.

consider as well decisions reached by the Lords on contempt of court issues which did not proceed to Strasbourg, we can see why Eric Barendt concluded that in this field the top court 'has been inconsistent in the weight it attaches to freedom of speech and of the press'.[14]

The *Sunday Times* case

The *Sunday Times* case is extremely important in the history of the European Court, and indeed in the history of English law too.[15] The House had held that newspaper articles could not be published because, being concerned as they were with the way in which Distillers Ltd had manufactured the drug thalidomide, they would interfere with the administration of justice given that a negligence action against Distillers Ltd was in the process of being litigated. The action was being dealt with by a professional judge, not by a jury of lay people, and was taking quite some time to be processed through the courts. The House of Lords nevertheless held that the articles were in contempt because, at a time when the litigation in question was not completely dormant, the articles suggested that Distillers Ltd were at fault. It was as if the airing of this crucial issue of public interest, which involved the blighting of many people's lives, should take place behind the closed doors of a courtroom and there alone, and that judges would be tempted to draw from newspaper articles conclusions which they could not justify on the basis of evidence presented in the courtroom. True to the prevailing attitude of the period in question (more than 20 years prior to the Human Rights Act 1998), the requirements of the European Convention were not brought to the attention of their Lordships by the lawyers for either side, nor did the Law Lords themselves make even passing reference to them. They held unanimously that the publishers of the *Sunday Times* had been in contempt. The six judges who had heard the case in lower courts had come to the same conclusion. But in Strasbourg the Commission held by eight to five,[16] and the Court by 11 to nine,[17] that the House's interpretation of UK contempt of court law was in violation of Article 10. As observed elsewhere,[18] this difference of opinion went deep. Essentially the House of Lords viewed free speech as one value amongst many which had to compete for judges' preferential treatment; the European Court, on the other hand, began with the presumption that the right to free speech was the most fundamental value and that it could be set aside only if very convincing reasons were given for so doing. The European judges did not think that the UK judges had given strong enough reasons for de-prioritizing the right.

The first opportunity afforded to the House of Lords to look again at the law on contempt in the light of the *Sunday Times* case arose just a year after the European Court's pronouncements. This was in *Attorney General v BBC*,[19] where the BBC pursued an appeal on whether a local valuation court was the kind of 'court' which was regulated

[14] Barendt (2009), 654.
[15] *Attorney General v Times Newspapers Ltd* [1974] AC 273.
[16] Commission Report, Series B28 (18 May 1977).
[17] *Sunday Times v UK* (1979–80) 2 EHRR 245.
[18] Dickson (2012a), 356–7.
[19] [1981] AC 303.

by contempt laws. Although the question was by that stage a hypothetical one—because the BBC had voluntarily delayed the broadcasting of a television programme about the Exclusive Brethren until after the local valuation court had reached its decision on whether that organization's meeting rooms should be exempted from rating on the basis that they were places of public religious worship—the Law Lords heard the appeal so as to clarify the reach of the contempt laws. Viscount Dilhorne provided a list of other bodies—such as VAT tribunals—which would also be embraced by those laws if a local valuation court was held to be in that category. It seems that the consequences of so holding greatly influenced that particular judge to rule in favour of the BBC, for he said: 'I need not dilate on the uncertainty that would result from the contrary view or on its effect on freedom of speech'.[20] Lord Scarman was the only Law Lord to draw specific attention to the European Court's recent judgment in *Sunday Times v UK*, which he thought gave an enhanced importance to the BBC's appeal. And, while he did not think that in this appeal the House needed to apply the Practice Statement of 1966 and overrule its own decision in the *Sunday Times* case, he added that:

> I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make on the international obligations assumed by the United Kingdom under the European Convention. If the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country's international obligation to observe the European Convention as interpreted by the European Court of Human Rights.[21]

This is a very early example of a Law Lord's acceptance of the influence of the European Court in English domestic law. Adopting the language of the European Court, Lord Scarman concluded his judgment by saying that extending the contempt laws to local valuation courts and their like was not 'necessary in a democratic society': there was no 'pressing social need'.[22] The House therefore allowed the BBC's appeal, differing from both the Court of Appeal[23] and the Divisional Court.[24] The Lords were of the view that a local valuation court was more of an administrative body than a judicial body and therefore not a 'court' in the strict sense of the word. The need to give a very high value to the right to freedom of expression was certainly one influential factor in the decision, but the precedents cited were all about the meaning of 'court'; none was about the constitutional importance of free speech.

The *Spycatcher* litigation

In the second of the two contempt cases which went to Strasbourg, *Attorney General v Guardian Newspapers Ltd*,[25] there was just as wide a gulf between the attitudes of the Law Lords and the European judges as there was in the *Sunday Times* case 12 years earlier.

[20] Ibid, 339G.
[21] Ibid, 354E–F.
[22] Ibid, 362D.
[23] [1981] AC 303, 307 (where Lord Denning MR dissented).
[24] [1978] 1 WLR 477.
[25] [1987] 1 WLR 1248.

Their Lordships, vainly attempting to hold back the tide of international publishing, voted by three to two to stop two national newspapers reproducing extracts from *Spycatcher*, a book written by a former British spy, Peter Wright.[26] The majority did so on the grounds of national security, with Lord Templeman expressly basing his conclusion on what he thought were the principles laid down in *Sunday Times v UK*. But the minority, comprising Lord Bridge and Lord Oliver, were more accurate in their reading of the European judgment. Lord Bridge remarked that until then he had not been in favour of adopting the European Convention as part of English law but the majority's decision in this case had now undermined his confidence in the common law and he foresaw 'inevitable condemnation and humiliation in Strasbourg'.[27] This was prophetic, for when *Spycatcher* reached Strasbourg every one of the 11 Commissioners[28] and 24 judges[29] who considered the matter found that there had been a violation of Article 10 from the date on which the House of Lords confirmed the interlocutory injunction (13 August 1987) to the date 14 months later when it lifted that injunction (13 October 1988).[30]

In that second House of Lords' decision there are small signs that the Law Lords were beginning to recognize that the common law could be beneficially influenced by the values and principles inherent in the European Convention. Lord Griffiths, for example, said that he could see no reason why English law should take a different approach from that adopted by the Convention (which accepted the interests of national security as well as the need to prevent breaches of confidence as reasons for restricting the right to freedom of expression),[31] and Lord Goff said: 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention]'.[32] However, while holding that publication of extracts from *Spycatcher* should no longer be restrained by an injunction, the House still ruled that on the facts the *Sunday Times* had committed a breach of confidence and should not be allowed to gain from its own wrong in that regard. Hence the Crown was entitled to an account of profits from that newspaper. Still not satisfied, the *Sunday Times* lodged a second application in Strasbourg and argued that the requirement to account for its profits (and to pay some of the Crown's costs of the litigation) was another violation of Article 10 (as well as of Articles 13 and 14—the rights to an effective remedy and to be free from discrimination). But this time the application was unsuccessful: the European Commission declared it to be admissible, but then decided by ten to three that on the merits there had been no violation of Article 10, nor (unanimously) of Articles 13 or 14.[33] The House's orders were considered to be:

> necessary in that they met a pressing social need to sanction the applicants' violation of breach of confidence… [T]hose sanctions, given their minor nature, impact and

[26] *Spycatcher* (William Heinemann, Richmond, Victoria, Australia, 1987). See Lee (1988), 109–19.
[27] [1987] 1 WLR 1248, 1286C–G. Lord Oliver shared Lord Bridge's concern.
[28] *Observer and Guardian v UK* App No 13585/88, Commission report of 12 July 1990.
[29] *Observer and Guardian v UK* (1991) 14 EHRR 153.
[30] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.
[31] Ibid, 273C.
[32] Ibid, 283G.
[33] *Times Newspapers Ltd v UK* App No 146644/89, report of 8 October 1991. The UK government did not refer the case to the European Court, so on 15 May 1992 the Committee of Ministers resolved to affirm the Commission's conclusions: Resolution DH(92)15.

> consequences, and given the respondent State's margin of appreciation, were proportionate to the legitimate aim of preventing the disclosure of information received in confidence and could be regarded as necessary within the meaning of Article 10(2) of the Convention.[34]

The newspaper's argument that it and its readers were being discriminated against, because within a week of its article appearing *Spycatcher* was to be published in the United States, was not attractive to the Commission: the State was acting within its margin of appreciation by insisting that publication in the United Kingdom at any stage prior to publication in the United States would still be a breach of confidence. The House could not therefore be faulted for the way it sanctioned a newspaper in financial terms for breaching confidence, although whether the *Sunday Times* was, overall, financially worse off after the *Spycatcher* saga is not possible to determine.

In a third application taken to Strasbourg over the Peter Wright book, the House of Lords again emerged unscathed. It had ruled that the *Sunday Times* was in contempt of court for publishing extracts from *Spycatcher* two days before the book was to be published in the United States but knowing that an interlocutory injunction against publication in the United Kingdom was still in place vis-à-vis other newspapers.[35] The Law Lords gave short shrift to the claim by the *Sunday Times* that it could not be guilty of contempt because it had acted completely on its own volition (having acquired a copy of the book from its own source) and had not aided or abetted the other newspapers against which injunctions had been issued. At the European Commission the *Sunday Times* maintained that its rights under Articles 7 and 10 of the Convention had been violated.[36] On Article 7,[37] the newspaper suggested that when it published the *Spycatcher* extracts there was no judicial precedent establishing that a third party's performance of an act which other named persons had been enjoined from performing could amount to contempt even when the third party was not aiding and abetting those other persons. But the Commission disagreed: on the date of publication 'the constituent elements of the common law offence of contempt of court were sufficiently clear', and '[t]he fact that the established legal principles involved were applied to novel circumstances does not render the offence retroactive in any way'.[38] On Article 10, the Commission said there was 'nothing unreasonable or arbitrary' in the House's conclusion that 'the public interest in having justice done unimpeded between parties must prevail over that interest in the freedom of the press'.[39] The Commission noted that 'there was no prior restraint on the publication of the extracts by the applicants and that the sanction of finding them in contempt of court, with liability for costs, was of a minor nature'.[40]

So, in all the *Spycatcher* litigation the only respect in which the House of Lords failed to uphold the right to free speech in accordance with Convention standards—although it

[34] Ibid, para 56.
[35] *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191.
[36] *Times Newspapers Ltd v UK* App No 18897/91, decision of 12 October 1992.
[37] Article 7(1) begins: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'.
[38] See n 36 above, 'The Law', section 2.
[39] Ibid, 'The Law', section 1 (d); the quote is from Lord Jauncey of Tullichettle at [1991] 1 AC 191, 232C.
[40] Ibid, 'The Law', section 1(d).

was a hugely important respect—was with regard to the continuation of the interlocutory injunction beyond the time when it was necessary in a democratic society. As in the *Sunday Times* case involving thalidomide, the Law Lords had allowed themselves to be bedazzled by the fact that the publication at issue was in some way interfering with pending litigation. The European Court reminded the House that democracy is stronger than the Law Lords supposed: a domestic court very rarely needs to impose restraints on publications in order to preserve democracy.

Between the decisions by the European Court in the *Sunday Times* case and the three *Spycatcher* cases, the European Commission condemned England's contempt laws for a third time when a solicitor had been held in contempt for allowing a journalist to have access to written materials which had been read out in open court after being compulsorily disclosed.[41] Fearing defeat in the European Court, the UK government reached a friendly settlement with Ms Harman under which it agreed to engineer a change in English law bringing it into line with European standards. This was achieved by a change to the Rules of the Supreme Court in 1987.[42] It is odd that this wrinkle in the contempt laws had not been ironed out at the time when the Contempt of Court Bill was going through Parliament a year earlier. That Bill had been preceded by the report of a committee chaired by Lord Justice Phillimore, which completed its work as far back as 1974, and also by a discussion paper issued by the government in 1978, but no-one seems to have picked up the anomaly which came to light in the *Harman* case.

A kind interpretation of the House's record in the three contempt cases which were reviewed in Strasbourg is that the Law Lords' attitude was motivated by such a strong commitment to the right to a fair trial, or to due process, that the right to free speech was sublimated. It is of course natural that judges should wish to raise the right to a fair trial above nearly every other consideration, since conducting trials is their main activity, but it is at the same time strange that, especially in non-criminal cases involving no jury, the judges could not proclaim that, on account of their training, experience, and inclination, they themselves could not be influenced by allegedly 'contemptuous' publications. The Law Lords did, however, strike that pose in 1989, in the well-known case concerning the alleged contempt by the *Observer*, a Sunday newspaper, when it published a special weekday edition reproducing extracts from an inspectors' report into the takeover of Harrods by the three Fayed brothers. The publication took place just as the House of Lords was about to hear an appeal dealing with whether the inspectors' report could be made public, and, to make matters even more stark, the *Observer* sent copies of its articles directly to the very Law Lords who were about to hear the appeal. The five-man Appellate Committee, before dealing with the appeal, referred the issue of whether the conduct of the *Observer* was in contempt of court to a separate three-man Appellate Committee, which duly held that the newspaper was not in contempt.[43] In the report delivered by that Committee, presented by Lord Bridge, we read:

> [I]t is difficult to visualise circumstances in which any court in the United Kingdom exercising appellate jurisdiction would be in the least likely to be influenced by public

[41] *Harman v UK* (1984) 38 DR 53, consequent on *Home Office v Harman* [1983] 1 AC 280.
[42] RSC Ord 24A r 14A, now CPR 31.22(1). See, generally, Bailey (1982); Eady and Smith (2011).
[43] *Re Lonrho plc* [1990] 2 AC 154.

> discussion of the merits of a decision appealed against or of the parties' conduct in the proceedings.[44]

While the headnote to the official law report states that the Appellate Committee 'considered' the House's previous judgments in *Attorney General v Times Newspapers Ltd* (the *Sunday Times* case),[45] it seems clear from the recognition given to the impact of the European Court's decision in *Sunday Times v UK*, in particular the enactment of the Contempt of Court Act 1981, that as in *Attorney General v BBC*[46] the House was effectively departing from its decision of 16 years earlier. The Law Lords confirmed that they could not resort to decisions of the European Court as 'direct authority', since the Convention was 'no part of our municipal law', but they gave indirect effect to the European Court's decision by recognizing that 'the 1981 Act…may be presumed to have been intended to avoid future conflicts between the law of contempt of court in the United Kingdom and the obligations of the United Kingdom under the Convention'.[47] In any event, the conduct of the *Observer* did not seem to influence the views of the Law Lords who had been sent the articles because, when the original Appellate Committee eventually heard the substantive appeal by the newspaper, it held that the Secretary of State had acted lawfully in delaying publication of the inspectors' report.[48]

To some extent this more liberal, and realistic, approach to contempt of court had been presaged a few years earlier in *Attorney General v English*,[49] where the House had held that the *Daily Mail* had not committed contempt when, in the middle of the trial of a paediatrician for murdering a baby with Down's syndrome, it published an article written by Malcolm Muggeridge strongly supporting the candidature at a forthcoming parliamentary by-election of a severely disabled person—the kind of person, said the newspaper, whom doctors might now allow to die shortly after birth. The Law Lords gave a fairly broad interpretation to section 5 of the Contempt of Court Act 1981, which provided a defence to a contempt charge if the publication was part of a discussion in good faith of matters of general public interest, and if the risk of prejudicing legal proceedings was 'merely incidental to the discussion'. Lord Diplock, with whom the other four Law Lords concurred, suggested that this newspaper article was the 'antithesis' of the article complained of in the *Sunday Times* case, but his justification for such a view is, with respect, not wholly coherent. Lord Diplock claimed that the whole purpose of the article in the *Sunday Times* case was to put pressure on Distillers Ltd in the conduct of its defence in the pending civil actions, whereas the article in the *Daily Mail*, while published in the middle of the paediatrician's criminal trial, would have had just an incidental risk of prejudicing the minds of the jurors involved in the trial.

[44] Ibid, 209G. The other two Law Lords were Lords Goff and Jauncey.
[45] [1974] AC 273. The headnote to the All ER report says that that case was 'distinguished'.
[46] See text at n 19 above.
[47] [1990] 2 AC 154, 208H.
[48] *R v Secretary of State for Trade and Industry, ex parte Lonrho plc* [1989] 1 WLR 525. The report was eventually published in March 1990. The Fayed brothers complained to the European Court of Human Rights that its publication violated their rights under Arts 6 and 13 of the Convention because it determined their civil right to a reputation without allowing them access to a court. But the European Court found no violation because the report was part of an investigation, not the determination of a dispute: *Fayed v UK* (1994) 18 EHRR 393.
[49] [1983] 1 AC 116. See too Walker (1991), 594–5.

This differentiation is not convincing. Lord Diplock would have been more persuasive if he had acknowledged that the House had got it wrong in the *Sunday Times* case and that labelling the conduct of the *Daily Mail* as contempt of court was no more necessary in a democratic society than it had been in the *Sunday Times* case. As Lord Diplock based his ruling on section 5 of the 1981 Act it seems very probable that, had that Act not been passed (as a consequence of the *Sunday Times* case), Lord Diplock and his brethren would have found the *Daily Mail* to be just as much in contempt as the *Sunday Times* had been held to be by a previous set of Law Lords a decade earlier.

Shayler, surveillance and jury secrecy

The next chapter in the story of the House of Lords' involvement with contempt laws involves another former spy, David Shayler. His activities eventually led to two separate appeals to the House. In the first, *R v Shayler*,[50] the focus was on the extent to which the right to free speech can be restricted on grounds of national security. Shayler had disclosed information to a national newspaper, the *Mail on Sunday*,[51] and the Crown alleged that this was a breach of the Official Secrets Act 1989. In the course of a hearing prior to the defendant's trial, Shayler's counsel argued that the disclosures he had made were in the public interest (because they shed light on dubious practices allegedly engaged in by the United Kingdom's security services, such as paying Libyan rebels to try to assassinate Colonel Gaddafi in 1996), and so were protected from prosecution under sections 1 and 4 of the 1989 Act. In addition, counsel argued that at common law the defendant could rely on the defences of necessity and duress of circumstances. But the House agreed with the Court of Appeal[52] in holding that the 1989 Act did not provide a defence of publication in the public interest and that sections 1 and 4 were not incompatible with Article 10 of the European Convention: there were sufficient and effective safeguards in place to make sure that the power to withhold permission for publications was not abused. These safeguards included the right of the defendant to make disclosure to a Crown servant (as defined by section 12 of the 1989 Act, which extends the term to officials such as the Commissioner for the Secret Intelligence Service[53]), the right to seek authorization for more general disclosure (and to apply for judicial review if that authorization is refused), and the fact that a prosecution for contempt could proceed only if the Attorney General gave consent to it. The case was sent back to the Crown Court for the criminal trial to resume on the basis of the law as set out by the Lords.[54]

In the course of his judgment Lord Bingham of Cornhill said that '[t]he fundamental right of free expression has been recognised at common law for very many years,'[55] but the earliest of the four House of Lords' decisions he cited in support of that proposition was the first *Spycatcher* case in 1987, the one with which the European

[50] [2002] UKHL 11, [2003] 1 AC 247.
[51] And also to the *Evening Standard*, a London newspaper.
[52] [2001] EWCA Crim 1977, [2001] 1 WLR 2206.
[53] Appointed under the Intelligence Services Act 1994, s 8.
[54] Shayler was later convicted and sentenced to six months in prison.
[55] [2003] 1 AC 247, [21].

Court disagreed.[56] He also admitted that the first time this fundamental right had been underpinned by statute was in the Human Rights Act 1998.[57] At one stage in his judgment, Lord Hope seemed to be on the point of holding that the omission of a public interest defence from the Official Secrets Act 1989 did make it incompatible with Article 10, but what eventually persuaded him to take the contrary view was the fact that defendants such as David Shayler could seek judicial review of any refusal by the authorities to deal with their complaints and that the standard of scrutiny which would be applied during that judicial review would be Convention-compliant. In support of that position Lord Hope relied on the criticisms expressed by the European Court in *Smith and Grady v UK*[58] about the Court of Appeal's approach to judicial review in *R v Ministry of Defence, ex parte Smith*,[59] and he added that the House's adoption of the proportionality test in *R (Daly) v Secretary of State for the Home Department*[60] meant that judicial review was now 'a much more effective safeguard'.[61] Their Lordships agreed that on the facts of the *Shayler* case the alleged common law defences of necessity and duress of circumstances did not arise for consideration. It remains unclear, therefore, whether such defences are available in this context.

After the Attorney General had secured an interlocutory injunction against Mr Shayler and Associated Newspapers, the magazine *Punch* published a comparable article to that in the *Mail on Sunday* and was duly accused, and convicted, of contempt of court. The publisher was fined £20,000 and the editor £5,000. The latter successfully appealed to the Court of Appeal,[62] but the Crown then went to the Lords and again won.[63] The editor's case turned on what was the requisite *mens rea* for the offence of so-called 'third party contempt'. The Court of Appeal thought it was that the defendant appreciated that publication of the article might be a threat to national security, but the House held it was that the defendant intended to impede the court's purpose in imposing the injunction (ie preventing publication of certain material). What was important, said the Law Lords, was the purpose of the court in issuing the injunction, not the purpose of the Attorney General in seeking it. This had the effect of keeping the scope of the contempt laws quite broad and was in line with the approach adopted by the House in what was described above as the third *Spycatche*r case, which the European Court approved.[64] As we shall see, it also mirrors the approach taken by the House (and European Court) to the law of blasphemy in *R v Lemon*.[65] One of the two Court of Appeal judges who favoured a narrower scope was Lord Phillips MR, the man who

[56] *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248. See 283–4 above. The other three decisions were *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (the second *Spycatcher* case); *R v Secretary of State for the Home Dept, ex parte Simms* [2000] 2 AC 115; and *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277.

[57] [2003] 1 AC 247, [22].

[58] (1999) 29 EHRR 493.

[59] [1996] QB 517. See Ch 8 above, at 230–1.

[60] [2001] UKHL 26, [2001] 2 AC 532, [26].

[61] [2003] 1 AC 247, [78]. See too Lord Hutton, [111].

[62] [2001] EWCA Civ 403, [2001] QB 1028 (Simon Brown LJ, later Lord Brown, dissented).

[63] *Attorney General v Punch* [2002] UKHL 50, [2003] 1 AC 1046. Only Lord Hope sat in this appeal as well as in *R v Shayler*.

[64] [1992] 1 AC 191. See 285 above.

[65] See 303–4 below.

would become the Senior Law Lord in 2008 and the first President of the Supreme Court in 2009. He had also objected to a proviso in the injunction which allowed the Attorney General to certify that a particular piece of information was *not* information which the Crown wanted to restrain. Lord Phillips saw that as tantamount to giving the Attorney General a power to censor the press, and therefore a violation of Article 10 of the European Convention. But the Law Lords all disagreed with this view, preferring to see the proviso as a simple, quick, and cheap method of resolving a particular dispute without the need to go to court.

The lack of any public interest defence in the Official Secrets Act 1989, however, is still a cause for widespread criticism.[66] But it is likely that if a challenge were taken to Strasbourg on this point it would fail. This is an area where the United Kingdom's top court seems to have faithfully applied the tests set out by the European Court for deciding whether an interference with Article 10(1) rights is justified. Moreover, in a recent decision by that Court, *Kennedy v UK*,[67] the European judges affirmed that the United Kingdom's laws on the use of intercept warrants, including the challenge procedures available to people who believe that their communications are being intercepted, are in compliance with the Convention (in particular with Articles 6(1), 8, and 13). The UK government relied successfully on the fact that people who believed their communications were being intercepted could seek reassurance from the Interception of Communications Commissioner and from the Investigatory Powers Tribunal; the authorization procedures set out in the Regulation of Investigatory Powers Act 2000 constituted further protection. There is no House of Lords or Supreme Court precedent on this issue, but it is virtually inconceivable that the top domestic court would grant protection in excess of what is required in this context by the European Court. The question is whether the European Court has itself gone too far in exempting Member States from a duty of transparency in this context. In *Kennedy v UK*, for example, the Court accepted the UK government's argument that it is not possible to disclose redacted documents or to appoint special advocates in cases such as these because those measures would inevitably reveal the fact that interception had taken place.[68] But would such a revelation in fact be all that damaging? It is surely the details of how the interception took place that may need to be kept secret, not the fact that it occurred.

For the sake of completeness it is worth noting that in *Attorney General v Associated Newspapers Ltd*, in 1994, the House again extended the liability of newspapers for contempt by holding that the statutory prohibition on disclosing the deliberations within juries[69] applied not just to the jurors themselves but also to others who further disclosed the deliberations, so long as the further disclosure was not just a re-publication of facts which were already known as a result of the earlier disclosure.[70] The only substantive opinion was that of Lord Lowry. He referred to the 'tenacious arguments' of counsel for the *Mail on Sunday*, one of which was that the decision in *Sunday Times*

[66] See eg the website of the Campaign for Freedom of Information: <http://www.cfoi.org.uk> (last accessed 12 December 2012).
[67] (2011) 52 EHRR 4. See too Ch 8 above, at 259–60.
[68] Ibid, para 187.
[69] Imposed by the Contempt of Court Act 1981, s 8(1).
[70] [1994] 2 AC 238.

v UK[71] meant that restrictions on freedom of expression had to be no greater than necessary. But Lord Lowry said that compliance with the European Convention was 'not immediately in issue'[72] and that, even if it were, the fact that counsel accepted the Convention-compliance of an absolute ban on disclosures by jurors meant *a fortiori* that a ban on the potentially more harmful disclosure by newspapers would also be Convention-compliant. Almost inevitably, the losing newspaper lodged an application with the European Commission on Human Rights, but the Commissioners found, by an unspecified majority, that 'in the circumstances of the present case… the interference with the applicants' freedom of expression did not take the state beyond the margin of appreciation which it enjoyed', and so declared the application inadmissible.[73] It would appear that jury secrecy is a feature of the British and Irish criminal justice systems which the European Court is not prepared to undermine, even though in the United States, where trial by jury is constitutionally protected, post-trial secrecy is not at all enforced.[74]

In sum, the attitude of the United Kingdom's top court to the notion of contempt of court has been extremely cautious. Had it not been for the involvement of the European Court of Human Rights in several cases—*Sunday Times*, *Spycatcher*, and *Harman*—the House of Lords would have been much slower to develop the relevant law, even to the limited extent that it did. Many countries do not have a comparable concept to contempt of court, or such a limited perception of what democracy entails. It is understandable, and laudable, that the United Kingdom's top judges should respect so highly the need for judicial processes to be carefully protected against external interference, but it is still important that the right to free speech—by the press especially—should not be undervalued when such protections are being devised.

Anonymity in court

The United Kingdom's top court has on several occasions had to consider whether a person involved in court proceedings is entitled to anonymity. In *In re S (A Child) (Identification: Restrictions on Publication)* the House of Lords denied anonymity to a mother who was on trial for murdering her son by poisoning him with large amounts of salt, the application having been made by the guardian of the 8-year-old brother of the dead child, who was worried that identifying the mother would inevitably lead to identification of the surviving brother as well, making life very difficult for him at school.[75] Lord Steyn delivered the only opinion of substance and in doing so he applied the four propositions which he said clearly emerged from the House's decision in *Campbell v MGN Ltd*[76] about the relationship between Articles 8 and 10 of the European Convention. These were that neither article has automatic precedence over

[71] (1979) 2 EHRR 245.
[72] [1994] 2 AC 238, 258G.
[73] *Associated Newspapers Ltd v UK* App No 24770/94, decision of 30 November 1994.
[74] Marder (1997).
[75] [2004] UKHL 47, [2005] 1 AC 593. The High Court and Court of Appeal came to the same conclusion; the latter included Lord Phillips MR, but Hale LJ dissented, saying that the High Court judge had not made the child's welfare the paramount consideration: [2003] EWCA Civ 963, [2004] Fam 43. See Fenwick (2004).
[76] [2004] UKHL 22, [2004] 2 AC 457. See also Ch 8 above, at 234–5; Choudhry and Fenwick (2005).

the other, that an intense focus on the comparative importance of the specific rights is required, that the justifications for restricting each right must be considered, and that the proportionality of each interference must be taken into account.[77] Applying these propositions, Lord Steyn concluded that in this case Article 10 had to take priority over Article 8. He pointed out that no injunction such as the one being sought here had ever been approved either in England or in Strasbourg and that even the UN Convention on the Rights of the Child, which 'protects the privacy of children directly involved in criminal proceedings, does not protect the privacy of children if they are only indirectly affected by criminal trials'.[78] The decision is a rare example of the best interests of a child being trumped by an even greater value—the public's right to know who is being tried in a criminal court, and for what offence.

It is by no means uncommon for witnesses in criminal trials, or in public inquiries, to apply to be kept anonymous for fear of the retribution which might be exacted on them by associates of the people whose reputations risk being damaged by the witnesses' evidence. If an anonymity order is issued by the court, it obviously limits the right to free speech of those who are reporting the trial or otherwise speaking about it. In *In re Officer L* the House of Lords had to consider what test should be applied by a court or tribunal when seeking to balance a witness's safety with the public's interest in the proceedings.[79] The issue arose during the Hamill Inquiry, which was examining whether any wrongful actions or inactions by Royal Ulster Constabulary officers facilitated the death of Robert Hamill in Portadown in 1997, or obstructed the investigation of his death.[80] The Inquiry refused anonymity to 11 police officers who had been asked to give evidence,[81] but the High Court and Court of Appeal in Northern Ireland thought this was the wrong decision.[82] In a further appeal to the House of Lords the view of the Inquiry was upheld, the only substantial opinion being that of Lord Carswell, a former Lord Chief Justice of Northern Ireland.[83]

Lord Carswell fell back on the test laid down by the European Court of Human Rights in *Osman v UK*, where it was held that the state's positive obligation to protect life arises when there is a 'real and immediate risk' to a person's life.[84] As far as Lord Carswell was concerned, no such risk had been shown to exist in this case. He did not expressly disapprove of the way the Court of Appeal had formulated the test, but he certainly differed from how that court had applied it. He agreed with the Court of Appeal, however, that the test is an objective one: whether the person in question is actually afraid is irrelevant. He left open the question whether factors relating to the public interest, such as the role of an Inquiry in restoring public confidence, could be taken into account when deciding what steps needed to be taken by the state to fulfil

[77] Ibid, [17]. See too *Von Hannover v Germany* (2006) 43 EHRR 7, and the sequel at (2012) 55 EHRR 15. Also Markesinis (1999).

[78] Ibid, [26].

[79] [2007] UKHL 36, [2007] 1 WLR 2135.

[80] See <http://www.roberthamillinquiry.org> (last accessed 12 December 2012). With criminal proceedings pending, the final report of the Inquiry is still awaited.

[81] When applying for restriction orders the police officers relied on the Inquiries Act 2005, s 19.

[82] [2006] NIQB 75 (Morgan J), [2007] NICA 8 (Kerr LCJ, Campbell and Girvan LJJ).

[83] The other four Law Lords—Lords Hoffmann, Woolf (sitting as a retired judge), Brown, and Mance—simply concurred.

[84] See Ch 4 above, at 120–2.

its positive obligation. Lord Carswell also dealt with counsel's argument that the police officers had a right under the common law to have measures taken to protect their anonymity. His Lordship pointed out that under the common law the subjective fears of the individual *could* be taken into account, as could a range of other factors such as potential damage to his or her health. He ended his judgment by trying, not altogether successfully perhaps, to merge the common law and Article 2 tests into a single test, 'in the interests of simplicity'.[85] But at no stage of the proceedings was there a mention of the right of the press, or of anyone else, to report the identity of the witnesses. Counsel for the Inquiry does not seem to have raised that right in his arguments to the Lords. It is perhaps a further example of how the right to free speech is not always at the forefront of senior judges' minds, even after several years of the Human Rights Act 1998, and of section 12 in particular.[86] To some extent one can understand why a court might not seek to weigh Article 10 against Article 2 in the way that it was prepared to weigh it against Article 8 in *In re S*, but in *In re Officer L* it could be argued that Article 8 (and Article 6) issues were engaged as well as Articles 2 and 10 and that therefore a more broadly based balancing exercise should have been conducted. What result would arise from such an exercise will have to be a matter for another day.

In *In re BBC (Attorney General's Reference No 3 of 1999)*[87] the House did expressly favour Article 10 when it terminated an anonymity order relating to the defendant in a criminal trial after it had decided, some years earlier,[88] that DNA material could have been admitted as evidence at that trial. Applying *In re S*, discussed above, the House could see no justification for putting the defendant in this case into a more advantageous position concerning publicity than he would have been in if the House's earlier decision on the admissibility of this kind of evidence had been made in some other defendant's case.[89] Lord Hope found the restriction on the defendant's Article 8 rights to be in pursuit of a legitimate aim and proportionate. The case is also important because it confirms that the top court has an inherent jurisdiction to grant (or refuse) such anonymity orders even if no such power has been conferred by statute.

Finally, in *In re Guardian News and Media Ltd*,[90] a challenge was raised by a newspaper to anonymity orders relating to five men whom the government had designated as suspected terrorists and whose financial assets had been frozen as a result. The orders had been kept in place right up to the men's appeal to the Supreme Court, at which stage an application was made for the orders to be discharged. The Justices unanimously agreed that the legitimate public interest in the publication of a full account of legal proceedings should take precedence over any rights of the men to the protection of their reputation. In what, with respect, is not the most persuasive of his judgments,

[85] [2007] 1 WLR 2135, [28].

[86] This provides that, if a court is considering whether to grant any relief which might affect the exercise of the right to free speech, it must have 'particular regard' for the importance of that right. See too 299 below.

[87] [2009] UKHL 34, [2010] 1 AC 145.

[88] In *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91. The delay in challenging the anonymity order is explained by the fact that it was only in 2005 that Pt 10 of the Criminal Justice Act 2003 came into force, making the retrial of an acquitted person possible if new and compelling evidence becomes available.

[89] [2010] 1 AC 145, [71] (per Lord Brown) and [79] (per Lord Neuberger).

[90] [2010] UKSC 1, [2010] 2 AC 697.

Lord Rodger, presenting for the whole court, said that keeping the names of the men secret would deny to the public information which is relevant to the debate over how the freezing order system operates. He observed that the identities of people who are charged with criminal offences are made public, sometimes months before their trial is due to take place, so why should the names of people who are not even charged with an offence not also be made public? The answer to that is surely that very many people who might initially be thought to be involved in crimes are later shown to be entirely innocent, and indeed the police now often go to some lengths to restrict the publication of the names of suspects until they have been charged. But none of the Law Lords made that point. Lord Rodger's judgment is, if anything, rather rhetorical in tone, as when he observes that '[n]ot E but Mr John Entick of Stepney has gone down in history as the plaintiff in the great case of *Entick v Carrington*'.[91] The judgment was delivered on the day that the substantive appeal hearing began, and just over a week later the seven-member bench issued a decision holding that the government had indeed exceeded its legal powers when issuing freezing orders against the appellants.[92] That outcome probably constituted small comfort to the individuals, whose names had already been dragged through the mud without any due process to speak of.[93]

Journalists' sources

The House has not, in general, been very sympathetic to journalists who argue that they have an almost absolute right to conceal their sources. A key moment was the decision in *Norwich Pharmacal Co v Customs and Excise Commissioners*,[94] where a company which owned a patent for a chemical compound sought discovery from the Customs and Excise Commissioners of the names and addresses of people who were importing the compound in violation of the patent. The Court of Appeal disallowed the claim but on appeal the House unanimously ordered the Commissioners to reveal the information. In doing so the Law Lords propounded a general rule which no doubt sent a chill down the spine of journalists across the country. In the words of Lord Reid, the principle was that:

> [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did… [J]ustice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.[95]

If an order for discovery in this kind of situation could be made against a state body such as the Customs and Excise Commissioners then *a fortiori* it could be made against

[91] (1765) 19 State Tr 1029, 95 ER 807, cited at [2010] 2 AC 697 [67].
[92] *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534. For further discussion of this case see Ch 3 above, at 71–2.
[93] For a senior judge's view on media intrusion, see Arden (2012).
[94] [1974] AC 133.
[95] Ibid, 175B.

private newspapers or broadcasters. This is indeed what transpired in *British Steel Corpn v Granada Television Ltd*.[96] The television company had been given confidential information about British Steel by someone who worked there. The television company used the material in a *World in Action* programme about the steel strike which was then taking place and British Steel sought a court order requiring the company to disclose the name of its informant. The High Court,[97] Court of Appeal,[98] and House of Lords all held for British Steel, with the Lords asserting that journalists had no right to maintain the anonymity of their sources if such disclosure was necessary in the interests of justice (this was before the enactment of the Contempt of Court Act 1981, which is dealt with below). No reference at all was made to the European Convention on Human Rights, by counsel or by judges. The decision was made easier for the Lords by the facts that the television company knew full well what it was doing when it used the material and that disclosure by the company would not amount to self-incrimination on its part. Mr Hoffmann, as he then was, argued on behalf of British Steel that this was not a case about the freedom of the press: it was about the public interest in the preservation of confidence. That seems to have persuaded all but one of their Lordships of the justness of British Steel's cause. It was left to Lord Salmon, dissenting, to assert that:

> The immunity of the press to reveal its sources of information save in exceptional circumstances is in the public interest, and has been so accepted by the courts for so long that I consider it is wrong now to sweep this immunity away… I do not say that national security will necessarily always be the only special circumstances [requiring disclosure], but it is the only one which has been effective until now… The freedom of the press depends upon this immunity. Were it to disappear so would the sources from which its information is obtained; and the public be deprived of much of the information to which the public of a free nation is entitled.[99]

Section 10 of the Contempt of Court Act 1981

As a result of *Sunday Times v UK*,[100] Parliament enacted the Contempt of Court Act 1981, section 10 of which deals specifically with disclosure of sources of information:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

The applicability of this provision first came before the Lords in *Secretary of State for Defence v Guardian Newspapers Ltd*,[101] where a newspaper relied upon the section to

[96] [1981] AC 1096. The appeal hearing in the Lords extended over seven days, as it had in the Court of Appeal.
[97] Ibid.
[98] Ibid.
[99] Ibid, 1195B–D.
[100] See 282–3 above.
[101] [1985] AC 339.

resist a claim by the government that it should hand over a document marked 'Secret'[102] which had been supplied to it by an informant, Sarah Tisdall. The document concerned the deployment of nuclear missiles in the United Kingdom. Again, all courts which looked at the government's claim upheld it, albeit for different reasons. For the majority of the Law Lords, who were split three to two, the government had adduced sufficient evidence to show that disclosure was necessary in the interests of national security. Unfortunately the House was considering this issue four months after Ms Tisdall had already pleaded guilty at the Old Bailey of breaching the Official Secrets Act 1911 by passing the documents in question to the *Guardian*. As Lord Diplock put it, their Lordships had to perform mental gymnastics by dismissing from their minds what had happened at the Old Bailey because this was an appeal against an interlocutory order issued three months prior to Ms Tisdall's trial. Of course, just because Ms Tisdall had breached the 1911 Act did not mean that the return of the original document to the government was necessary in the interests of national security. Indeed, the two dissenting Law Lords, Lords Fraser and Scarman, thought that the government had not produced enough evidence to show that return of the document was really necessary on the facts of this case.[103] Lord Fraser noted that the government had allowed 12 days to elapse between the document's publication and the request to the newspaper's editor for its return so that it could be forensically examined, and he had expected more evidence to be adduced on what documents qualified for the label 'Secret'—was it only documents that related to national security?[104] Lord Scarman, picking up on the reliance by the newspaper's lawyers on the European Convention on Human Rights,[105] emphasized that the government had conceded that 'the contents of this memorandum are so far as they relate to national security innocuous'.[106] He found the evidence of danger to the country's security system to be 'meagre and full of omissions'.[107] The *Guardian* did not, however, take the case to Strasbourg.

A similarly restrictive approach to section 10 of the 1981 Act was adopted by the House three years later in *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985*.[108] Applying the decision in the *Guardian* case, their Lordships (and the Court of Appeal[109]) unanimously held that inspectors appointed to investigate whether there had been insider dealing prior to a merger of two companies were entitled to be given the name of the informant who had enabled Jeremy Warner, a business journalist, to write two articles for the *Independent* about the matter. The journalist relied on the fact that the Financial Services Act 1986 allowed him a 'reasonable excuse'

[102] In government parlance this label referred to material the unauthorized disclosure of which would cause 'serious injury to the interests of the nation'. There was a higher category, labelled 'Top Secret', which referred to material the unauthorized disclosure of which would cause 'exceptionally grave damage to the nation'. Lord Diplock appears to have taken judicial notice of the classification system.

[103] The judge at first instance, Scott J as he then was, was of the same view (but he thought that the government had a proprietary interest in the document which justified its return).

[104] [1985] AC 339, 358F–H.

[105] And on the *Harman* litigation, 286 above: ibid, 342B. See too Lord Scarman's opinion at 361E.

[106] Ibid, 365C. The document was headed 'Deliveries of Cruise Missiles to RAF Greenham Common—Parliamentary and Public Statements'.

[107] Ibid, 366A.

[108] [1988] AC 660. Lords Griffiths and Oliver delivered the main opinions.

[109] Ibid.

not to supply information, but his counsel conceded that the section 10 test should be used to determine whether the journalist had a 'reasonable excuse'. The question in this case was therefore whether disclosure of the informant's name was 'necessary . . . for the prevention of crime'. Counsel relied upon Article 10 of the European Convention but failed to persuade the House that the European Court had adopted a narrow meaning of the phrase 'for the prevention of crime'. On this occasion the evidence provided by the inspectors to show that the identity of the informant was truly 'necessary' was enough to convince all of their Lordships—although not without one or two doubts—that the Court of Appeal's order for disclosure should be affirmed.[110]

The seminal case which displays the conflict between the attitudes of the House of Lords and the European Court in this area is *X Ltd v Morgan-Grampian (Publishers) Ltd*.[111] Affirming a unanimous Court of Appeal, which in turn had affirmed Hoffmann J as he then was, the Lords also held unanimously that on the facts before them the interests of justice in ordering a journalist to reveal his source (or at least his notes, which might help in the search for his source), so that victims of the source's leaked information could seek to protect their rights, outweighed the public interest in protecting a journalist's sources. The case turned on the meaning of the words in section 10 of the Contempt of Court Act 1981, cited above.[112] Strangely, counsel for the journalist, William Goodwin, does not seem to have urged the Lords to consider the impact of the European Convention in this context, relying instead on the Lords conducting an appropriate balancing exercise on the wording of section 10. What largely swung their Lordships in favour of ordering disclosure was the fact that continued publication of the leaked information could mean that the two plaintiff companies would suffer severe damage to their business and their employees would lose their livelihood. In addition, the information in question had apparently been stolen rather than leaked accidentally.[113] But when the case was taken to Europe, the European Court of Human Rights held by 11 to seven that the House had not given 'relevant and sufficient' reasons for concluding that the restriction on the journalist's right to freedom of expression was 'necessary in a democratic society'.[114] Clearly the majority in Strasbourg placed a higher value on the right to free speech than England's top judges were prepared to do: for the former the right to free speech was again the default position and could be displaced only if there were very strong reasons for doing so, but for the Law Lords the right to free speech was just one factor to weigh in the balance.

A few years later this disparity between the United Kingdom's top judges and the European judges was still very much apparent. In *Interbrew SA v Financial Times Ltd*, a journalist for the *Financial Times* had revealed information about the terms of a possible takeover bid by one company of another and the first company sought a *Norwich Pharmacal* order[115] requiring the newspaper to hand over the copy of the document so

[110] At first instance Hoffmann J had held that the journalist did have a reasonable excuse for refusing to divulge his source: *The Times*, 1 April 1987.

[111] [1991] 1 AC 1.

[112] See 295.

[113] [1991] 1 AC 1, 44H–45C (per Lord Bridge), 49D–E (per Lord Templeman), 54E (per Lord Oliver).

[114] *Goodwin v UK* (1996) 22 EHRR 123. The Commission had come to the same conclusion by 11 v 6: Commission report of 1 March 1984.

[115] See 294 above.

that the first company might be able to discover who had leaked the information. In refusing to do so the newspaper relied on section 10 of the Contempt of Court Act 1981, but neither the High Court nor the Court of Appeal was persuaded that the freedom of the press should outweigh the company's right to track down wrongdoing within its own staff.[116] The House of Lords, moreover, refused permission to appeal. However the newspaper then took its case to the European Court of Human Rights and, after a long delay, eventually won.[117] The decision must have come as a great surprise to the judges who had dealt with the matter in England, for it shows how the European Court will scrutinize particularly carefully a state's limitations on the confidentiality of journalistic sources and will alter the balance struck by the domestic court if it thinks it is appropriate to do so. Here, said the unanimous Strasbourg Court, the reasons given for the limitations imposed on the newspaper's freedom of expression had not been relevant and sufficient. Firstly, while a source's bad faith and intention to cause harm were clearly relevant factors, there was no compelling evidence that the source in this case fell into that category. Secondly, it was not sufficient that the company had merely shown that, if the source was not identified, it would otherwise be unable to bring a claim or avert a threatened legal wrong: the domestic proceedings had not permitted the purpose of the source to be ascertained with the necessary degree of certainty and so no significant weight was to be accorded to the alleged nefarious purpose. Thirdly, it had not been established in the domestic courts that the document in question was not authentic, so its alleged fabrication could not be regarded as an important factor. Fourthly, full details of the efforts made by the company to identify the source had not been presented, and so the domestic court's conclusion that no alternative means of doing so were available was based on mere inferences.[118] This very close unpicking of the Court of Appeal's reasoning in the *Interbrew* case, as in the *Goodwin* case, is the kind of judicial activism by the European Court which Lord Hoffmann has decried,[119] but it does clearly demonstrate that the Strasbourg court places a higher value on freedom of speech than top judges in the United Kingdom.

Between the passing and the commencement of the Human Rights Act 1998 the Lords took the opportunity in *R v Secretary of State for the Home Department, ex parte Simms*[120] to rule that the fundamental right to freedom of expression (in that case, the right of prisoners to speak to journalists to try to persuade them to investigate the safety of their convictions) could not be overridden except by words that were precise and unambiguous. On the facts, the Home Secretary's blanket policy of disallowing journalists to interview prisoners unless the journalists first gave an undertaking not to publish any part of the interviews was held to be unlawful. The Court of Appeal (of which Judge LJ, a later Lord Chief Justice, was a member) was reversed. Lords Steyn and Hobhouse gave the two main judgments, each of them affirming that the Home Secretary's policy was unreasonable and disproportionate, and with Lord Hobhouse going further than any of the other judges by backing up his conclusion with references

[116] [2001] EWHC Ch 480; [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229.
[117] *Financial Times Ltd v UK* (2010) 50 EHRR 46.
[118] Ibid, paras 59–69.
[119] Hoffmann (2009).
[120] [2000] 2 AC 115. See also Ch 2 above, at 25.

to judgments of the European Court of Human Rights.[121] One cannot help but think that, had the issue of prisoners' voting rights ever reached the House of Lords, a similar approach might have been taken to the breadth of the prohibition on voting.[122]

Shortly after *Simms*, in *Cream Holdings Ltd v Banerjee* the House had to consider whether to impose an injunction on a newspaper, the *Liverpool Echo*, to restrain it from divulging information which had been disclosed to it in breach of confidence by a former employee of a company.[123] The company was worried that such disclosure would severely damage its financial stability. The application required the House to consider for the first time section 12 of the Human Rights Act 1998, which had been included in the Act after extensive lobbying by the press. Under this provision, in relation to applications for relief to restrain publication before trial, the court has to be 'satisfied that the applicant is likely to establish that publication should not be allowed'.[124] In addition:

> …the court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material…, to (a) the extent to which the material has, or is about to, become available to the public, or it is, or would be, in the public interest for the material to be published, [and] (b) any relevant privacy code.[125]

The House held unanimously, reversing the Court of Appeal,[126] that when section 12(3) talks of the applicant being 'likely to establish that publication should not be allowed', this means that in general the applicant has to show that he or she would probably win at the trial (ie more likely win than not). But in some situations a lesser degree of likelihood will suffice, for instance where the potential consequences of disclosure are particularly grave or where any injunction granted will of necessity be very short-lived. The top court thereby settled on a flexible approach to prior restraint orders, one which was more demanding than the former *American Cyanamid* test (requiring the applicant only to have a 'real prospect of success')[127] but not always as demanding as a probability test. Lord Nicholls gave the only speech in this case, with the other four Law Lords simply concurring. The House thereby set out clearly and unambiguously what its approach would henceforth be in this context. In the case before it their Lordships agreed that the company was more likely to fail than to succeed at the trial, so the part of the interim injunction which related to information already supplied by the employee to the *Liverpool Echo* was discharged.

The decision in *Norwich Pharmacal*,[128] with which this section began, has not been overruled by the top court, but its application must now be read subject to the European

[121] Ibid, 139B–140C.
[122] See Ch 12 below, at 371.
[123] [2004] UKHL 44, [2005] 1 AC 253.
[124] Section 12(3).
[125] Section 12(4).
[126] Which included Simon Brown LJ, as he then was: [2003] EWCA Civ 103, [2003] Ch 650.
[127] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Prior to then the common law test was whether the applicant had established a *prima facie* case. As this was generally understood to mean that on the balance of probability the applicant would win, it seems very close to the test set by the Lords under the Human Rights Act.
[128] See 294 above.

Court's very high appreciation for the right of the profession of journalism to keep its sources secret. The European Court's critique of the House of Lords in *Goodwin* and *Interbrew*[129] reveals a disparity of approach which throws retrospective doubt on the correctness of the House's decisions in the *Guardian* and *Insider Dealing* cases[130] and gives cause for concern that the two courts are still not on the same wavelength in this particular context.

Broadcasting

The strict control of television and radio broadcasting is one of the hallmarks of a dictatorial society. The United Kingdom's top court is therefore understandably reluctant to exercise its powers to restrict the broadcasting of material. But it also seems reluctant to review the exercise of such powers by a broadcasting authority, including the state-owned BBC. This was made obvious in the landmark decision in *R v Secretary of State for the Home Department, ex parte Brind*,[131] where, prior to the Human Rights Act, the House of Lords refused to overturn a 'broadcasting ban' imposed by the UK government in relation to proscribed organizations in Northern Ireland. An application in Strasbourg by the disgruntled journalists proved unsuccessful too.[132] On two further occasions in the last ten years the House has refused to alter broadcasters' own decisions to refuse to broadcast certain material.

In *R (ProLife Alliance) v BBC*[133] the House allowed the BBC's appeal against a decision by the Court of Appeal which had held that it was for the courts to determine whether the tests of taste and offensiveness used by broadcasting companies were legally justified.[134] A political party had argued that its Article 10 rights were violated when the broadcasters refused to show, as part of a party election broadcast, images of aborted foetuses in a mangled state. In dealing with the party's application for judicial review, the Law Lords took a distinctively 'non-common law' approach. The majority began by deducing from the wording of Article 10 of the Convention that, even though it did not expressly confer a right on political parties to make free television broadcasts, it still required refusals of such broadcasts to be justified under one of the grounds listed in Article 10(2). But once Parliament had set the test for deciding whether the public would be unduly distressed by seeing particular images—the 'offensive material restriction' imposed on independent broadcasters by the Broadcasting Act 1990[135] and on the BBC by its agreement with the government[136]—that test had to be exercised by the broadcasters and not by the courts. If it was clear, as it was here, that the broadcasters had applied the test honestly and reasonably, the courts should not interfere with their decision.

[129] See 297–8 above.
[130] See 295–7 above.
[131] [1991] 1 AC 696.
[132] *Brind and McLaughlin v UK* (1994) 77-A DR 42.
[133] [2003] UKHL 23, [2004] 1 AC 185. See too Ch 2 above, at 26–7.
[134] [2002] EWCA Civ 297, [2004] 1 AC 185. Again Simon Brown LJ, as he then was, was a party to the Court of Appeal decision.
[135] Section 6(1)(a).
[136] Paragraph 5.1(d).

ProLife Alliance had not argued that the offensive material restriction was itself incompatible with Article 14 of the European Convention, which protects against discrimination on the ground of 'political or other opinion'. Had it done so it might have stood a better chance of winning the case. As it was, the Law Lords were able to fall back on the principle that the domestic law of the land must be obeyed. But their Lordships went further than that. Lord Hoffmann, who gave the main speech for the majority, asserted that the primary right under Article 10—the right not to be prevented from expressing one's opinions—was not even engaged in this case: 'There is no human right to use a television channel. Parliament has required the broadcasters to allow political parties to broadcast but has done so subject to conditions, both as to qualification for a [party election broadcast] and as to its contents'.[137] He went on:

> In my opinion, therefore, the Court of Appeal asked itself the wrong question. It treated the case as if it concerned the primary right not to be prevented from expressing one's political views and concluded that questions of taste and decency were not an adequate ground for censorship. The real issue in the case is whether the requirements of taste and decency are a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular public medium, namely television.[138]

With respect, it is a little hard to understand how the reasonableness of the taste and decency requirements can be relevant if the right to free speech is not engaged at all. Given that UK law did permit certain political parties to make election broadcasts, if the taste and decency requirements were held to be discriminatory, arbitrary, or unreasonable, would that not mean that Article 10(1) had been violated in relation to the political parties affected by those requirements? What was the point in examining the objective justifiability of the taste and decency requirements if Article 10(1) was not even engaged? Lord Hoffmann prayed in aid the fact that in 2000 the European Court of Human Rights had rejected an earlier application from ProLife Alliance in relation to the 1997 general election, implying at the time that the taste and decency requirements were not an arbitrary or unreasonable interference with their access to television broadcasting.[139] But that does not mean that in the European Court's view Article 10 was not even engaged.

To this author the more convincing approach in *ProLife Alliance* was taken by the dissenting judge, Lord Scott of Foscote. He confirmed that Article 10 *was* engaged[140] and he stated the question to be whether the rejection of ProLife Alliance's desired programme was 'necessary in a democratic society for the protection of the right of homeowners that offensive material should not be transmitted into their homes'.[141] He answered that question in the negative, having pointed out that 'material that might be required to be

[137] [2004] 1 AC 185, [57]. Lord Hoffmann cited three paragraphs from a case note written on the Court of Appeal's judgment: Geddis (2002).

[138] Ibid, [62].

[139] Ibid, [71]. There appears to be no reference to this application on the HUDOC database. He also resorted to 'practicality and common sense': [69].

[140] Ibid, [85].

[141] Ibid, [92].

rejected in one type of programme might be unexceptionable in another'.[142] He went so far as to say that refusing to broadcast the images 'would…be positively inimical to the values of a democratic society'[143] and that no reasonable decision-maker could have come to the decision reached by the BBC and other broadcasters in this case.[144] This opinion is a good example of how forthright some Law Lords and Justices can be when they find themselves in a minority position on the bench. It is certainly a good advertisement for the retention of dissenting judgments at the highest level of the UK judicial system.[145] Interestingly, ProLife Alliance does not appear to have lodged an application in Strasbourg.

The second case considered by the House of Lords on broadcasting rights did raise in a direct way the compatibility of domestic legislation with Article 10 of the Convention. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* the applicants argued that the statutory prohibition on political advertising on television and radio in the United Kingdom[146] was incompatible with Article 10.[147] Lord Scott was the only Law Lord who sat in this case as well as in the *ProLife Alliance* case but on this occasion he agreed with his colleagues that on the facts of the case the statutory prohibition was not incompatible with the Article 10 rights of Animal Defenders International (ADI). However, he did point out that this decision did not mean that the House 'should be taken to be franking sections 319 and 321 against any possible attack made on Article 10 grounds'. He added:

> The width of the statutory prohibition is remarkable. It would appear, for example, to withhold from ADI, or from any organisation whose objects were wholly or mainly to bring about changes in the law, the ability to place for broadcasting an advertisement with no political content whatever, eg to attend a car boot sale, or an advertisement with an entirely neutral political content, eg to encourage voters to vote at an election.[148]

Lord Bingham, who gave the leading speech, was not so cautious. For him this was an area where the courts, as in the *ProLife* case, should give great weight to the judgment of Parliament. He said that elected politicians could be expected to be particularly sensitive to what was necessary to safeguard democracy, Parliament had accepted the Secretary of State's statement when the Communications Bill was going through Parliament that the government wished to proceed with the Bill even though it could not be sure that it did not violate the European Convention,[149] and legislation must of

[142] Ibid, [95].
[143] Ibid, [98].
[144] Ibid, [100].
[145] See Kerr (2012a); Alder (2000).
[146] Communications Act 2003, ss 319 and 321.
[147] [2008] UKHL 15, [2008] 1 AC 1312. By this time the House had the benefit of the European Court's judgment in *Murphy v Ireland* (2003) 38 EHRR 13, where it upheld Ireland's statutory ban on religious advertising through audio-visual media.
[148] Ibid, [41].
[149] Under the Human Rights Act 1998, s 19, the Minister in charge of a Bill in either House of Parliament must, before the Bill's second reading, make a statement that the Bill is compatible with Convention rights or that the government nevertheless wants the House to proceed with the Bill. See Clayton and Tomlinson (2009a), paras 4.60–4.67.

necessity lay down general rules and draw lines: 'The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial'.[150] Baroness Hale entirely agreed with Lord Bingham and pointed out in addition that the elephant in the committee room, 'always there but never mentioned', was the risk that advertising could come to dominate elections in the United Kingdom in the way that it has come to do in the United States.[151] An application challenging the House's decision in the *Animal Defenders International* case is currently under consideration by the European Court of Human Rights.[152]

The net result of these two decisions by the House of Lords is that the right to free speech is considerably attenuated in the field of broadcasting. The 'rights of others', which are included in Article 10(2) as one of the permissible grounds for interfering with the right to free speech, have been interpreted in such a broad manner as to almost suggest that the preferences of the majority should determine what someone should be allowed to say on the television or radio, especially during advertising slots or at election times. The top court seems content as well to distinguish between audio-visual and print media in this context, but has paid little attention to the fact that that distinction has already broken down with the rise of the internet and social media.

Blasphemy and obscenity

Overall, the House of Lords also exhibited a rather conservative approach to the topics of blasphemy and obscenity. A clear indication of this is the attitude struck by their Lordships to the private prosecution brought by Mary Whitehouse against the editor and publisher of *Gay News* in 1976.[153] The magazine had published a poem entitled 'The Love that Dares to Speak its Name', which described in detail acts of sodomy and fellatio conducted upon the body of Jesus Christ after his death. The jury convicted the defendants, who then appealed on the ground that the jury should have been directed to find them guilty only if they had intended to blaspheme. The Court of Appeal (including a future Law Lord, Roskill LJ) dismissed the appeal, and so did the House of Lords, albeit by three to two. Perhaps surprisingly, the majority included the liberal Lord Scarman while the minority included the conservative Lord Diplock. What strikes the reader about the judgments at this distance in time is their focus on the details of precedents rather than on the values which should underlie the law. Counsel for the defendants argued that the obsolescent crime of blasphemous libel (which had not been prosecuted for 50 years) should continue to be applied only if it complied with the protection granted to freedom of belief by Article 9 of the European Convention on Human Rights, the implication being that it did not, although no authority was cited for that proposition. They also suggested that the House of Lords had previously implied that, when someone was being prosecuted for blasphemy,

[150] [2008] 1 AC 1312, [33].

[151] Ibid, [47]. See eg the US Supreme Court's decision in *Citizens United v Federal Election Commission* 558 US 310 (2010).

[152] Application No 48876/08; an oral hearing took place on 7 March 2012.

[153] *R v Lemon* [1979] AC 517. See too Ch 9 above, at 262.

mens rea had to be proved, citing *Bowman v Secular Society Ltd*.[154] But the majority judges were convinced that the common law did not require anything more than that the defendant intended to publish something which in law was blasphemous. Lord Edmund-Davies, the other dissentient, observed that, in the absence of any binding precedent, the House, being free to declare what the law is, should now hold that there is a need to prove a subjective intention to blaspheme.[155] He thought this would be in line with the law's increasing tendency to move away from strict liability as regards both statutory offences and common law offences: 'to treat as irrelevant the state of mind of a person charged with blasphemy would be to take a backward step in the evolution of a human code'.[156]

At the same time it is difficult not to have sympathy for the 'common sense' approach adopted by Lord Russell of Killowen, who implied that the ordinary person would not appreciate the difference between proving an intention to publish and proving an intention to blaspheme. And Lord Scarman's main point was that the law of blasphemy, far from being curtailed, should be freed from the shackles of history and extended to protect religions other than Christianity. He thought that was the way forward for 'a successful plural society'[157] and he even asserted that 'by necessary implication' Article 9 of the European Convention imposed a duty on everyone to refrain from insulting or outraging the religious feelings of others.[158] The editor and publisher of *Gay News* did then lodge an application in Strasbourg, but the European Commission of Human Rights declared it inadmissible on the grounds that (a) the House of Lords had not overstepped its law-making powers or violated Article 7 of the Convention by clarifying what had to be proved for a successful prosecution of this offence, (b) the restriction on the right to free speech was justified because it was for the protection of the rights of others, namely, the right of someone like Mrs Whitehouse not to be offended in her religious feelings by publications, and (c) it was necessary in a democratic society to protect the religious feelings of citizens against indecent attacks on the matters held sacred by them.[159] Given the way in which religious sensibilities seem to have acquired a much greater significance in recent years, both nationally and globally, it is entirely likely that the third of these grounds would still hold good in the eyes of today's Supreme Court, but it is to be hoped that the second would not, as it is much too widely worded.

It is worth noting, in passing, that in *Gold Star Publications Ltd v DPP* the House, in rejecting a publishing company's third appeal against an order made by magistrates, held that magazines stored in the company's export warehouse should indeed be forfeited because they were obscene and 'kept for publication for gain', as stipulated by statute.[160] The same counsel represented the appellants as in the *Gay News* case, but again they lost. The two judges who delivered speeches for the four Law Lords in the

[154] [1917] AC 406.
[155] [1979] AC 517, 656B.
[156] Ibid, 656D–E. [157] Ibid, 665E. [158] Ibid, 665C.
[159] *X Ltd and Y v UK* (1982) 28 DR 77, 'The Law', paras 10–12.
[160] [1981] 1 WLR 732. The legislation in question was the Obscene Publications Act 1959, ss 3(1) and (3). See too Ch 12 below, at 341–2.

majority, Lords Wilberforce and Roskill, each cited the decision of the European Court of Human Rights in *Handyside v UK*,[161] but in favour of the prosecution rather than the defence. Lord Simon dissented on the basis that he did not think Parliament, when it enacted the Obscene Publications Act 1959, could have intended to concern itself with the effect of obscene publications outside England and Wales. Once again the losing appellants lodged an application in Strasbourg, but the European Commission ruled that the application was manifestly ill-founded.[162] It thought that it was a legitimate aim for the UK legislation, 'in the interest of the protection of its own moral standards, to prevent the country from becoming the source of a flourishing export trade'; the measure taken could therefore be considered to be necessary in a democratic society within the terms of Article 10(2) of the European Convention. For the same reason, the interference with the appellants' right to enjoyment of their possessions, protected by Article 1 of Protocol No 1 to the Convention, was justifiable 'in the public interest'. The European Commission's decision supports the proposition that, in relation to alleged indecency and obscenity, states are allowed a wider margin of appreciation than they are in relation to political or commercial expression.

Defamation

As Barendt has pointed out, it is only recently that courts in the United Kingdom, and the top court in particular, have dealt with defamation claims by seeking a balance between the right to a reputation and the right to free speech. The common law of defamation was developed without much attention being paid to the latter.[163] At the same time, as we saw in Chapter 8, the top court has refused to elevate the right to a reputation to be an integral part of the more fundamental right to privacy.

The House has traditionally been a supporter of the right to sue for defamation, so much so that London has gained a reputation as the defamation capital of the world.[164] In a series of decisions in the twentieth century the Law Lords expanded the right to sue. In *E Hulton & Co v Jones* they ruled that a publisher could be liable for defamation even if he or she did not know that what was being written was defamatory of a particular individual;[165] in *Knupffer v London Express Newspaper* they held that, while a group of people could bring a defamation claim together, individuals within that group could do so too if they showed that they were specifically referred to;[166] in *Lewis v Daily Telegraph* they held that whether a statement was defamatory depended on what a 'reasonable reader' would think:[167] as a reasonable reader is likely to operate on the principle that there is no smoke without fire, this too could be read as a decision which, on balance, favoured rather than discouraged libel actions.

It is true that the House also upheld the defence of fair comment, thereby 'liberating' journalists to speak their mind about matters. Michael Foot benefited from a generous

[161] (1979–80) 1 EHRR 737 (decided in 1976).
[162] *X Co v UK* App No 9615/81, decision of 5 March 1983; 32 DR 231.
[163] Barendt (2009), 653.
[164] Socha (2005).
[165] [1910] AC 20. [166] [1944] AC 116. [167] [1964] AC 234.

construction of this defence when he was sued by the then owner of the *Sunday Times* and *Daily Sketch*, Lord Kemsley, for headlining an article in the magazine *Tribune* about another journalist's article with the words 'Lower than Kemsley': Foot was allowed to plead 'fair comment' even though the article itself did not make clear whether he was referring to the individual who was Lord Kemsley or to the newspapers he owned.[168] Yet 40 years later the House seemed to hold to the contrary in *Telnikoff v Matusevitch*,[169] where a letter had been written to the *Daily Telegraph* containing remarks about an earlier article in that newspaper. The House ruled that, when deciding whether what was written in the letter was comment rather than fact, regard should be had only to the letter and not to the previous article. This places a considerable onus on writers to contextualize their remarks and it also seems inconsistent with the rule, also endorsed by the Lords in this case, that when deciding whether comments made were fair, regard *could* be had to the previous article. As a result of the Lords' ruling the libel action was re-tried, and the jury upheld the claim for defamation and awarded compensation of £240,000. Mr Matusevitch then lodged an application with the European Commission of Human Rights, but this was declared to be manifestly ill-founded. The Commission was not persuaded that the applicant had been prohibited from commenting on what was, in his opinion, a racist attack: he had simply not taken enough care to use language that was pure comment rather than a misrepresentation about what he was commenting on. The restriction on his right to free speech was therefore 'necessary in a democratic society' within the meaning of Article 10(2) of the European Convention.[170] This does seem to unduly restrict the defence of fair comment, thereby operating as a chill factor for columnists everywhere.

But there are also cases in which the House of Lords expanded the right to free speech by limiting the availability of a defamation action. A good example is *Derbyshire County Council v Times Newspapers Ltd*,[171] where it held that local authorities cannot sue for defamation because there is no public interest favouring their right to do so, a proposition which it is hard to believe was not firmly established in English law before 1993. To cement it in place the Law Lords had to overrule a High Court decision dating from 1972[172] and to follow instead a decision of the Supreme Court of Illinois in 1923[173] and dicta from the Supreme Court of South Africa in 1946.[174] Lord Keith, with whom the other four Law Lords concurred, expressly stated that it would be contrary to the public interest to allow local authorities to sue for defamation because 'to admit such actions would place an undesirable fetter on freedom of speech'. While the Court of Appeal in this case (in the absence of any binding precedents) was content to decide the matter in accordance with the jurisprudence of the European Court of Human

[168] *Kemsley v Foot* [1952] AC 345.
[169] [1992] AC 343.
[170] *Matusevitch v UK* App No 20169/92, decision of 5 July 1993. But see Young (2000), who argues that, to comply with the Convention, UK law should allow the defence of fair comment to be available in relation to value judgments and not just opinions.
[171] [1993] AC 534.
[172] *Bognor Regis UDC v Campion* [1972] 2 QB 169.
[173] *City of Chicago v Tribune Co* (1923) 307 Ill 595.
[174] In *Die Spoorbond v South African Railways* [1946] AD 999, 1012–13 (per Schreiner JA).

Rights,[175] Lord Keith said he had reached his conclusion solely upon the common law of England, although he agreed with Lord Goff's statement in the second *Spycatcher* case,[176] which we have already suggested was somewhat disingenuous, that there was no difference in principle between England's law on freedom of speech and the law under the Convention.[177]

One of the largest steps the House of Lords ever took in favour of the right to free speech was the decision in *Reynolds v Times Newspapers Ltd*, which has since given its name to the so-called Reynolds defence.[178] The *Sunday Times* was again involved. It had published an article a few days after the resignation in 1994 of Albert Reynolds as the Irish Taoiseach (ie Prime Minister). The article was entitled 'Goodbye gombeen man' and sub-headed with 'Why a fib too far proved fatal for the political career of Ireland's peacemaker and Mr Fixit'. The paper did not report Mr Reynolds' own explanation for the events of that week and he sued the paper for defaming him. A first reading of the judgments might give the impression that the Law Lords were actually restricting the defences available to someone who is sued for defamation, because they expressly rejected the proposition of counsel for the newspaper, Lord Lester QC, that the common law should develop a new category of 'privileged information' based solely on the subject-matter involved, namely, political information.[179] Moreover, on the facts of this particular case the Law Lords rejected the appeal of the *Sunday Times* by three to two, ruling that the article it had published was not covered by the defence of privilege at all. But in the course of explaining their conclusions the Law Lords agreed, *obiter*, that the existing common law principle of qualified privilege was elastic enough to allow interferences with the right to free speech to be confined to situations where they were 'necessary in the circumstances of the case'. At several points in their judgments their Lordships emphasized the importance of the right to free speech, with Lord Nicholls saying that 'freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country'[180] and Lord Steyn, as noted in Chapter 2 above, asserted that 'there is a constitutional right to freedom of expression in England'.[181] Lord Steyn also stressed the 'new landscape' that was being brought about by the Human Rights Act 1998.[182] His words look forward, but they carry an implicit criticism of the common law to date:

> The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before the House must be considered. The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order

[175] [1992] QB 770, 813B (per Balcombe LJ).

[176] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283–4. See 284 above.

[177] [1993] AC 534, at 551F–G.

[178] [2001] 2 AC 127. The Lords affirmed the decision of the Court of Appeal (ibid), to which Lord Bingham CJ and Robert Walker LJ, as they then were, were parties.

[179] The US Supreme Court favoured such a category in *New York Times Co v Sullivan* 376 US 254 (1964). See Kentridge (1996).

[180] [2001] 2 AC 127, 200D.

[181] Ibid, 207F. See Ch 2, at 25.

[182] The judgments in *Reynolds* were issued on 28 October 1999, midway between the Act's enactment and its coming fully into force.

> foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need.[183]

Only Lord Hobhouse entered a note of caution: 'This case is not concerned with freedom of expression and opinion … There is no human right to disseminate information that is not true'.[184]

So in *Reynolds* the House of Lords granted greater latitude to writers who are commenting on matters of public interest, even if they cannot stand over the truth of what they are writing. It is enough if they can show that they behaved like fair and responsible journalists, which means that they must have taken reasonable steps to verify the facts they are asserting and to discover the response of the allegedly defamed party to the allegations being made. Lord Nicholls listed ten factors which a court should take into account when assessing whether the writer has behaved responsibly. In *Reynolds* the *Sunday Times* eventually lost in the Lords because the report in question had not referred to the former Taoiseach's version of events. As Lord Nicholls put it: 'it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given'.[185] On this point, however, Lords Steyn and Hope dissented. They would have preferred the question whether the occasion was privileged in law to be reconsidered by the judge at the retrial, because that judge would have the benefit of considering all the evidence, not just the summary at which the Lords had looked.

The House undoubtedly liberalized the law on free speech in *Reynolds*, but it also created opportunities for new disputes to arise over what amounts to fair and responsible journalism. That was essentially the issue which confronted the Law Lords seven years later, in *Jameel v Wall Street Journal Europe SPRL*.[186] The journal had published an article suggesting that a Saudi Arabian trading company and its general manager may have had links with a terrorist organization. On the evening prior to publication the journalist apparently rang an employee of the group, who asked him to delay publication for a day while he obtained a comment from the general manager (who was in Japan at the time, where it was 3am when the journalist called the employee). But the journalist refused to delay and the article was published the next day. On these facts, all five of their Lordships held that the *Reynolds* defence applied. Lord Bingham said that to deny the defence to the *Wall Street Journal Europe* solely on the basis of the journalist's failure to wait long enough for the company in question to respond 'subverts the liberalising intention of the *Reynolds* decision' and there was a consensus that, whatever response the company might have made, the article would have been printed anyway. The article had in any event honestly admitted that the journal had been unable to reach the company for comment.[187] The Law Lords were, however, divided three to two

[183] [2001] 2 AC 127, 208A–B.
[184] Ibid, 237H–238A.
[185] Ibid, 206D.
[186] [2006] UKHL 44, [2007] 1 AC 359. See Beattie (2007b), Lewis (2007b).
[187] Ibid, [35].

on a second issue in the case. Lords Bingham, Hope, and Scott thought that there was no need to change the common law rule (approved by the House in *Derbyshire County Council v Times Newspapers Ltd*[188] and again in *Shevill v Presse Alliance SA*,[189] albeit *obiter* on both occasions) that a trading company could sue for libel even though it could prove no financial loss. Lord Hoffmann and Baroness Hale disagreed, the former saying that 'a commercial company has no soul and its reputation is no more than a commercial asset'[190] and the latter remarking that a requirement to show financial loss would in these days 'achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it'.[191] Her Ladyship added that the power of major multi-national corporations was enormous and so '[t]he freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government'.[192] The *Wall Street Journal Europe* lodged an application in Strasbourg, but it was declared inadmissible.[193]

The only opportunity which the new Supreme Court has so far had to expatiate upon the *Reynolds* defence is *Flood v Times Newspapers Ltd*.[194] *The Times* had accused a Detective Sergeant of taking money in exchange for disclosing confidential information about extradition cases to a security firm which had clients that included high-profile Russians who were themselves the subjects of extradition requests. The Court of Appeal held against *The Times*,[195] but the Supreme Court allowed the newspaper's appeal.[196] In doing so Lord Phillips indicated that to benefit from the *Reynolds* defence a journalist must have considered the full range of meanings that could be given to what he or she was writing.[197] He also stressed that while a certain issue, such as police corruption, may be a matter of public interest, a journalist must be careful not to publish details of the issue that are not a matter of public interest; on the facts here it was deemed permissible to reveal the identity of the police officer suspected of corruption,[198] although one has to wonder whether the story would not still have been of considerable public interest even if Sergeant Flood's name had not been explicitly mentioned. As regards the steps that journalists are required to take when trying to verify the accuracy of what they are writing, Lord Phillips emphasized that each case turns on its own facts,[199] but journalists must honestly and reasonably believe the facts they are publishing to be true, which

[188] [1993] AC 534.

[189] [1996] AC 959.

[190] [2007] 1 AC 359, [91]. This fits with the House's decision that local authorities cannot sue in defamation: see *Derbyshire County Council v Times Newspapers Ltd*, at 306–7 above.

[191] Ibid, [158].

[192] Ibid.

[193] (2009) 48 EHRR SE19.

[194] [2012] UKSC 11, [2012] 2 AC 273.

[195] [2010] EWCA Civ 804, [2011] 1 WLR 153.

[196] A further issue, namely the continued publication of the article on the newspaper's website even after the police had completed their investigation of the respondent, was adjourned to a later hearing, if *The Times* wished to pursue it: [107] (per Lord Phillips). In a further recent case involving *The Times*, the Court of Appeal in England and Wales held that it was not a violation of Art 10 to impose liability for defamatory archived material. The House of Lords refused the newspaper permission to appeal against that decision and a subsequent application by the paper to the European Court of Human Rights was unsuccessful: *Times Newspapers Ltd v UK* App No 23673/03 and 30002/03, judgment of 11 October 2005.

[197] [2012] 2 AC 273, [53].

[198] Ibid, [74] (per Lord Phillips).

[199] Ibid, [75].

in turn depends on the type of source used for the information; here there was strong circumstantial evidence to support the truth of what the journalist had written. In this context both Lord Mance and Lord Dyson intimated that the judgment of experienced professionals in the field should be borne in mind. As Lord Mance put it:

> The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect.[200]

The judgment in *Flood* was issued at the very time when the Leveson Inquiry into the culture, practice, and ethics of the press was taking evidence. The report of that inquiry could well have a bearing on what in future is regarded—by the courts—as responsible journalistic practice.[201]

Conclusion

This chronicle of the extent to which the House of Lords and Supreme Court have protected the right to free speech in English law has revealed that, as in several other contexts, the United Kingdom's top court has not kept pace with the international standards as interpreted by the European Court of Human Rights. While it has learned the lesson so unambiguously directed at it by Strasbourg in the *Sunday Times* and *Spycatcher* cases, it has, if anything, been overly liberal in permitting newspapers to identify persons involved in litigation even when to do so inevitably means significant damage to their reputation and/or financial interests. Only physical security seems to be enough in the top court's eyes to merit a restriction on the media's freedom of expression in such cases.

As regards the law relating to the protection of journalists' sources, the House has twice had to be put right by the European Court,[202] and there still appears to be an inconsistency between the approaches of the top domestic court and the Strasbourg Court. So far this discrepancy has not been evident in cases concerning broadcasting bans, but an application on that topic is currently pending at Strasbourg. The domestic court's approach to blasphemy, obscenity, and defamation has been largely compliant with European Convention standards, except in relation to the peripheral issue of costs.[203] The *Reynolds* defence, a creation of the House of Lords, may in future need to be evaluated by the European Court if a victim of what is alleged to be 'unreasonable' journalistic practices relies on his or her Article 8 rights in an application to Strasbourg. That will provide the European Court with an opportunity to re-consider how best to

[200] Ibid, [137]; see too [199] (per Lord Dyson).

[201] Leveson (2012) and <http://www.levesoninquiry.org.uk> (last accessed 12 December 2012).

[202] In the *Goodwin* and *Interbrew* cases: see 297–8 above.

[203] In *MGN Ltd v UK* (2011) 53 EHRR 5, where the European Court found that the House of Lords had not violated the newspaper company's right to free speech by holding that it had breached Naomi Campbell's right to have information about her medical treatment kept confidential (see 234 above), the Court did nevertheless rule unanimously that the newspaper company's Art 10 right had been breached by the House's holding, in *MGN Ltd v Campbell (No 2)* [2005] UKHL 61, [2005] 1 WLR 3394, that it should pay the 'success fee' which Ms Campbell had promised to her lawyers as part of a 'no win no fee' agreement. See too Skinner (2011).

'balance' Articles 8 and 10, although it is unlikely that any more prescriptive approach will be devised than that already adopted voluntarily by the top domestic court in cases such as *In re S (A Child)*.[204]

There is a distinct possibility that cases concerning the right to free speech through social media and the internet will come before the Supreme Court and European Court in the near future. At that point the value attached to Article 10 will need to be re-assessed, even if at the end of the day the difficulties inherent in preventing publication of information outside Europe remain very difficult to prevent. The Supreme Court has not yet been directly confronted with the phenomenon of 'hate speech', but when this occurs the Justices will want to think long and hard about where exactly to draw the line between freedom of expression and incitement to hatred.[205]

[204] See 291–2 above.
[205] See, generally, Hare (2009).

11

Equality and Freedom from Discrimination

Introduction

The common law's record concerning equality and freedom from discrimination is not a glorious one. Even today, nearly 50 years after the first anti-discrimination legislation was enacted at Westminster in the form of the Race Relations Act 1965,[1] it is almost impossible to find unequivocal statements by senior judges asserting that it is contrary to the common law to differentiate between the extent of people's access to jobs, goods, facilities, or services merely on the basis of some irrelevant characteristic such as their gender or race. The other grounds for discrimination which are prohibited by statute—disability, religious or other belief, sexual orientation, marital status, gender reassignment, and age—are even less likely to be the subject of common law attention. This is so even though there have been approximately 80 decisions by the House of Lords or Supreme Court in this field since Parliament began to intervene in the area.

Baroness Hale points to a dictum in a Privy Council decision of early 1998 in which support is given to the notion that 'treating like cases alike and unlike cases differently is a general axiom of rational behaviour'.[2] But on the facts of that case, just a few months before the Human Rights Act 1998 was finally enacted, the Judicial Committee still refused to generalize a right to equality where the Constitution of Mauritius conferred the right to 'the protection of the law' as well as providing that 'no law shall make any provision that is discriminatory either of itself or in its effect'.[3] Baroness Hale hints that in 2009 the top court was still not demonstrating 'a growing appreciation of the scope and complexity of equality issues'. Intriguingly, she adds: 'the House has become comfortable with formal equality [which she defines as the right to be treated equally by the law] but is somewhat less comfortable with the accommodation of difference'.[4] As in other areas, due to the adventitious nature of litigation, the United Kingdom's top court cannot be wholly blamed for not having had the full range of opportunities to enunciate principles on all the important points, but it has had the chance to examine a stream of fact situations which, had the judges felt so inclined, could have prompted hard-hitting dicta which would have firmly cemented basic principles of equality and

[1] Note too that the Government of Ireland Act 1920, s 5, prohibited the two Parliaments in Ireland from making laws directly or indirectly imposing any disadvantage on account of religious belief.

[2] *Matadeen v Pointu* [1999] 1 AC 98, 109, cited in Hale (2009a), 576.

[3] Sections 3 and 16 of the Constitution. Even more worryingly, the Judicial Committee held that Mauritius's procedures allowing scrutiny of Parliamentary Bills, and judicial review of administrative decisions, were adequate to comply with Art 26 of the International Covenant on Civil and Political Rights, which begins 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.

[4] Hale (2009a), 575. More generally, see Fredman (2011); Barmes (2009); McCrudden (2009); Monaghan (2008); Van de Heyning (2008); Doyle (2007); Gardner (1996); Moon and Allen (2006); Bamforth (2004).

non-discrimination into the mindsets of lawyers and judges throughout the country, and perhaps further afield.[5]

In this chapter attention will first be paid to the attitudes struck by top judges when faced with general questions concerning the interpretation of anti-discrimination statutes. Then it will look at how they have dealt with issues relating to equal pay, trans-sexualism, homosexuality, disability, and age. Given her vocal extra-judicial advocacy for women's rights, a section will be devoted to the particular contribution of Baroness Hale as a judge in this field. The remainder of the chapter will look at equality issues that have arisen outside of the anti-discrimination statutes. Throughout the chapter the importance of EU standards, as well as those promoted by the European Court of Human Rights, will be readily apparent. Yet even those external sources have not succeeded in provoking top domestic judges to amend the country's common law, and more remains to be done to make UK laws truly reflective of equality.

The interpretation of anti-discrimination statutes

By and large the United Kingdom's top courts have interpreted anti-discrimination legislation in a purposeful manner. On a few occasions, however, they have appeared to take the line of least resistance and have applied the legislation in a way which is less than optimum from an equality point of view. In three cases in the early 1970s a rather literal approach was taken to the interpretation of the race discrimination legislation:[6] while discrimination on the basis of 'national origins' was expressly outlawed, the Lords did not think that that term embraced discrimination on the basis of nationality,[7] and while the legislation outlawed discrimination by service providers 'to the public or a section of the public', the Lords held that private clubs with a genuinely selective membership system could maintain a colour bar because they were not providing a service to 'a section of the public',[8] even if the members were numbered in their thousands.[9] The first of these three rulings was wholly reversed by Parliament,[10] while the second and third were partly reversed, so that clubs with more than 24 members were no longer exempt.[11] In a fourth appeal to the House at this time, the Lords held that children in the care of a local authority who were in need of fostering were 'a section of the public', but even a liberal judge such as Lord Wilberforce dissented on that point.[12]

[5] Some discrimination claims have been won on principles of contract law, so the claimant has had little incentive to appeal the matter further on other grounds: see eg *Constantine v Imperial Hotels Ltd* [1944] KB 693.

[6] There were Race Relations Acts passed in 1965, 1968, and 1976.

[7] *Ealing London Borough Council v Race Relations Board* [1972] AC 342; Lord Kilbrandon dissented on the grounds that the 1976 Act was conceived as a measure of social reform and relief of distress, and allowing 'national origins' to embrace nationality was more consistent with reality: 369G–H.

[8] *Race Relations Board v Charter* [1973] AC 868. On this occasion Lord Morris dissented, agreeing with the Court of Appeal: 895H.

[9] *Dockers' Labour Club and Institute Ltd v Race Relations Board* [1976] AC 285. This time Lord Kilbrandon agreed with his fellow Law Lords.

[10] In the Race Relations Act 1976, s 3(1), which extended the definition of 'racial grounds' to include nationality.

[11] Ibid, ss 25(1) and 26(1).

[12] *Race Relations Board v Applin* [1975] AC 259. In the *Dockers' Labour Club* case the House preferred the approach in *Charter* to that in *Applin*.

Three further decisions by the Lords in the early 1980s betrayed a similar lack of enthusiasm for the legislation's overall purpose. It was as if the view prevailed that anti-discrimination legislation was an undesirable curb on people's freedom to interact with whomever they liked on their own terms. Two of the cases concerned the investigative powers of what by then had become the Commission for Racial Equality: *Hillingdon London Borough Council v Commission for Racial Equality*[13] and *R v Commission for Racial Equality, ex parte Prestige Group plc*.[14] In the former, where the Commission was challenging the approach of the borough council to the way it was treating people who arrived at Heathrow Airport with nowhere to live, the Lords held that the Commission could conduct a formal investigation into a named person or organization only if it had material before it which was:

> sufficient to raise in the minds of reasonable men, possessed of the experience of covert racial discrimination that has been acquired by the Commission, a suspicion that there may have been acts by the person named of racial discrimination of the kind that it is proposed to investigate.[15]

Echoing what he had said in the *Dockers' Club* case,[16] Lord Diplock added that, when an Act allows an administrative body to take decisions which 'affect to their detriment the rights of other persons or curtail their liberty to do as they please', Parliament must be presumed to have intended that the body should act fairly towards those persons who will be so affected.[17] In the *Prestige* case, which was a leapfrog appeal direct from the High Court, the Lords confirmed that before launching a named-person investigation the Commission must have grounds for suspecting the person or organization of some unlawful act of discrimination. Lord Diplock even intimated that the Commission for Racial Equality had wasted taxpayers' money in trying to convince their Lordships to overrule the *Hillingdon* case, decided by the House less than two years earlier.[18] Griffith, perhaps sarcastically, suggests that the Lords' decision in the *Prestige* case 'was probably not intended by Parliament',[19] and Monaghan agrees.[20] Be that as it may, Parliament has not since intervened to correct this interpretation of the legislation. While the general principle of fairness enunciated by Lord Diplock in *Hillingdon* is to be applauded,[21] it does not need to operate so strictly in a context where discrimination is being alleged.

The third unfortunate decision in the early 1980s touched upon sex discrimination as well as race discrimination. In *R v Entry Clearance Officer, ex parte Amin*[22] all five judges held that the performance of public duties, such as controlling entry into the country, was not the direct provision of facilities or services and so was beyond the reach of both the Sex Discrimination Act 1975 and the Race Relations Act 1976. Thus,

[13] [1982] AC 779.
[14] [1984] 1 WLR 335.
[15] [1982] AC 779, 791C (per Lord Diplock).
[16] [1976] AC 285, 296F. The passage is criticized by Griffith (1997), 176–7.
[17] [1982] AC 779, 787F.
[18] [1984] 1 WLR 335, 347G–H.
[19] Griffith (1997), 179.
[20] Monaghan (2007), 597.
[21] As it was by, eg, Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2004] 1 AC 604, [30].
[22] [1983] 2 AC 818. Lords Scarman and Brandon dissented on a subsidiary point.

when a special voucher scheme was introduced to help people demonstrate that they had already produced sufficient evidence of entitlement to enter the United Kingdom, there was nothing unlawfully discriminatory about the scheme's presumption that husbands are normally the heads of households. The decision in *Amin* meant that a whole array of public services provided by the state were at a stroke exempted from the Act's scope. This too had to be corrected by Parliament.[23]

To some extent the House of Lords regained face through its decision in *Mandla v Dowell Lee*,[24] where, reversing the Court of Appeal, their Lordships pronounced that the term 'ethnic origins' had to be interpreted widely, so that whether a group was an ethnic group would depend largely on whether it regarded itself—and was regarded by others—as a distinct community with a long shared history and a cultural tradition. On the facts of the case, where a school had refused admission to a Sikh boy because wearing a turban would accentuate religious distinctions in the school, the Lords ruled that Sikhs were a racial group and that the school's 'no turban' rule was not justifiable within the terms of the statute.[25] The headmaster's personal conviction that the 'no turban' rule would lead to an improved educational service was not sufficient to make it objectively acceptable. This decision, in which the leading opinion was that of Lord Fraser, marked a welcome awakening of the House's awareness of the purpose and potential of anti-discrimination legislation. As the learned judge put it, the meaning given by the House to 'ethnic origins' was 'consistent with the ordinary experience of those who read newspapers at the present day'.[26]

In cases raising issues of race discrimination the Law Lords were not able to pray in aid the views of what was then the European Economic Community, because that inter-governmental organization did not concern itself with racism until 2000.[27] But from its earliest days the Community was very much concerned with sex discrimination. Article 119 of the Treaty of Rome 1957 said that each Member State must ensure and maintain the principle 'that men and women should receive equal pay for equal work'.[28] This was supplemented by two key Directives—the Equal Pay Directive of 1975[29] and the Equal Treatment Directive of 1976.[30] A raft of other Directives followed on various aspects of sex discrimination, but it was the two from the mid-1970s which most greatly influenced the House of Lords. That influence was enhanced by the fact that several infringement proceedings were taken against the United Kingdom by the EEC's European Commission. In one such case the United Kingdom was found to be in breach of the Equal Pay Directive because its domestic law did not ensure equal

[23] Section 19B(1A) of the 1976 Act, inserted by the Race Relations Act 1976 (Amendment) Regs 2003 (SI 1626), reg 20(1).

[24] [1983] 2 AC 548. Lords Fraser and Templeman delivered the leading opinions.

[25] Race Relations Act 1976, s 1(1)(b)(ii).

[26] [1983] 2 AC 548, 562D.

[27] Although Art 6 of the Treaty of Rome 1957 did outlaw discrimination on the basis of nationality in relation to free movement of workers.

[28] The current version of this provision—Art 157(1) of the Treaty on the Functioning of the European Union—reads: 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

[29] Council Directive 75/117/EEC.

[30] Council Directive 76/207/EEC.

pay for work of equal value.[31] In another the European Court of Justice (ECJ) ruled that exceptions in the United Kingdom's Sex Discrimination Act 1975 were too broad in that they exempted collective agreements, employment in private households, and employment in undertakings with fewer than five employees.[32] More generally, the EEC as a whole was being told by the ECJ that one of the fundamental principles of EEC law was equality. As early as 1977 the ECJ said that the general principle of equality required that 'similar situations shall not be treated differently unless differentiation is objectively justified'.[33] Although this was a rather formal, unsophisticated, notion of equality—begging many questions over how to be 'objective' in this context—it was a significant advance over the prevailing orthodoxy within the UK legal systems. It seemed that the ECJ was prepared to be more creative than even a top common law court.[34]

In the interpretation of the anti-discrimination statutes the courts have more recently adopted a suitably purposive approach in order to ensure that the mischief of discrimination is comprehensively tackled. Thus, in the context of efforts to protect women, the House of Lords has held: that a claimant can compare one specific term of her contract with that in a man's contract even if, taken as a whole, the two contracts might appear to provide equal benefits;[35] that a claimant can compare him- or herself with workers doing work of equal value even if there are workers of the opposite gender doing the same work as the claimant;[36] that there is no need for a male comparator when a woman is complaining about discrimination based on pregnancy;[37] that protection extends to female ministers of religion;[38] that the removal of a right to redundancy pay after the age of 65 is not indirectly discriminatory against men;[39] and that a claimant does not have to prove that the comparator he or she is using was in precisely the same situation as the claimant.[40] Most notably of all, in *R v Secretary of State for Employment, ex parte the Equal Opportunities Commission* the Lords held that a provision in the Employment Protection (Consolidation) Act 1978—which made it more difficult for part-time workers than full-time workers to claim employment rights—was indirectly discriminatory against women and could be 'disapplied' because it was inconsistent with EU law.[41] This was a constitutionally important milestone for the House of Lords because it was the first occasion on which, in obeisance to an earlier Act of Parliament,[42] it refused to apply a later Act. The House recognized that Parliament could bind itself and decided that it would enforce Parliament's wish to do so.

[31] *Commission of the European Communities v UK* Case 61/81, [1982] ICR 578.
[32] *Commission of the European Communities v UK* Case 165/82, [1984] 1 All ER 353. An exemption relating to employment as a midwife survived the Commission's challenge.
[33] *Ruckdeschel v Hauptzollamt Hamburg-St-Annen* Cases 117/76 and 16/77, [1977] ECR 1753, recital 7 of the judgment.
[34] For a critique of the activism of the ECJ, see Schepel (2000) and Rasmussen (1986).
[35] *Hayward v Cammell Laird Shipbuilders Ltd* [1988] AC 894.
[36] *Pickstone v Freeman's plc* [1998] AC 66.
[37] *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] 1 WLR 1454. See, generally, McColgan (2006).
[38] *Percy v Church of Scotland Board of Mission* [2005] UKHL 73.
[39] *Secretary of State for Trade and Industry v Rutherford* [2006] UKHL 19, [2006] ICR 785.
[40] *Hewage v Grampian Health Board* [2012] UKSC 37.
[41] [1995] 1 AC 1.
[42] European Communities Act 1972, s 2(1). This is one of the Acts which Sir John Laws and others have labelled 'constitutional statutes'. See Ch 2 above, at 20–30.

It was in the field of sex discrimination that the House of Lords first endorsed this approach to equality by insisting that discrimination is unlawful even if the alleged discriminator has no intention to discriminate. What matters is the effect of the discriminator's act, not the motivation behind it. So an education authority was unlawfully discriminating if, as there were only three grammar schools for girls in its area as opposed to five for boys, it offered fewer grammar school places to girls than to boys.[43] And a local council was unlawfully discriminating if it charged men to use the swimming baths until they reached the age of 65 whereas it stopped charging women once they reached the age of 60.[44] There might be economic reasons why *most* men aged between 60 and 64 would be more able than women of that age to pay for entry to the baths, but the fact remained that *all* men were being treated less favourably just because of their gender. Yet in more recent years the House and Supreme Court have been quick to point out, perhaps rather metaphysically, that while the alleged discriminator's motive, intention, reason, or purpose may be legally irrelevant, it is still necessary to explore why he or she so acted.[45] In those cases the House of Lords was able to reach its decision without first referring the matter to the ECJ for a preliminary ruling. In many other cases requests for preliminary rulings *were* made, thereby relieving the United Kingdom's top court of direct responsibility for the development of domestic law and depriving it of opportunities to develop the common law in tandem with, or in advance of, European Community law. It is a form of self-denying ordinance comparable to the so-called 'mirror' principle enunciated with respect to European Convention law.[46]

In two further cases the House of Lords extended the scope of discrimination law regardless of the nature of the discrimination in question. In *Nagarajan v London Regional Transport*[47] it held that, when a person is victimized for having previously raised an allegation of discrimination, the alleged discriminator can be liable (and also his or her employer) even though there was no conscious motivation to discriminate: it is enough if the discriminator treats the person less favourably because of his or her knowledge that the person has previously alleged discrimination. And in *Rhys-Harper v Relaxion Group plc*[48] the House extended liability for all types of discrimination to situations occurring after an employee has left his or her employment.

The Jewish Free School case

However, lest anyone should be under the impression that today's senior judges in the United Kingdom share the same view as to what precisely constitutes discrimination, regard must be had to the nine judgments issued by the Supreme Court Justices in 2009 in *R (E) v Governing Body of JFS*, a dispute about the admission policy applied

[43] *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155.
[44] *James v Eastleigh Borough Council* [1990] 2 AC 751.
[45] See eg the judgment of Lord Hope in *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728.
[46] In *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. See Ch 2 above, at 39–43.
[47] [2000] 1 AC 501.
[48] [2003] UKHL 33, [2003] ICR 867.

by a state-funded Jewish school.[49] A boy was not admitted because his mother was a Jew whose conversion to Judaism was not in accordance with the tenets of Orthodox Judaism. Five of the judges held that the admission policy was directly discriminatory on grounds of ethnic origins,[50] two that it was not directly but indirectly discriminatory,[51] and two that it was not discriminatory at all.[52]

The majority view chimed with that put forward on behalf of the Equality and Human Rights Commission, which was allowed to intervene in the case. The Commission argued that all rules based on a person's descent from a particular class of person are racial rules, citing Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966, which states that the term 'racial discrimination' means:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Counsel for the school countered by arguing that there was nothing to suggest that Orthodox and non-Orthodox Jews are different ethnic groups, as Ashkenazi and Sephardic Jews might be, and '[a] person's matrilineal antecedents are only one factor among many in his [*sic*] racial and ethnic make-up'.[53] The two judges who held that there was no discrimination—Lord Rodger and Lord Brown—were starkly at odds with their seven colleagues. Lord Rodger said that the finding of discrimination (whether direct or indirect) led to 'extraordinary results' and 'produces manifest discrimination against Jewish schools in comparison with other faith schools.[54] Lord Brown observed that the majority's position meant that all Jewish schools where the admissions criteria depend upon the child being recognized as Jewish under religious law had been operating a directly racially discriminatory policy since the enactment of the Race Relations Act in 1976. He also pointed out that it was 'of the greatest importance not to expand the scope of direct discrimination and thereby place preferential treatment which could be indirect discrimination beyond the reach of possible justification',[55] and he added:

> It can no more be disproportionate to give priority to a Jewish child over that of a child, however sincere and committed, not recognised as Jewish, than it would be to refuse to admit a boy to an oversubscribed all-girls' school.[56]

[49] [2009] UKSC 15, [2010] 2 AC 728. Baroness Hale has said that this was the most interesting case to come before the Supreme Court in its first year: <http://ukhumanrightsblog.com/2010/09/16/lady-hale-still-embarrassed-to-be-only-diversity-supreme-court-judge> (last accessed 12 December 2012).

[50] Lord Phillips, Baroness Hale, and Lords Mance, Kerr, and Clarke.

[51] Lords Hope and Walker. Baroness Hale and Lords Mance, Kerr, and Clarke also held that if the admission policy was not directly discriminatory it was indirectly so.

[52] Lords Rodger and Brown. Religious discrimination in schools' admission policies was outlawed in England, Wales, and Scotland by the Equality Act 2006, s 49, but an exception was made by s 50(1)(a) for designated faith schools.

[53] [2010] 2 AC 728, 742F.

[54] Ibid, [243].

[55] Ibid, [247].

[56] Ibid, [256].

More than one of the Justices pointed out that a principal reason for the rifts between them was that English law does not countenance the defence of justification to a claim of direct discrimination.[57] Yet that is not a position required by European Convention law, since the European Court of Human Rights does not apply a rigid distinction between direct and indirect discrimination. It prefers a simpler approach, whereby, to be lawful, discrimination on prohibited grounds has to be in pursuit of a legitimate aim, necessary in a democratic society and proportionate. In the earlier case of *R (Carson) v Secretary of State for Work and Pensions*, discussed below,[58] the House of Lords had favoured an approach to Article 14 which focused on whether there was a good reason for the alleged discrimination and it is perhaps unfortunate that such a straightforward approach was not also followed in the *Jewish Free School* case. Reading between the lines, it seems clear that the Justices were slightly bedazzled by the traditions within Judaism, perhaps because it is easier to think of Judaism as a religion and not (as it is in English law) an ethnicity. More broadly, this may be a field of law which would benefit from an overhaul, even though it is largely now codified in legislation.[59] Given the constraints imposed by that legislation, the room for manoeuvre within the judiciary is limited, but a greater focus on the concept of equality rather than discrimination may be a way forward.

Specific issues

Equal pay

One particularly important area of equality law concerns equal pay, a matter on which the United Kingdom's top court has pronounced on at least six occasions in the past 15 years. Although most of these cases went against the claimants, this was primarily because the wording of the legislation in question did not permit any other construction than that placed upon it by the top judges. When they have had the scope to do so, the judges have been willing to stretch the application of the relevant law so that equal pay between the sexes is indeed a reality, as in the well-known case where dinnerladies complained that their rate of pay had been reduced in order to allow their employer to engage in competitive tendering.[60] But the judges have stopped short of developing the statutory right to equal pay into a common law right to a fair wage, and they have maintained that stance even in the wake of the National Minimum Wage Act 1998. They have also permitted employers to justify differential pay awards to employees doing the same job on the basis of market considerations affecting the job in question.[61]

Thus, in *British Coal Corpn v Smith*[62] the House of Lords agreed that whether a variation in contractual terms is genuinely due to a material factor other than gender is a question of fact for the tribunal and should not be interfered with on appeal unless there appears to be no clear evidence on which the tribunal could have reached its

[57] See eg Lord Phillips at [9], Baroness Hale at [67]–[70]. Eg ibid, [9] (per Lord Phillips) and [67]–[70] (per Baroness Hale.

[58] See 334–7 below.

[59] Principally the Equality Act 2010. See also Jowell (1994).

[60] *Ratcliffe v North Yorkshire County Council* [1995] 3 All ER 597.

[61] *Rainey v Greater Glasgow Health Board* [1987] AC 224.

[62] [1996] ICR 515.

decision. Some might argue that this is a dereliction of the House's duty to give clear guidance on what 'material' means in this context. In *Strathclyde Regional Council v Wallace*[63] the House of Lords ruled that, once an employer has shown that a disparity in pay is genuinely due to a material factor other than sex, the employer does not then have to show that the disparity could have been avoided by the adoption of other measures. Lord Browne-Wilkinson confirmed that the purpose of the legislation on equal pay is to eliminate sex discrimination in pay, not to achieve fair wages, and he rejected the argument that a factor determining pay could not be 'material' unless it could be objectively justified. Two years later this decision was applied in *Glasgow City Council v Marshall*,[64] where the Lords held that once an employer has established that a pay disparity is due to 'a significant and relevant' factor other than gender, he or she does not then have to give a reason for the disparity. While it is true that, in theory, the judges could have developed a common law principle which requires fair wages, no barrister has been so bold as to make that argument before the top court and the judges have not referred to any of the relevant international standards in this area—weak though they are—to substantiate such a principle.[65] The approach of the Supreme Court towards employment law is still one dominated by contract law rather than by human rights law, although, as the decision of the House of Lords in *Inland Revenue Commissioners v Stringer* shows,[66] the influence of EU law sometimes allows the latter to intrude into the former.[67]

On a few occasions the House has asked the ECJ (now the Court of Justice of the EU) for guidance on how to interpret UK equal pay law in a way which makes it consistent with EU law. In *Preston v Wolverhampton Healthcare NHS Trust*,[68] for example, the House asked whether a six-month limitation period for making equal pay claims was compatible with the Community law's principle of effectiveness, whereby national procedural rules for the protection of Community law rights must not make the exercise of those rights excessively difficult in practice and no more difficult than the exercise of domestic law rights. The ECJ replied that the six-month rule was not incompatible per se and that it was not acceptable to re-start the limitation period at the end of each contract whenever there was a stable employment relationship comprising a succession of short-term contracts;[69] nor was it acceptable that, if a claimant won his or her case, the remedy available could extend back in time for only two years: it should extend back to the beginning of the employment in question, or at least to 8 April 1976 when the Court of Justice ruled that pensions are part of 'pay' for the purposes of the Equal Pay Directive.[70] When *Preston* returned to the Lords, a further set of judgments was

[63] [1998] 1 WLR 259.

[64] [2000] 1 WLR 333.

[65] eg International Covenant on Economic, Social and Cultural Rights 1966, Art 7(a). See too O'Connell (2012).

[66] [2009] UKHL 31, [2009] 4 All ER 1205, where it was held, following a ruling of the Court of Justice of the EU ([2009] ICR 932), that employees on sick leave are still entitled to annual holiday pay and payment in lieu of public holidays.

[67] There was an unusual flurry of employment law cases decided by the Supreme Court in 2011 (nine out of 60): see Dickson (2012b), 258–9.

[68] [1998] 1 WLR 280.

[69] *Preston v Wolverhampton Healthcare NHS Trust* Case C-78/98, [2001] 2 AC 415.

[70] In *Defrenne v Sabena (No 2)* Case 43/75, [1976] ICR 547.

issued.[71] Strangely, in their interpretation of the ECJ's ruling, the Lords unanimously held that the six-month rule was not 'less favourable' to claimants than the six-year limitation period available for domestic claims for breach of contract. The Lords said that other factors had to be borne in mind, such as that a contract claim can only be retroactive for six years while an equal pay claim can go back to the start of the employment or to 1976 (whichever period is shorter) and proceedings in a court are much more time-consuming, expensive, and formal than proceedings in an employment tribunal.[72] This reasoning, with respect, seems weak.

A test case bearing the same name as the one just discussed (although not all of the claimants were the same) came before the House again in 2006,[73] the question being whether the time limit for bringing a claim regarding an equality clause in an employment contract, when there has been a transfer of the undertaking to a new employer, begins to run from the date of the transfer or from the end of the claimant's employment with the transferee. Lord Hope, for the court, held that it ran from the date of the transfer, so the 60,000 or so claims which depended on the outcome of the appeal were deemed to be out of time. In reaching this conclusion, Lord Hope applied the ECJ's reasoning in the earlier preliminary ruling: the employment in question is 'the employment to which the claim relates', not future employment. Later that same year, in *North Wales Training and Enterprise Council Ltd v Astley*,[74] Lord Hope again gave the main judgment when applying a preliminary ruling by the ECJ.[75] On this occasion the House held that the applicants' continuity of employment had not been broken even though they had waited three years after the transfer of an undertaking before electing to become employees of the transferee (they had been working as secondees from the Department of Employment up until that time). In *Derbyshire v St Helens Borough Council*[76] a group of 39 women seeking equal pay also won a famous victory when the Lords ruled that they had been subjected to adverse treatment on account of their persistence in pursuing their claim.

In this field the top judges are not prepared to overturn government policies which are based on assessments of what would be economically best for the country. In *R v Secretary of State for Employment, ex parte Seymour-Smith* the Court of Appeal had held that an order extending from one year to two years the period of continuous employment required before an unfair dismissal claim could proceed had a disparate adverse effect on women and was therefore incompatible with the Equal Treatment Directive 1976.[77] But on appeal the House overturned this conclusion, saying that such a declaration of incompatibility was inappropriate in judicial review proceedings (as opposed to employment tribunal proceedings) and that the lawfulness of the extension of the qualifying period should be referred to the ECJ.[78] That Court gave its ruling two years

[71] *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] UKHL 5, [2001] 2 AC 455; Lord Clyde replaced Lord Lloyd of Berwick on this panel.
[72] Ibid, [30] (per Lord Slynn) and [45] (per Lord Clyde).
[73] *Preston v Wolverhampton Healthcare NHS Trust (No 3)* [2006] ICR 606, 614F.
[74] [2006] UKHL 29, [2006] 1 WLR 2420.
[75] *CELTEC Ltd v Astley* Case C-478/03, [2005] ICR 1409.
[76] [2007] UKHL 16, [2007] 3 All ER 81.
[77] [1995] ICR 889.
[78] [1997] 1 WLR 473.

later[79] and when the House finally returned to the issue a year further on it held, with two dissents, that, while the extension in the qualifying period did amount to indirect discrimination for the purposes of what was then Article 119 of the Treaty of Rome 1957, the different treatment could be justified by objective factors unrelated to discrimination.[80] In a passage which has broader implications for the approach of the top UK court to socio-economic matters in general, Lord Nicholls said:

> Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors… National courts, acting with hindsight, are not to impose an impracticable burden on governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation, are not good enough. But governments are to be afforded a broad measure of discretion.[81]

In this case the Lords also held that the government needed to be given a reasonable amount of time to assess whether the policies it had adopted were having the effect it thought they would have. On the facts before the Lords, six years was held not to be a long enough period to allow for such an assessment. This decision, it is submitted, is a very significant signal from the United Kingdom's top court that, however ingenious lawyers might be in their arguments, and however directive EC law might appear to be, there are still policy issues which are best left to governments. As Jeffrey Jowell has ably demonstrated, some decisions are best not taken by judges.[82]

It is clear, however, that the Supreme Court's reservations concerning its competence to adjudicate on certain issues are not solely dependent on the amount of money which is at stake. By way of illustration we can refer to *Birmingham City Council v Abdullah*,[83] where the Court held that a claim for equal pay could be brought as a breach of contract claim in the High Court as well as a statutory claim in an employment tribunal. That meant that the time limit for such claims is six years, not just six months as previously thought. Reports in the press shortly after the decision was announced indicated that Birmingham City Council alone would need to spend £757 million to cover the costs of dealing with the newly eligible claims.[84]

Transsexualism and homosexuality

The Lords again displayed a mixture of activism and restraint in the context of discrimination against transsexuals. In *Bellinger v Bellinger*[85] they ruled that section 11(c) of the Matrimonial Causes Act 1973, which requires a marriage to be a union between parties who are 'respectively male and female', was incompatible with Articles 8 and 12 of the European Convention on Human Rights because it did not take into account the fact

[79] Case C-167/97, [1999] 2 AC 554. See Barnard and Hepple (1999).
[80] [2000] 1 WLR 435.
[81] Ibid, 450F–G.
[82] Jowell (2009). See too Sumption (2012a); Collins (2002).
[83] [2012] UKSC 47, [2012] ICR 1419.
[84] See <http://www.guardian.co.uk/uk/2012/nov/12/birmingham-council-equal-pay>, (last accessed 12 December 2012).
[85] [2003] UKHL 21, [2003] 2 AC 467. See too Chs 3 and 8 above, at 74 and 232 respectively.

that people sometimes change their gender after birth. But, while the Lords could have chosen to exercise the power of interpretation conferred by section 3 of the Human Rights Act 1998, they opted not to do so because this was a matter that required the attention of Parliament, and the government had already indicated, following a decision of the European Court of Human Rights,[86] that it would try to engineer a change to UK law. To cite Lord Nicholls again:

> Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.[87]

In a later case the Lords again took their lead from Europe—this time from Luxembourg rather than Strasbourg—when ruling that a woman had suffered unlawful discrimination when she was denied the opportunity to become a police officer on the specious ground that, being a male-to-female transsexual, she would not be allowed to conduct body searches of men.[88]

In the last decade or so there has also been a complete transformation in the attitudes of the United Kingdom's top courts to the rights of homosexuals. Back in 1979 the House of Lords endorsed the conviction of the editor and publisher of *Gay News* for publishing a poem describing in detail the commission of homosexual acts on the corpse of Christ; Lord Diplock and Lord Edmund-Davies dissented on the basis that they thought it was necessary to show that the defendants had intended to blaspheme, but their three brethren saw no such need.[89]

The starting point of the revolution was the decision in *Fitzpatrick v Sterling Housing Association Ltd*,[90] where the Law Lords held that a gay man could succeed to the tenancy held by his deceased partner on the basis that he was a member of the tenant's 'family', although he could not succeed as the tenant's 'spouse'. Five years later, with the Human Rights Act having come into force in the meantime,[91] a different group of Law Lords (only Lord Nicholls sat in both cases) held that they could now use section 3 of that Act to interpret the word 'spouse' as including a gay partner. The Lords did not expressly overrule *Fitzpatrick*, but can be taken to have done so impliedly. And, unlike in *Bellinger*, on this occasion there was no constitutional objection to using section 3:

> [T]he social policy underlying the 1988 extension of security tenure [through the Housing Act of that year] . . . to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a

[86] *Goodwin v UK* (2002) 35 EHRR 18.
[87] [2003] 2 AC 467, [37].
[88] *Chief Constable of West Yorkshire Police v A (No 2)* [2004] UKHL 21, [2005] 1 AC 1.
[89] [1979] AC 517. The majority comprised Viscount Dilhorne, Lord Russell, and Lord Scarman. See too Ch 9 above, at 262, and Ch 10 above, at 303–4.
[90] [2000] 1 AC 27. See too Ch 3 above, at 88, and Ch 8 above, at 240.
[91] Although enacted in November 1998, it did not come fully into effect on 2 October 2000.

> close and stable relationship . . . The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.[92]

Bamforth contends that the decision in *Ghaidan* recognizes a new and potentially broader basis for anti-discrimination protection in UK law: 'having once been the province of specific statutory protections in employment and analogous areas, [the prohibition on discrimination] has now become a general principle of statutory interpretation affecting every area in which the Human Rights Act applies'.[93] If that were indeed so, it would be commendable. But subsequent case law does not bear out Bamforth's optimism.

In 2003 the House of Lords had an opportunity to rule that harassment on the ground of sexual orientation was unlawful sex discrimination, but they declined to do so on the dubious basis that each of the two appellants would have been treated in the same way even if they had been of the opposite sex.[94] The Law Lords could have developed a principle within the common law saying that in the context of discriminatory treatment the concept of 'sex' is to be taken as embracing 'sexuality'; in doing so they would merely have been anticipating the implementation of an existing EU Directive which required EU states, by 2005, to deem sexual harassment to be discrimination on the grounds of sex. In another case the House of Lords found that domestic law did not discriminate against lesbians through the way that it dealt with their liability to pay child maintenance,[95] but this decision was later overturned by the European Court of Human Rights.[96]

The most remarkable decision in this area must be the 2010 decision of the new UK Supreme Court in *HJ (Iran) v Secretary of State for the Home Department*,[97] where the Justices held that it would be a violation of the UN Convention on the Status of Refugees 1951 to deport people to countries where, because of the dangers facing them as homosexuals, they would have to conceal their true sexuality in order to be safe from persecution. In stark contrast to the old adage that homosexuality is 'the love that dares not speak its name',[98] Lord Rodger, who himself had never married and was, very sadly, to die of a brain tumour within less than a year of delivering his judgment, said that the applicants for asylum in this case (who had fled from Iran and Cameroon) had a right to live freely and openly as gay men. He chose to illustrate his point with what he called 'trivial stereotypical examples from British society':

> [J]ust as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.[99]

[92] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [35], per Lord Nicholls. See too Chs 3 and 8 above, at 66–8 and 239 respectively.

[93] Bamforth (2003), 221. See too, although in a different context, Fredman (2006).

[94] *MacDonald v Advocate General of Scotland* [2003] UKHL 34, [2003] 1 All ER 339.

[95] *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91. See too 330 below.

[96] *JM v UK* (2011) 53 EHRR 6.

[97] [2010] UKSC 31, [2011] 1 AC 596. See too Ch 3 above, at 65, and Ch 8 above, at 231.

[98] The phrase comes from the poem 'Two Loves' by the lover of Oscar Wilde, Lord Alfred Douglas (1894).

[99] [2011] 1 AC 596, [78].

The decision in *HJ (Iran)* raises as many questions as it provides answers, particularly in relation to the boundaries of the principle upon which it was decided. Does it mean that gay people from around the world can flock to the United Kingdom and receive asylum if they can show that their home country criminalizes homosexuality and regularly enforces that law? Does the principle extend to other vulnerable groups (vulnerable because they are discriminated against), who likewise can show that they are viewed as criminals, or as otherwise undesirable, in their home country? Even amongst prominent gay activists in the United Kingdom questions have been asked about the apparent breadth of the House's precedent.[100] There is no denying the great humanity that lies at the heart of it, but the limits of the principle require future consideration.

A seven-judge Supreme Court attempted to do just that in *RT (Zimbabwe) v Secretary of State for the Home Department*,[101] where much of the discussion centred around whether the approach adopted in *HJ (Iran)* could be applied to asylum seekers who, although they were politically neutral, feared being returned to Zimbabwe because once they were there they could be persecuted for not demonstrating positive support for the ruling regime. Lord Dyson, with whom the other Justices all agreed, stressed that people should not be forced to lie about their political beliefs:

> [I]t is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour.[102]

Lord Dyson also stressed that for the purposes of the Refugee Convention 'persecution is more than a breach of human rights'.[103] But he explained that this did not mean that the importance of the right in question to the particular applicant was relevant. It meant only that, to claim refugee protection, the applicant had to be at risk of being prohibited from exercising the 'minimum core entitlement' conferred by the right, not just from undertaking some activity 'at the margin of a protected interest'.[104] Here, the core of the right not to hold a political belief was at issue. It remains to be seen how the Supreme Court will develop this distinction between core and marginal rights.

Disability discrimination

The senior judges have been somewhat less expansive in the context of discrimination against people with disabilities, but there has still been significant progress in recent years. In *Archibald v Fife Council*[105] the Lords held that an employer had to take steps to prevent a disabled employee from being placed at a disadvantage even if the employee was so disabled as to be unable to meet the requirements of a higher grade job and that was all that was available. They stressed that the duty to make reasonable adjustments,

[100] eg Matthew Parris, 'We must harden our hearts and our borders', *The Times*, 10 July 2010.
[101] [2012] UKSC 38, [2012] 3 WLR 345.
[102] Ibid, [43].
[103] Ibid, [50].
[104] Ibid, [47]–[51].
[105] [2004] UKHL 32, [2004] 4 All ER 303.

imposed on employers by section 6 of the Disability Discrimination Act 1995, obliged employers to treat a person with disabilities *more favourably* than others. Baroness Hale said that, while a lot depends on the circumstances of individual cases, 'the general policy of achieving fairness and transparency in local government appointments is also extremely important'.[106] In *SCA Packaging Ltd v Boyle*[107] the Law Lords extended the definition of disability to make it easier for people to be classified as disabled if their impairment could recur when they were not receiving treatment for their condition.

On the downside, the courts have, in this writer's view, failed to recognize the needs of people with disabilities in two important contexts—that of the right to commit suicide and that of 'disability-related' discrimination. In the former the Law Lords ran scared of the 'slippery scope' argument in the 2001 case of *R (Pretty) v DPP*, where a woman with motor neurone disease wished to have it made clear that her husband would not be prosecuted for assisting a suicide if he helped her to depart this life at a time of her own choosing.[108] The European Court of Human Rights endorsed that position even though it amounted to blatant discrimination against people who have severe disabilities.[109] In 2009, in its last ever set of judgments, the House of Lords obviously felt uncomfortable with such an outcome and so required the Director of Public Prosecutions to issue guidelines on the sorts of factors that would in future be taken into account when a decision was being made on whether to prosecute someone for assisting a suicide.[110]

In *Lewisham London Borough Council v Malcolm* the House held that there had not been a sufficient connection between the applicant's schizophrenia and the decision to re-possess his property in order to trigger the discrimination provisions in the Disability Discrimination Act 1995.[111] Four of their Lordships thought it was appropriate to compare the applicant with someone who was not suffering from schizophrenia, but Baroness Hale deduced from the Parliamentary history of the legislation that Parliament did not intend such a comparison to be made. In any event, the government was unhappy with the House's decision and a few months later it issued a consultation paper on how best to reform the law. This eventually resulted in the enactment of section 15(1) of the Equality Act 2010, which stipulates that A discriminates against a disabled person B if A treats B unfavourably 'because of something arising in consequence of B's disability'. This reform considerably broadens the grounds on which a discrimination claim can be lodged.[112]

Ageism

The Supreme Court has recently issued the first ever decisions by the top court concerning ageism, and the Justices once again touch upon the thorny issues of whether

[106] Ibid, [70].
[107] [2009] UKHL 37, [2009] ICR 1056.
[108] [2001] UKHL 61, [2002] 1 AC 800. See too Ch 8 above, at 227–9.
[109] *Pretty v UK* (2002) 35 EHRR 1.
[110] *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345. See Ch 8 above, at 228–9.
[111] [2008] UKHL 43, [2008] 1 AC 1399.
[112] As yet it has not been extended to Northern Ireland, where the *Malcolm* decision still represents the law.

direct discrimination can ever be justified and what amounts to justification of indirect discrimination. In *Seldon v Clarkson Wright and Jakes*[113] a firm of solicitors required one of its partners to leave the partnership at the end of the year in which he became 65. Mr Seldon claimed this was either direct or indirect discrimination, but he effectively lost on both points, because the Supreme Court remitted the case to the employment tribunal for it to consider whether the choice of a mandatory retirement age of 65 was a proportionate means of achieving the legitimate aims of the partnership (namely, giving non-partner solicitors an opportunity to attain a partnership within a reasonable time and thereby an incentive to remain with the firm; facilitating workforce planning by clarifying when vacancies were to be expected; and limiting the need to expel underperforming partners, thus contributing to a congenial and supportive culture within the firm). In the pendant case of *Homer v Chief Constable of West Yorkshire Police*[114] the applicant complained of indirect discrimination when he was effectively blocked from attaining the highest grade in the place where he worked as a legal advisor, the Police National Legal Database, because he did not have a law degree. He was 62 and due to retire at 65, but he would have needed four years of part-time study to acquire a law degree. The House allowed his appeal on the basis that there had been indirect discrimination but, as in the *Seldon* case, it remitted the case to the employment tribunal for a consideration of whether there was justification for this discrimination. Apart from illustrating all too well the unduly prolonged nature of discrimination proceedings (both claims had been through four levels of hearing before being sent back to the original tribunal), these decisions once again demonstrate how difficult it can be for those who feel discriminated against to prove their case. Ageism is a field in which there is likely to be considerably more litigation within the next few years, some of which is almost bound to culminate in the Supreme Court.

The contribution of Baroness Hale

Baroness Hale was appointed to the House of Lords in January 2004 and she remains the only woman to have been appointed to the United Kingdom's highest court. Prior to her appointment she had already established a reputation for being a strong advocate of women's rights and of the need to take account of a woman's point of view when debating controversial legal issues. While serving in the Court of Appeal she issued several judgments showing her firm commitment to feminism.[115] In the House of Lords and Supreme Court she may have found it more difficult to win arguments, but she has doggedly persevered in reminding her male colleagues that more often than not there is a way of looking at a legal problem which differs depending on the gender of the viewer. While she concedes that feminist judges cannot have an 'agenda' to shape the law to their own design, she adds that 'they can certainly bring their own experience and understanding of life to the interpretation or development of the law or to its

[113] [2012] UKSC 16, [2012] ICR 716.
[114] [2012] UKSC 15, [2012] ICR 704.
[115] eg *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48; *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2003] QB 20; see too Hale (2001b) and (1999).

application in individual cases'.[116] She has even suggested, tongue in cheek, that her own appointment as a Lord of Appeal may not have been entirely legal.[117]

Her Ladyship's tendency to forefront a feminist perspective was made evident within four months of taking up her appointment in the Lords. In *Chief Constable of West Yorkshire Police v A (No 2)*[118] she delivered the most substantial opinion when holding that a woman who had applied to become a police constable had been unlawfully discriminated against when she was rejected on the ground that, being a transsexual, she could not search someone who was of her original male gender, nor someone who was of her new gender. Baroness Hale emphasized that EC law (not European Convention law) required the relevant statutory provisions to be interpreted in a way which protected a transperson's acquired gender. Her very use of the term 'transperson' in the opening sentence of her judgment immediately sent a signal that she for one was not trapped in outdated thinking about this topic. She concluded that, in 1998, when the discrimination in this case occurred, EC law required a transperson to be recognized in her reassigned gender for the purposes covered by the Equal Treatment Directive.[119]

On the same day as her opinion in *A (No 2)* was issued Baroness Hale joined with two of her colleagues in holding that the supermodel Naomi Campbell could recover damages from Mirror Newspapers for revealing details of the drug therapy she was receiving.[120] A month later she agreed with the reasons given by Lord Bingham for dismissing the appeals in *R (Ullah) v Special Adjudicator* and she did not demur from his dictum that '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[121] It seems, however, that she has rowed back on that position.[122]

Baroness Hale gave the lead judgment in *Archibald v Fife Council*,[123] mentioned above,[124] on the extent of an employer's duty to take reasonable steps to prevent a disabled employee from being at a disadvantage when compared with employees who are not disabled. The female claimant had been a road sweeper for the council but had become unable to continue in that role because of a disability she had developed. She was retrained for sedentary work but failed to get appointed to any of the more than 100 posts for which she then applied within the council. Eventually she was sacked for incapacity. The courts had to decide whether the positive discrimination which is permitted by the Disability Discrimination Act 1995 meant that on these facts the council had to ensure not just that the claimant was qualified to be transferred to a non-manual job but also that she was actually transferred. Because the employment tribunal had not accepted the latter option as legally possible, which the House said it was, the case was remitted to the tribunal for reconsideration.

[116] Hale (2010), v; see too Hale (2001a) and Hunter (2008).
[117] Hale (2005).
[118] [2004] UKHL 21, [2005] 1 AC 51.
[119] Ibid, [63].
[120] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.
[121] [2004] UKHL 26, [2004] 2 AC 323.
[122] Hale (2012). See too 331 below, and Ch 2 above, at 39–43.
[123] [2004] UKHL 32, [2004] ICR 954.
[124] See 325.

Perhaps the most remarkable difference of opinion featuring Baroness Hale occurred in *R v J*,[125] where her four male colleagues all held that it was not permissible to prosecute a man (who was in his 30s) for the indecent assault of a woman when the victim in question was a girl under the age of 16 and the 12-month time limit for prosecuting him for the offence of having unlawful intercourse with a girl under that age had expired. Although there is no obvious display of animosity between Baroness Hale and her colleagues in the sequence of opinions, it is clear that she looked at the situation from a wholly different perspective. Lord Bingham described the kind of interpretation placed on the legislation by Baroness Hale as 'impossible',[126] while Lord Steyn said the conclusion he and his male colleagues had reached was 'inescapable'.[127] Lords Clyde and Rodger each thought that Parliament's intention was clear at the time, even though the legislation concerned had recently been amended.[128] For Baroness Hale, however, the majority's approach to statutory construction was by no means the only plausible one. She pointed out that the Sexual Offences Act 1956 had developed piecemeal over time, that it was not possible to say whether the more general or the more specific offence was legislated for first, and that there were many situations in which the two offences were not mutually exclusive.[129] She politely chided her brethren with the words: 'Although we do have to try to make sense of the words Parliament has used, we do not have to supply Parliament with the thinking that it never did and words that it never used'.[130] In answer to the argument that to prosecute the man in this case for indecent assault would be an abuse of process (the view of Lords Steyn and Clyde), she pointed out the harm that can be caused by older men in a position of trust who take advantage of the vulnerability of young girls: 'it can cause untold damage to their self-esteem, their capacity to form ordinary intimate relationships in the future, and their perceptions of how to live in families, all of which are so crucial to their own ability to be effective partners and parents in their turn'.[131] She thought that the public conscience would be more affronted by prohibiting prosecutions in these situations than by allowing them.[132]

A feminist perspective was also displayed in *R (Kehoe) v Secretary of State for Work and Pensions*,[133] where Baroness Hale was again the sole dissenter when her colleagues held that the Child Support Act 1991, in denying a mother access to a court in order to claim financial support for her children from their father, was not in violation of the mother's rights under Article 6 of the European Convention concerning access to justice. The male judges all held that the Act presented a substantive rather than a procedural bar to recovery, and that no 'rights' were engaged. But in Baroness Hale's view the case was indeed about rights, although children's rights rather than adults'

[125] [2004] UKHL 42, [2005] 1 AC 562.

[126] Ibid, [18]. He added: 'what possible purpose could Parliament have intended to serve by prohibiting prosecution under section 6 after the lapse of 12 months if exactly the same conduct could thereafter be prosecuted, with exposure to the same penalty, under section 14?'

[127] Ibid, [37].

[128] Ibid, [44] and [60]–[63], respectively.

[129] Ibid, [86]–[88].

[130] Ibid, [89].

[131] Ibid, [78].

[132] Ibid, [81].

[133] [2005] UKHL 48, [2006] 1 AC 42. See too Ch 7 above, at 197–8.

rights. By explaining the history behind the common law's imposition of a parental duty to maintain children, she presented a plausible argument to the effect that the 1991 Act had not removed that common law obligation and that women should therefore still be allowed to seek its enforcement through the courts. As she was aware of her own reputation in this field of law, she ended her judgment by saying that her conclusion 'comes as no surprise'.[134] On this occasion, however, Baroness Hale was even more rights-orientated than the judges of the European Court of Human Rights, for when Mrs Kehoe later lodged an application in Strasbourg she was unsuccessful.[135]

In *M v Secretary of State for Work and Pensions*[136] Baroness Hale was once more the lone dissenter when her brethren held that a woman who was now in a relationship with another woman was not eligible for a reduction in her liability to pay child maintenance to her former husband (even though she would have been eligible had she been in a relationship with a man) and that this did not constitute a breach of any provision in the European Convention. On this occasion the Baroness was vindicated, because when the woman in question took her case to Strasbourg she won.[137] Baroness Hale's position on the calculation of child support also prevailed in the House's three-to-two decision in *Smith v Secretary of State for Work and Pensions*,[138] where the majority held that, in assessing the earnings of a self-employed non-resident parent (usually a man), capital allowances are not deductible. In support of her construction of the legislation Baroness Hale cited the UN Convention on the Rights of the Child, which imposes on parents the primary responsibility to secure, 'within their abilities and financial capacities', the conditions of living necessary for the child's development',[139] and she concluded: 'Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken'.[140]

In *Percy v Church of Scotland Board of National Mission*[141] Baroness Hale joined in holding that a female minister of the Church of Scotland had an employment contract with the Church[142] and that her discrimination claim (that if she had been a male minister who had had an affair with a married woman she would not have been required to resign) was not a 'spiritual matter' within the exclusive cognisance of her church. An employment contract, said Baroness Hale, does not deal in spiritual matters.[143]

Naturally Baroness Hale was happy to go along with her colleagues in allowing the two appeals in *Fornah v Secretary of State for the Home Department*,[144] where one woman was claiming asylum because she feared persecution for reasons of family membership if she were sent back to Iran and the other feared female genital mutilation if she were

[134] Ibid, [77].
[135] *Kehoe v UK* (2009) 48 EHRR 2. The seven judges, of which three were women, unanimously found no violation of either Art 8 or Art 13 of the Convention.
[136] [2006] UKHL 11, [2006] 2 AC 91. See Wintemute (2006).
[137] *JM v UK* (2011) 53 EHRR 6.
[138] [2006] UKHL 35, [2006] 1 WLR 2024. Lords Nicholls and Rodger dissented.
[139] Article 27(2).
[140] [2006] 1 WLR 2024, [78].
[141] [2005] UKHL 73, [2006] 2 AC 28.
[142] Lord Hoffmann dissented on this point.
[143] [2006] 2 AC 28, [152].
[144] [2006] UKHL 46, [2007] 1 AC 412.

returned to Sierra Leone. Both women were held to be members of a 'particular social group' for the purposes of the 1951 Refugee Convention. And in *Derbyshire v St Helens Borough Council* she again joined in allowing the appeal of 39 women who had been subjected to adverse treatment by the local council because they had persisted with their claim for equal pay.[145]

But it should by no means be assumed that Baroness Hale is a 'soft touch' when it comes to human rights arguments. On many occasions she has been on the side of rejecting such arguments, even when the decision has impacted quite harshly on the claimant or when one or more of her brethren have been in favour of upholding the argument. Thus, in *N v Secretary of State for the Home Department*[146] she joined in reversing an immigration adjudicator's decision that sending a failed asylum seeker back to Uganda, even though she was suffering from HIV/AIDS, would be a violation of her right not to be subjected to inhumane treatment. The Lords so held despite the fact that the woman in question had been kidnapped by the Lords Resistance Army in Uganda for two years and had then been held by the Ugandan security forces, where she was raped. Because the claimant would not be in danger of persecution if she was returned to Uganda, and even though the treatment she would receive for her HIV/AIDS would be very inadequate compared to the treatment available in the United Kingdom, this was, in Baroness Hale's words, one of the 'sad cases where we must harden our hearts' and not one of the 'even sadder cases where to do so would be inhumane'.[147] True to her then support for the *Ullah* principle,[148] she did not think she could impose greater obligations on the United Kingdom than Strasbourg jurisprudence warranted, 'much though I would like to be able to do so'.[149] She did not consider whether the common law could come to the assistance of the claimant in this regard. The sub-text in this case, never openly expressed, was that to allow this woman's claim would be to open the flood-gates to sick people around the world, who might try to enter the United Kingdom and then claim that sending them back to a country where the medical treatment they would receive would be of a much lower standard would be inhumane.

Likewise, in *R (SB) v Head Teacher and Governors of Denbigh High School*,[150] Baroness Hale agreed that a school's uniform policy, under which Muslim girls were allowed to wear the shalwar kameeze but not the jilbab, was not in violation of Article 8 nor of Article 2 of Protocol No 1 (the right to education) in the European Convention. And in *Secretary of State for Trade and Industry v Rutherford*[151] she agreed that provisions in the Employment Rights Act 1996, which removed rights to compensation for unfair dismissal and redundancy pay after the age of 65, were not indirectly discriminatory against men merely because many more men than women work beyond the age of 65. She did not believe that the detriment in question had a sufficiently different impact on men when compared with women (even though the statistics showed that 40 per cent

[145] [2007] UKHL 16, [2007] ICR 841. See too 321 above.
[146] [2005] UKHL 31, [2005] 2 AC 296. See Palmer (2005).
[147] [2005] 2 AC 296, [59].
[148] See Ch 2 above, at 39–43.
[149] [2005] 2 AC 296, [71].
[150] [2006] UKHL 15, [2007] 1 AC 100. See too Chs 2 and 9, at 43–6 and 267–8 respectively.
[151] [2006] UKHL 19, [2006] 4 All ER 577.

more male workers were affected than female workers). Nor did Baroness Hale make any particularly 'feminist' points in the important case on distribution of assets following a divorce, *Miller v Miller*.[152] In *AL v Secretary of State for the Home Department*[153] Baroness Hale gave the main judgment in a case where the Lords held that the government's policy of distinguishing, in immigration cases, between people who had families and people who did not was not discriminatory under Article 14 of the European Convention, although she expressed 'considerable misgivings and regrets' about the result.

Since the founding of the Supreme Court Baroness Hale has continued to set many of her judgments within a feminist context. Most notably, she was the sole dissenter in the case concerning the enforceability of pre-nuptial contracts, *Granatino v Radmacher*.[154] The eight male Justices held that the common law rule, according to which agreements for the future separation of parties to a marriage were contrary to public policy, was obsolete. Instead, weight should be given to the pre-nuptial agreement (as with post-nuptial agreements), provided that each party entered into it of his or her own free will, without undue influence or pressure, with full information, and with the intention that it should be effective. Baroness Hale's view was that this was a reform which only Parliament should initiate. As a former chairperson of the Law Commission, she was well aware of the care which goes into the compilation of reports on law reform, and she was obviously nervous of the courts making law in this area when dealing with a factual situation which was outside the norm in that the wealthier party here was the wife, not the husband. Having noted that English law had reached a position 'where the differing roles which [a wife and husband] may adopt within the relationship are entitled to equal esteem', she observed that the question arising in this case was 'how far individual couples should be free to re-write that essential feature of the marital relationship as they choose'.[155] One of the advantages of leaving law reform in this area to Parliament, after the Law Commission has produced a report, is that opinions differ as to whether it is permissible 'to contract out of the guiding principles of equality and non-discrimination within marriage' or whether this is 'a retrograde step likely only to benefit the strong at the expense of the weak'.[156] Baroness Hale added: 'In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman'. This is a bold statement, one which comes close to saying that male judges cannot be relied upon to arrive at the appropriate solution to this kind of problem, not unless there are more women judges in the group to remind them of the typical scenario, in which the wife would not benefit from a pre-nuptial agreement.[157] But it seems that there is much support for Baroness Hale's position in legal academia, with one group of writers commenting that:

> For those who adhere to the Realist School of jurisprudence it might seem relevant to observe the fact that the majority of eight justices was made up of men, several of

[152] [2006] UKHL 24, [2006] 2 AC 618 (also known as *McFarlane v McFarlane*).
[153] [2008] UKHL 42, [2008] 1 WLR 1434.
[154] [2010] UKHL 42, [2011] 1 AC 534.
[155] Ibid, [132].
[156] Ibid, [135].
[157] See Meehan (2010), Herring et al (2011), and Harris et al (2011).

> whom have a background in commercial law where the sanctity of contract is a vital principle and two of whom are Scottish lawyers whose domestic law already gives special recognition to ante-nuptial agreements. By contrast, the minority was a woman and the sole family law expert on the bench in this ground breaking case.[158]

It is impossible in the space available to give a comprehensive account of Baroness Hale's contribution to this field of law, but enough has been said to indicate that it is significant. It is public knowledge that she was unsuccessful in her bid to be appointed as the President of the Supreme Court in succession to Lord Phillips in 2012, but that does not mean that she is in any less powerful a position than before to raise awareness within the Court of the female perspective on issues and of the importance of equality as a legal value. No doubt she will continue to do so with her customary panache, even if at times she ruffles a few judicial feathers.[159]

Other equality issues

Some evidence that the House of Lords adopted an approach to equality that was not out of step with that promoted by the European Court of Human Rights is provided by the fact that it was not until 2011 that a decision of the Lords was overturned in Strasbourg on the ground that Article 14 (the right to be free from discrimination) had been violated.[160] But it also says something about the limited nature of the 'equality' which Article 14 itself provides. It is, of course, primarily an anti-discrimination provision and, although it ends with the famous phrase 'or any other status', as if that brings within its scope all other possible grounds for unfairly discriminating between people, the attitude of the European Court towards the meaning of those words has been quite conservative, at least until recently.[161] And in this regard the House of Lords and Supreme Court have not been any more radical than the European Court.

Reference has already been made to the refusal of both the House of Lords and the European Court to apply Article 14 in situations where people with disabilities are unable to do things which able-bodied people can do.[162] Nor did either court think, in the *Dudson* case, that a person who was under 18 years of age when he committed a murder was entitled to an oral hearing when the Lord Chief Justice was reviewing the 'tariff' period set for the offence, that is, the minimum period during which the defendant has to remain in prison in order to satisfy the requirements of retribution and deterrence for the offence in question.[163] Part of the applicant's argument was that these arrangements failed to take proper account of his youthfulness when he committed

[158] Harris et al (2011), 372.

[159] As in *R (McDonald) v Kensington and Chelsea Royal LBC* [2011] UKSC 33, [2011] 4 All ER 881, where Baroness Hale, who dissented, was overtly criticized by some of her male colleagues for suggesting that their decision could leave the elderly applicant in a disgusting physical state.

[160] *JM v UK* (2011) 53 EHRR 6.

[161] O'Connell (2009).

[162] See the discussion of the *Pretty* case at 326 above.

[163] *R (Dudson) v Secretary of State for the Home Department* [2005] UKHL 52, [2006] 1 AC 245; *AD v UK* App No 39586/05, decision of 25 August 2009.

the crime (he was 16), but neither the House nor the European Court could see any improper discrimination in this.[164]

This was also the position of both courts in another important case in which the whole rationale underlying Article 14 was at issue. This was *R (Carson) v Secretary of State for Work and Pensions*,[165] where a British writer living in South Africa complained that she was not being paid the annual increases to her British state pension which pensioners living in the United Kingdom, or in some other countries, such as the United States, with which the United Kingdom had reciprocal arrangements, were being paid. The core question was whether living in a different place qualified as an 'other status' for the purposes of Article 14. The Lords, the Chamber of the European Court, and the Grand Chamber of the European Court, all held that on the facts of this case it did not, but in each of the courts there were dissenters—one in the Lords (surprisingly, Lord Carswell), one in the Chamber (the judge from Poland), and six in the Grand Chamber. In the Lords, all the judges were at pains to try to simplify the approach to Article 14 cases, much as they had tried to simplify the approach to Convention rights in general in the case of *R (SB) v Denbigh High School*[166] and were to do so again in *Belfast City Council v Miss Behavin' Ltd*.[167]

More particularly, their Lordships declined to apply, as Stanley Burnton J had done at first instance in *Carson*, the so-called 'Michalak questions', which derived from Brooke LJ's judgment in *Wandsworth LBC v Michalak*[168] and ultimately from the treatment in a leading practitioner's book on human rights law.[169] These questions required judges in Article 14 cases to ask, firstly, do the facts fall within the ambit of one of the Convention rights; secondly, if yes, was the complainant treated differently in relation to that right when compared with others; thirdly, were those others in an analogous situation to that of the complainant; and fourthly, if yes, was there an objective and reasonable justification for the different treatment? Stanley Burnton J had added a fifth question, namely, was the different treatment based on a prohibited ground?[170] As far as Lord Nicholls was concerned, he preferred to keep the approach in Article 14 cases 'as simple and non-technical as possible', the essential question being whether the difference in treatment 'can withstand scrutiny'. Where the relevant difference was not obvious, the scrutiny should be directed at whether the different treatment has a legitimate aim and whether the means chosen to achieve it are appropriate and proportionate.[171] Lord Hoffmann was more specific: he did not like the way the third and fourth of the *Michalak* questions overlapped: if the complainant was not in an analogous position with the comparators, in what kind of case did the judge have to consider the fourth question at all? He implied that the third and fourth questions could be replaced with

[164] His tariff was originally set at 18 years, while that of his three adult co-defendants was 25 years; on review the Secretary of State accepted the Lord Chief Justice's recommendation that it be reduced to 16 years.

[165] [2005] UKHL 37, [2006] 1 AC 173.

[166] [2006] UKHL 15, [2007] 1 AC 100. See too Ch 2 above, at 43–6.

[167] [2007] UKHL 19, [2007] 1 WLR 1420. See too Ch 2 above, at 45–6.

[168] [2002] EWCA Civ 271, [2003] 1 WLR 617.

[169] Beatson et al (2008), paras 3–174 to 3–181.

[170] [2002] EWHC 978 (Admin), [2002] 3 All ER 994, [51].

[171] [2006] 1 AC 173, [3].

one single question: 'is there enough of a relevant difference between X and Y to justify different treatment?'[172] Lord Rodger also said that 'a court faced with a case of alleged discrimination should not go mechanically through a series of questions'; instead, it should identify the particular issue which has to be resolved, and often that will be whether the complainant is really in an analogous situation to that of someone who is treated more favourably.[173] Lord Walker was similarly sceptical of the step-by-step approach promoted in *Michalak*, and he went further to suggest that the focus on the use of comparators, which has been a central feature of UK discrimination law since the Sex Discrimination Act 1975, was no longer necessary: the European Court had never shared that fixation, preferring instead to ask whether the applicant was in an analogous situation to that of others who were being treated more favourably.[174] Finally, Lord Carswell also suggested that a more simple approach should now be adopted to Article 14 cases: he described the *Michalak* questions as forming 'a Procrustean bed' into which some cases are forced.[175]

Turning to whether the position of Mrs Carson was indeed 'analogous' to that of people living in the United Kingdom or in some other countries who did receive annual increases to their pensions, the four Lords in the majority were fairly abrupt in finding that she was not. Lord Hoffmann prefaced his conclusion by reminding us that:

> [w]hether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means.[176]

He suspected the Strasbourg court had given Article 14 a wider interpretation than was originally intended, comparing the current position to that which prevails in the United States under the Fourteenth Amendment to the Constitution. He therefore thought it was necessary 'to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some justification'.[177] He added that it is usually easy to decide whether a case involves the right to respect for the individuality of a human being or 'merely a question of social policy', the former being very hard to justify and the latter usually depending upon 'considerations of the general public interest'.[178] In Mrs Carson's case he thought it was clear that her position was not the same as people living in the United Kingdom: social security systems are generally considered to be national in character, the fact that Mrs Carson had paid national insurance contributions was a necessary but not sufficient condition for the state retirement pension, she was no longer a UK taxpayer, people living outside the United Kingdom could have been paid no pension at

[172] Ibid, [31].

[173] Ibid, [43]–[44].

[174] Ibid, [61]–[70]. He cited two examples from the European Court's jurisprudence: *Van der Mussele v Belgium* (1983) 6 EHRR 163 and *Johnston v Ireland* (1986) 9 EHRR 203, cases of some vintage but still representative of the European Court's preferred approach.

[175] Ibid, [97].

[176] Ibid, [15].

[177] Ibid. He cited the US Supreme Court case of *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307.

[178] [2006] 1 AC 173, [16].

all, and the government was acting rationally in entering into reciprocal arrangements with other countries when doing so brought no economic disadvantage to the United Kingdom.[179] For Lord Walker an additional reason for finding that Mrs Carson was not in an analogous situation was that place of residence was not a 'personal characteristic' such as to trigger the phrase 'other status' in Article 14, and he cited both European Court and House of Lords authority for that view.[180] He too was taken by the approach adopted in the United States, where the Supreme Court subjects 'suspect' grounds of discrimination to particularly severe scrutiny, as the European Court does when faced with grounds such as race, gender, illegitimacy, religion, nationality, and sexual orientation. He did not think that place of residence was like any of those grounds, although he did not expressly consider whether it could qualify for protection as less than a suspect ground. If justification were needed for the different treatment, Lord Walker saw it in the fact that: '[t]his is an issue of macro-economic policy which is eminently within the province of the legislature and the executive'.[181] Yet Lord Carswell, the lone dissenter, thought that no macro-economic policy was involved:

> In short, pensions were becoming too expensive to pay at the full rate to all those who had contributed, so the Government had to find some means of keeping down the cost, and the chosen means of doing so was to deprive one class of uprating. Inclusion of individual pensioners in this class depended on the adventitious matter of whether this country had in the past entered into a reciprocal agreement with the particular states in which they reside. I do not find it possible to regard the selection of this class for less favourable treatment as a matter of high state policy or an exercise in macro-economics.[182]

When the case was taken to Strasbourg the majority of judges agreed with the House of Lords, but they did stress that place of ordinary residence *is* an aspect of personal status for the purposes of Article 14.[183] Here, however, the applicants were not in an analogous position to people living in the United Kingdom, because national social security systems are intended to provide a minimum standard of living for those who are residing within the nation,[184] and nor were they in an analogous position to those living in countries with reciprocal arrangements, because countries differ greatly with respect to matters such as taxation and inflation. In any event, individuals do not need as much protection against differences of treatment based on their choice of where to live as they need against differences based on their inherent characteristics such as gender or race (a rather question-begging assumption perhaps).[185] Moreover, '[b]ecause of their

[179] Ibid, [18]–[27].

[180] Ibid, [53]–[54]. The cases cited were *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979–80) 1 EHRR 711 and *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196.

[181] Ibid, [80].

[182] Ibid, [99].

[183] *Carson v UK* (2009) 48 EHRR 41, para 76; (2010) 51 EHRR 13 (GC), para 70–1. In *JW and EW v UK* App No 9776/82, decision of 3 October 1983, 34 DR 156, the European Commission declared inadmissible an application from a British pensioner living in Australia who had been denied an uprated pension.

[184] This is recognized by the ILO's Social Security (Minimum Standards) Convention 1952, Art 69, and by the European Code of Social Security 1964, Art 68, and European Code of Social Security (Revised) 1990, Art 74(10)(f).

[185] Note 183 above, paras 73–82 (Chamber) and paras 83–90 (GC).

direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"'.[186]

While there was a happy coincidence as regards the positions adopted by the Lords and the European Court in *Carson*, shortly afterwards the bodies were at loggerheads again in two further cases. In the first, *M v Secretary of State for Work and Pensions*,[187] we have already noted that Baroness Hale rightly predicted, through her dissent, that the European Court would consider it to be a breach of Article 14 of the Convention for a lesbian mother not to be allowed to reduce her liability to pay child maintenance to her former male partner just because she was now living with a woman rather than with another man. The majority in the Lords wrongly believed that the Strasbourg Court did not view gay and lesbian relationships as falling within the scope of the right to respect for family life under Article 8 of the Convention.[188] In the second case, *R (Clift) v Secretary of State for the Home Department*,[189] the House held that applying a different early release scheme to prisoners depending on whether they had been given a determinate sentence of 15 years or more was not discriminatory under Article 14 read in conjunction with Article 5 (the right to liberty). Here again the House refused to go beyond what the European Court had already decided, even though it was well aware of the anomaly in question (the European Court having already held that discretionary life prisoners, automatic life sentence prisoners, mandatory life sentence prisoners, and juveniles detained at Her Majesty's Pleasure should all benefit from a release scheme determined by a judge rather than by a government minister). The Strasbourg Court held that the House's position was out of date: there was no objectively justifiable reason for applying a different early release system depending on whether the prisoners in question had received a determinate sentence shorter or longer than 15 years.[190] It is disappointing that the top UK court did not itself take the initiative to advance domestic UK law in this context. This is another unfortunate example of the dead hand of the mirror principle favoured by *Ullah*.

Conclusion

The record of the House of Lords and Supreme Court in the context of equality and freedom from discrimination has been reasonably good, but far from startling. In the interpretation of anti-discrimination legislation the top court has grown increasingly purposive in its approach, but the *Jewish Free School* case, albeit in the rather niche context of the traditions of one particular minority faith, has thrown up some basic differences in the way the Justices draw a distinction between direct discrimination, indirect discrimination, and non-discrimination. The court has been willing to promote the concept of equal pay but has refused to involve itself in policy choices which it deems

[186] (2009) 48 EHRR 41, para 73, citing *Stec v UK* (2006) 43 EHRR 47, para 52.
[187] [2006] UKHL 11, [2006] 2 AC 91. See also 330 above.
[188] *JM v UK* (2011) 53 EHRR 6.
[189] [2006] UKHL 54, [2007] 1 AC 484.
[190] *Clift v UK* App No 7205/07, judgment of 13 July 2010.

to be better left to elected politicians to decide. There has been something of a revolution in the attitude displayed towards transsexualism and homosexuality, and a decent start has been made to the application of new rules on ageism. But the way in which some cases on disability have been handled leaves a lot to be desired, and even in areas where the top domestic court has been more progressive it has still underestimated the lengths to which the Strasbourg Court wants national legal systems to go to protect the right to be free from discrimination. Whether a Supreme Court which is more diverse in its composition would be better at predicting the European Court's advances is a moot point, especially as the European Court has itself been slow to develop Article 14 in the way that many human rights activists would have wanted.[191]

[191] Baker (2006) and (2007).

12

Property, Education, Elections

Introduction

It is often glibly stated that the European Convention on Human Rights does not extend to the protection of social or economic rights. While this may be true of the original text of the Convention, the first of the 14 subsequent Protocols, which was agreed just 17 months after the Convention itself (on 20 March 1952) and entered into force less than nine months after the Convention (on 18 May 1954), does protect one important economic right (the right to peaceful enjoyment of one's possessions: Article 1) and one important social right (the right to education: Article 2). In addition, it safeguards an additional political right—the right to free elections (Article 3). Protocol 1 has been ratified by 45 of the 47 Member States of the Council of Europe.[1] These are all rights the wording of which the parties who negotiated the original Convention could not quickly agree upon, hence their postponement to a Protocol.[2] They have since gained a foothold in the EU's Charter of Fundamental Rights—as Articles 17, 14, and 39–40 respectively. The bulk of this chapter is devoted to the right to peaceful enjoyment of one's possessions—more usually referred to as the right to property—but there are also short sections on the right to education and the right to free elections, topics on which the United Kingdom's top court has not yet had much to say.

The right to property

English property law is not at all familiar with the notion that property is a human right. Instead, English law has protected property on the basis of agreements, inheritance or, sometimes, mere possession. The allocation of diverse interests in land, goods, and money has by and large taken place on the basis of commercial profit. The concept of a trust, for example, was specifically developed to allow a division to be made between those who manage property and those who actually benefit from that management. Even today, notwithstanding the Human Rights Act 1998, textbooks on English property law have very little to say about the interaction between property law and human rights norms.[3] However, as we have seen in relation to the right to respect for one's

[1] The exceptions are Monaco and Switzerland.

[2] Bates (2010), 100.

[3] See eg Burn and Cartwright (2011), 22–4; Dixon (2010); Thompson (2009), 62–3, where Art 1 of Protocol No 1 is not even mentioned; and Clarke and Kohler (2005), where even less is said about the 1998 Act. For thought-provoking analyses, however, see Howell (2007), Allen (2005), and Gray (2002). McFarlane (2008), 41–56 considers useful hypothetical examples and argues that the general trend is towards horizontal application of the 1998 Act, with important consequences for private landowners, which worries him: 'Replacing established rules with individual decisions based on human rights principles may seem attractive but will lead to uncertainty and consequent confusion and expense' (at 632).

home,[4] it cannot be assumed that those norms are irrelevant. There is every chance that they will come to play a much greater role in this context than has been the case to date.

Article 1 of Protocol No 1 to the European Convention is already one of the most frequently cited of the Convention provisions, both in domestic proceedings and at Strasbourg. The issues which most often arise are twofold: firstly, what kind of interest qualifies as being worthy of protection and, secondly, when is an interference with that interest justified? To facilitate an examination of what the House of Lords and Supreme Court have said about these issues, it is useful to begin by setting out Article 1 of Protocol No 1 in full:

> (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The European Court has made it clear that this wording can be broken down into three distinct principles: (1) that once a person or company acquires an interest in property, that interest deserves protection (but the article confers no right to property in the first place); (2) that no-one should be deprived of his or her interest in property unless (with a few exceptions) compensation is provided for that deprivation; and (3) that, although the state can control the way in which property interests are used, it must do so only if the control has a legitimate aim and is exercised in a balanced and proportionate way.[5]

The House of Lords was, as in so many other domains, very cautious in its approach to the interaction between English property law and human rights law. Howell[6] regrets that the Law Lords did not take the opportunity to clarify the relationship in *YL v Birmingham City Council*,[7] a leading case on what counts as a public authority for the purposes of the Human Rights Act 1998,[8] but she was writing before the decision in *JA Pye (Oxford) Ltd v Graham*,[9] which is a centrepiece of this chapter, and also before the cluster of decisions around the protection of the right not to be evicted from one's home.[10]

[4] See Ch 8 above, at 242–56.

[5] The origin of this trio of rules is *Sporrong Lönnroth v Sweden* (1983) 5 EHRR 35. They were confirmed in, amongst other cases, *James, Webster and v UK* (1986) 8 EHRR 123. See Reid (2012), 679–93.

[6] Howell (2007), 635. She notes that in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] AC 674 the Lords objected to being set an 'examination paper' in the law relating to village greens, but that they did answer it.

[7] [2007] UKHL 27, [2008] 1 AC 95.

[8] See Ch 3 above, at 59–63.

[9] [2002] UKHL 30, [2003] 1 AC 419.

[10] Discussed in Ch 8 above, at 242–56.

The pre-Human Rights Act decisions

Decisions taken by the House of Lords on property issues prior to the coming into force of the Human Rights Act 1998 were challenged in Strasbourg on no fewer than 10 occasions.[11] In the first nine of these the application was declared inadmissible and in the tenth, the *Pye* case, a Chamber of the Court first upheld the claim on the merits but the Grand Chamber then reversed that decision. Since the Human Rights Act 1998 there have been at least 12 occasions on which the United Kingdom's top court has considered Article 1 of Protocol No 1 and in seven of these cases applications were subsequently lodged in Strasbourg grounded on that provision.[12] Three of these seven applications culminated in a friendly settlement (usually a sign that the UK government is prepared to concede that domestic law is out of step with the Convention's requirements), and a further two were declared inadmissible. Only two were considered on their merits: in one, both the Chamber and the Grand Chamber held for the state,[13] while in the other the Chamber held against the state.[14]

The early challenges to the House of Lords' decisions were in cases where the Lords themselves had not given any consideration to the human rights angle in the appeal before them, because English common law did not require them to do so and the Convention had not yet been incorporated into domestic law by statute. In *Gold Star Publications Ltd v DPP*[15] the publishers of allegedly obscene magazines challenged an order made by Croydon Magistrates' Court requiring the forfeiture of some 145,000 magazines which were destined for export. By four to one the Law Lords interpreted the words 'kept for publication or gain' in the Obscene Publications Act 1959[16] as embracing articles intended for publication abroad, and so upheld the forfeiture order. In Strasbourg the European Commission found that the interference with the company's property rights was justified. While accepting the company's argument that the phrase 'in the public interest' in the second sentence of Article 1(1) must be understood as referring to the public interest of the United Kingdom, it continued:

> It has been submitted that the United Kingdom should not be concerned with the protection of the morals of foreign subjects residing abroad, but . . . this is by no means the

[11] In the last three of these decisions the House of Lords listened to counsel's arguments on Art 1 of Protocol No 1 but refused to apply the provision because the 1998 Act was not in force at the time of the facts in question. See the *Pye* case (349–51 below), the *Spath Holme* case (351–2 below), and the *Allen* case (352–3 below).

[12] The five cases which did not proceed to Strasbourg were *Aston Cantlow* (see 353–4 below); *Wilson* (see 354–5 below); *Marcic* (see 355–6 below); *RJM* (see 361 below); and *Waja* (see 366 below). There were a further three applications in cases decided by the House of Lords but in which that court did not itself consider Art 1 of Protocol No 1. These were *Hickey v UK* (see 362 below); *Hoare v UK* (see 364 below); and *Ofulue v UK* (see 365 below), and in each of them the application was declared inadmissible.

[13] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, leading to *Carson v UK* (2009) 48 EHRR 41 (6 v 1) and (2010) 51 EHRR 13 (GC) (11 v 6). See too Ch 11 above, at 334–7.

[14] *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, leading to *JM v UK* (2011) 53 EHRR 6. See too Ch 11 above, at 324 and 330.

[15] [1981] 1 WLR 732. The case had already been unsuccessfully appealed to the Crown Court and the Divisional Court of the Queen's Bench Division: (1980) 71 Cr App R 185. See too Ch 10 above, at 304–5.

[16] Section 3(1) and (3). Lord Simon dissented.

> exclusive objective of the legislation. If it is justified for the protection of morals in the United Kingdom itself to prevent persons on its territory to engage in the publication of obscene matter for gain, including activities of this kind which serve as the basis of an export trade, then it follows a fortiori that if the measures recurred to for this purpose take the form of a deprivation of possessions, they must also be considered as being in the public interest of the United Kingdom. This is the more so as the term 'public interest' is not inherently limited to the protection of morals and clearly encompasses such considerations as the desirability to prevent an export trade in pornography.[17]

The Commission added that there was nothing contrary to 'the general principle of international law' in any such conclusion, any more than there would be if a country banned the export of a certain product altogether from its borders. The Law Lords had not therefore acted in a way which breached human rights, and, given the absence of the concept of human rights from English law, the very thought of doing so had probably never entered their heads.

Just four months later the European Commission again declared inadmissible an application based largely on Article 1 of Protocol No 1. This was in the high-profile dispute over the nationalization of BP's oil fields in Libya by Colonel Gaddafi. As contract and restitution lawyers will know, the dispute gave rise to the House of Lords' first opportunity to consider the applicability of the Law Reform (Frustrated Contracts) Act 1943, the net effect of which was to require Mr Hunt, a US citizen, to repay to BP some US$24 million for the 'valuable benefit' he had received prior to the nationalization of the oil fields.[18] In Strasbourg Mr Hunt's lawyers argued that the apparent arbitrariness of the House of Lords' decision in depriving the applicant of the benefit of his agreement with BP was a breach of 'the general principles of international law', referred to in Article 1 of Protocol No 1, in that: '[A] State is internationally responsible for an act or omission which, under customary or conventional international law, is attributable to that State and causes injury to an alien. The domestic law of the State may not be raised as a defence, and may indeed be as in this case, the modality of the injury'.[19] But the European Commission did not even get to consider this argument because it held that the proceedings in the House of Lords did not in fact involve a 'deprivation' of the applicant's possessions within the meaning of Article 1:

> [I]n all the Member States of the Council of Europe which are parties to the Convention, relations between individual joint owners are regulated in private law in such a way as sometimes to require one individual to give up possessions of which he was the owner, to the other joint owner. Such regulations are in the exclusive province of private law and outside the scope of the Convention, unless state responsibility is in some way involved in affecting their exercise.[20]

Here, no state responsibility was engaged because the UK government was not a party to the proceedings and did not influence their outcome (even though it was a major shareholder in BP).

[17] *X Co v UK* App No 9615/81, decision of 5 March 1983; 32 DR 231, 'The Law', para 2.
[18] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, applying s 1(3) of the 1943 Act.
[19] *H v UK* App No 10000/82, decision of 4 July 1983; 33 DR 247, 253.
[20] Ibid, 257.

Foreign laws were again involved in *Rumasa SA v Multinvest (UK) Ltd*,[21] where a Spanish company and two Spanish banks (all controlled by the Spanish state as a result of a decree passed in 1983[22]) sued the former owner of Rumasa SA for breach of fiduciary duties and the recovery of some US$46 million. The former owner argued, amongst other things, that the proceedings against him in the United Kingdom were an attempt to enforce a foreign law which was penal or otherwise contrary to public policy. Affirming the approach taken in the lower courts,[23] the House of Lords held that the proceedings were an attempt to recover property to which the plaintiffs claimed to be entitled even before the 1983 decree had been passed, and that English law *would* recognize, without looking into their merits, the effects of foreign laws concerning compulsory acquisition of property. Needless to say, Article 1 of Protocol No 1 again played no part in the arguments put to their Lordships, though Lord Templeman did go out of his way to say that, far from legislation on compulsory acquisition being abhorred, it is in fact 'universally recognised and practised'.[24] He referred to constitutional provisions in France, the United States, Germany, India, and 'the African states which achieved independence from colonial rule'; he even referred to 'the 1969 South American Convention on Human Rights'[25] and '[t]he United Nations and European Conventions'.[26] He distinguished the case before him from that of *Oppenheimer v Cattermole*, where a Nazi law had deprived a Jew of his rights and his nationality just because of his 'race' and where Lord Cross had said: 'To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.[27]

The *Rumasa* case was remitted for trial in the Chancery Division, where the judge later held that the former owner of Rumasa was required to repay more than US$53 million, 9 million Swiss francs and 13 million German marks. The former owner then alleged in Strasbourg that his rights under Article 1 of Protocol No 1 had been breached.[28] He argued that the reasons given by the House of Lords for refusing to allow him to raise his defence in the English courts was no answer to a complaint based on Article 1, and that, as a result, he had also suffered violations of Articles 6, 13, and 14 of the Convention. But the European Commission was having none of this. As in the *Hunt* case,[29] it found that this was a case about the regulation of rights between persons under private law, not one involving state responsibility or the formal expropriation of assets for public purposes. The United Kingdom had not directly deprived the applicant of his possessions and was not enforcing 'such laws as it deems necessary to

[21] [1986] AC 368.

[22] The decree was passed because the Rumasa group had allegedly embarked on business ventures which threatened the stability of the Spanish economy, the livelihood of its 60,000 employees, and the savings of bank depositors.

[23] [1986] AC 375 (HC) and 389 (CA).

[24] [1986] AC 368, 427G.

[25] He meant, of course, the Inter-American Convention on Human Rights 1969, which is open to Central and North American states too.

[26] [1986] AC 368, 427G–428A.

[27] [1976] AC 249, 278C. This was one of the earliest mentions of the term 'human rights' in an opinion delivered by a Law Lord.

[28] *Ruiz Mateos v UK* App No 13021/87, decision of 8 September 1988.

[29] See n 19 above.

control the use of property' within the meaning of Article 1(2). The mere fact that the United Kingdom provided a judicial forum for the determination of a private law dispute did not mean that it was interfering with the applicant's property rights.[30]

Again, then, we see a happy coincidence between the results arrived at by the top UK court and that preferred by the adjudicating Commission in Strasbourg, even though the two bodies were asking themselves different questions. The pattern continued in *Canterbury City Council v Colley*,[31] where the owners of a piece of land were claiming compensation for the revocation of planning permission they had obtained to build a house on that land. The House of Lords interpreted the compensation provisions in the Town and Country Planning Act 1971[32] in such a way as to limit the claimants to the value of the site with planning permission to build a house comparable to that which had previously stood there, not a much grander house as had been planned.[33] Lord Oliver, for the House, said that he did not embrace this conclusion with any enthusiasm, and that the result may even appear arbitrary and illogical, but the legislative history of the provision in question admitted of no other result.[34] At the European Commission it was held that the interference in this case was not 'deprivation of a possession' within Article 1(1) but 'control of the use of property' within Article 1(2), and that the question was not the lawfulness of the revocation of the planning permission (which the applicants were not challenging) but the proportionality of the compensation provisions.[35] Bearing in mind that the applicants had paid only £14,500 for the land, a relatively low price to reflect the uncertainty concerning the validity of the planning permission, that they were eventually awarded compensation of £45,000, and that the courts did not have any statutory power to award a higher amount, the Commission concluded that the compensation 'was not so inadequate that it could be said that a fair balance has not been struck in this case'.[36] The application was therefore declared manifestly ill-founded.

It was not until the mid-1990s that the relevance of Article 1 of Protocol No 1 to the law on taxation was raised in a UK setting. When it did occur, huge sums of money were involved. In *NAP Holdings UK Ltd v Whittles*[37] the House of Lords ruled by four to one[38] that the terms 'disposes of' and 'disposal' in a section of the Income and Corporation Taxes Act 1970[39] should bear their ordinary and natural meaning, so that they embraced an exchange of shares between companies in the same group. This was despite the fact that other sections in the Capital Gains Tax Act 1979 suggested that a share-for-share exchange should not be treated as amounting to a disposal: the Law Lords held that these 1979 provisions affected the tax position of shareholders who exchanged shares, but not the tax position of the company whose shares were being exchanged. They

[30] See n 28 above, 'The Law' para 2.
[31] [1993] AC 401.
[32] Section 164(4).
[33] The difference in the amount of compensation was approximately £61,000.
[34] [1993] AC 401, 408D–409C.
[35] *MJC and JEC v UK* App No 22245/93, decision of 6 April 1994.
[36] Ibid, 'The Law', para 1.
[37] (1997) 67 TC 166, decided by the House on 17 November 1994.
[38] Lord Lloyd of Berwick dissented.
[39] Section 273(1).

followed a decision reached by Hoffmann J and the Court of Appeal in a similar case just a few years earlier,[40] a decision which had surprised the financial community at the time because it went against how the law was currently understood. Once more, not surprisingly, the relevance of the European Convention was not alluded to by the Lords, but the disappointed subsidiary company (whose liability for tax had been increased from about £18 million to £239 million as a result of the House's decision) lodged an application in Strasbourg and for the first time the application was based first and foremost on Article 1 of Protocol No 1 (with a further allegation that there had been a breach of Article 14 taken in conjunction with Article 1 of Protocol No 1). The main arguments put on behalf of *NAP Holdings* were superficially compelling, namely that, according to all the information available to NAP at the time of the transaction in 1983, the disputed tax liability would not arise, and the Inland Revenue had not drawn the company's attention to a contrary ruling given in private in 1981 by the General Commissioners of Income Tax in the *Woolcombers* case (which was the subject of an appeal at the time of NAP's transaction); moreover an extra-statutory concession had been refused by the Inland Revenue even though it had been granted in other analogous cases.[41]

The European Commission was unpersuaded. It began by reminding us that:

> In the context of tax legislation, the European Court of Human Rights has recently re-iterated that the legislature must be allowed a wide margin of appreciation. The legislature's assessment will be respected unless it is devoid of reasonable foundation.[42]

And the Commission continued by pointing out that if the General Commissioners' decision was as unexpected as the applicant company suggested, the Inland Revenue would have been reasonably confident of a successful appeal and so were not acting in bad faith in not revealing the 1981 decision to NAP. Moreover, the fact that in 1988 the government had secured the passing of legislation which altered the law so as to bring it back into line with previous expectations, but had not made the law retrospective so as to benefit companies such as NAP, was not 'devoid of reasonable foundation' because other taxpayers might in the meantime have altered their behaviour to make it compatible with the ruling in the *Woolcombers* case. The Commission admitted that its consideration of the issues was of necessity limited (given the constraints imposed by the European Court), but there was no mistaking its unanimous willingness (by 15 to none) to defer to national tax legislation. One can only speculate that what privately motivated the Commissioners to react in such a way was their conviction that the drafters of the European Convention had never intended it to be used as a tool with which to interfere in a government's discretion to regulate national taxation systems. At the same time, the litigation was a stark reminder that property rights inhere not just in individuals but also in large financial institutions.

A further illustration of this fact is provided by *Bank of Scotland v UK*,[43] an application which followed the decision of the House of Lords in *Smith v Bank of Scotland*.[44]

[40] *Westcott v Woolcombers Ltd* [1986] STC 182 (Hoffmann J), (1987) 60 TC 575 (CA).
[41] *NAP Holdings UK Ltd v UK* (1996) 22 EHRR CD114.
[42] Citing *Gasus Dosier- und Fördertechnik GmbH v Germany* (1995) 20 EHRR 403.
[43] *Governor and Co of the Bank of Scotland v UK* (1999) 27 EHRR CD307.
[44] 1997 SC (HL) 111.

The House had there extended to Scotland a change to the law which it had already approved for England and Wales in *Barclays Bank plc v O'Brien*,[45] namely, that where a creditor is aware that the relationship between a debtor and a surety is such that the latter will be reposing trust and confidence in the former in relation to the financial affairs of the former, the creditor must be taken to have had constructive notice of a wrongful representation made by the debtor to the surety, so that the surety is entitled to have the legal charge set aside. Having lost in London, the Bank of Scotland then claimed in Strasbourg that its rights under Article 1 of Protocol No 1 had been violated, because the decision by the House of Lords constituted retrospective legislation. It argued that some £5.8 million of the money it was owed by small and medium-sized enterprises was secured by securities of the type in question and that as a result of the House's decision it could no longer rely on those securities. Other lenders were in a similar position. But the Commission, as in the *NAP Holdings* case, was unsympathetic. It noted that in the United Kingdom 'the progressive development of the common law through judicial law-making is a well entrenched and necessary part of the legal tradition' and that the House's extension of the legal development was done 'by reference to the concept of good faith which had long been an established principle of contract law in Scotland'. Banks and other lenders 'ought to have been aware of the requirement of good faith in entering into contracts and of the fact that this requirement was subject to judicial elucidation and development'. The House had not developed the law in a way that was 'in any sense arbitrary', so there had been no interference at all with the bank's 'possessions' in its contractual relationship with the surety.[46]

In one further case decided by the Lords on facts occurring prior to the commencement of the Human Rights Act, they had to consider the legality of a hefty surcharge imposed on the leader and deputy leader of Westminster City Council by a local government auditor on account of practices these individuals had engaged in while serving on the Council. Together with four others, they had been ordered to repay some £31 million. In the House of Lords, Article 1 of Protocol No 1 was not raised.[47] Article 6 of the Convention was given due consideration, but no unfairness in the trial of the two appellants was found. Dame Shirley Porter then applied to Strasbourg, but her application was declared inadmissible on all grounds, including Article 1 of Protocol No 1.[48] As regards the alleged disproportionality of the surcharge, the Court noted that Dame Shirley and the others had succeeded in getting the amount reduced to £26 million in the Divisional Court, and if that was the loss that had been caused to the local ratepayers then it had to be the amount surcharged. It was therefore not an unjustifiable deprivation of her possessions within the terms of Article 1(1) and no other aspect of Article 1 had been violated.

The taxation of building societies

At this juncture it is worth considering a further taxation law decision by the House of Lords which eventually raised human rights issues, principally relating to equality of

[45] [1994] 1 AC 180. See Chen-Wishart (1997).
[46] See n 43 above, at 'The Law'.
[47] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357. See too Ch 9 above, at 263.
[48] *Porter v UK* App No 15814/02, decision of 8 April 2003.

treatment. This was the *Woolwich Equitable Building Society* case. In the initial appeal to the House, the Law Lords held that two provisions in the Income Tax (Building Societies) Regulations 1986 were invalid because they were *ultra vires* and, as the substance of the Regulations was thereby altered significantly, the whole set of Regulations had to be considered void.[49] In response to this judgment—which frustrated the intention of Parliament—a further piece of legislation was enacted[50] to provide that the earlier enabling legislation[51] 'shall be deemed to have conferred powers to make all the provisions in fact contained in [the Regulations]'. This provision had retrospective effect, except that section 53(4) stated that it had no effect 'in relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18 July 1986'. The Woolwich was the only building society to have done that. Three other building societies commenced proceedings later than that date, in which they not only claimed restitution of the sums they had paid under the impugned Regulations[52] but also challenged the Treasury Orders which had set the composite-rate tax for 1986–87 and thereafter. But by a further piece of retrospective legislation Parliament provided that the Treasury Orders 'shall be taken to be and always to have been effective'.[53] During the parliamentary debates on this provision, the UK government accepted that the intention behind it was to pre-empt the proceedings launched by the three building societies and that the result would be that the Woolwich Building Society was being treated more favourably than others. It justified this by pointing out that if a legal challenge to the composite-rate tax for the years 1986–87 to 1989–90 were to be successful it would render unlawful all of the sums collected from building societies, banks, and other deposit institutions during that three-year period, an amount in the region of £15 billion!

For the European Court a number of important issues had to be decided here. Firstly, had there been any expropriation of property through double taxation? In the Court's view there had not, because any risk of double taxation was only technical or theoretical: had the voluntary arrangements between the building societies and the Inland Revenue continued to apply, an allowance for the interest already paid would have been made in the subsequent tax year. Secondly, had the applicants been deprived of any 'possessions'? On this the Court was more equivocal: because of the uncertainty as to whether the applicants' legal proceedings would be successful, even in light of the success of the Woolwich's claim, it could not express a definite view on whether any

[49] *R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400. Lord Lowry dissented in part. To avoid bad publicity while it was challenging the Regulations, the Woolwich had paid the money supposedly due under those Regulations, but after winning its challenge it sought to claim the money back. The Inland Revenue repaid it, but added interest only from the date on which the High Court judge had first declared the Regulations invalid. The Woolwich then went back to court to claim the interest dating from the time it had made the payments, a sum amounting to £6.7 million. Again the House held for the building society, in what has become an important case in the law of restitution: *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. This time Lords Keith and Jauncey, the two Scottish Law Lords, dissented.

[50] Finance Act 1991, s 53.

[51] Income and Corporation Taxes Act 1970, s 343(1A), inserted by Finance Act 1986, s 47.

[52] The Leeds Permanent Building Society claimed repayment of almost £57 million, the National and Provincial Building Society almost £16 million, and the Yorkshire Building Society almost £9 million.

[53] Finance (No 2) Act 1992, s 64.

of the proceedings constituted 'possessions', but it proceeded on the basis that they did. Thirdly, had there been an 'interference' with those possessions? Yes, because the applicants' proceedings had been rendered pointless by the retrospective legislation. Fourthly, was that interference justified? In short, yes: even though the first piece of retrospective legislation had the effect of extinguishing the applicants' restitution claims, the Court did not think that 'the ultimate aim of the measure was without reasonable foundation having regard to the public-interest considerations which underpinned the proposal to legislate with retroactive effect and Parliament's endorsement of that proposal'.[54] The same could be said of the second piece of retrospective legislation, which was enacted to safeguard the payment of even larger sums of money.[55] Fifthly, were the applicant building societies the victims of discriminatory treatment under Article 14 of the Convention read in conjunction with Article 1 of Protocol No 1? No, because they were not in an analogous position to the Woolwich, having not risked initial litigation to challenge the validity of the Regulations. Even if they were in an analogous position, there was good reason for treating them differently in that by the time of the enactment of the first piece of retrospective legislation 'the Woolwich had secured a final judgment in its favour from the House of Lords and it was understandable that Parliament did not wish to interfere with a judicial decision which brought to an end litigation which had lasted over three years'.[56] The Court also found no violation of Article 6 standing alone or of Article 6 read in conjunction with Article 14.

The message conveyed by this protracted litigation is that, as far as taxation is concerned, states can pretty much do as they please so long as it is done in the general interest and does not differentiate between categories of taxpayers on an irrational basis. This mirrors the pre-Human Rights Act position as illustrated by *NAP Holdings UK Ltd v Whittles*.[57] More generally, in its discussion of Article 6 the Court was particularly keen to show that it was not in favour of giving *carte blanche* to governments to interfere in court actions to which they themselves are parties, and it distinguished the case before it from *Stran Greek Refineries and Stratis Andreadis v Greece*,[58] where the interference was more drastic in that the applicants had been involved in litigation with the Greek state for nine years and had already obtained an enforceable judgment against the state.[59] The United Kingdom's top court was singing from the same hymn-sheet as the European Court in this context.

Summing up, it is obvious that, prior to the Human Rights Act, the United Kingdom's top court did not see any connection between any aspect of English property law and human rights law. Any coincidence of result in the House of Lords and European Commission or European Court was purely accidental. But the cases also show what a wide margin of appreciation the Strasbourg organs were willing to concede to Member States, particularly in relation to national laws on forfeiture, expropriation, valuation, taxation, and surcharges. Strasbourg also seemed to have little difficulty in accepting that, under the common law's doctrine of precedent, the top court was free to change

[54] *National and Provincial Building Society v UK* (1997) 25 EHRR 127, para 81.
[55] Ibid, para 82.
[56] Ibid, para 90. Judge Jambrek from Slovenia dissented on this point.
[57] See 344–5 above.
[58] (1995) 19 EHRR 293.
[59] *National and Provincial Building Society v UK* (1997) 25 EHRR 127, para 112.

the law with immediate effect, even if this significantly interfered with existing property interests. For anyone who maintains that English law inclines in favour of protecting vested property interests, the pre-Human Rights Act cases are hard to explain away. States can and do interfere with private property rights and international human rights law does little to counter such interference by imposing strict obligations based on individuals' or companies' fundamental rights.

The *Pye* case

Only one pre-Human Rights Act decision by the Lords impinging on Article 1 of Protocol No 1 made it through the admissibility stage in Strasbourg—*JA Pye (Oxford) Ltd v Graham*.[60] The claimants—a property development company—brought possession proceedings in relation to 23 hectares of land in Berkshire which the Graham family argued had become theirs through the rules on adverse possession. According to valuation reports obtained by the original owners, the land was worth about £10 million, but the government put its value at £2.5 million. The claimants lost before Neuberger J in the High Court,[61] won in the Court of Appeal,[62] but lost again in the House of Lords. Having failed on the point in the Court of Appeal the claimants conceded in the Lords that the Human Rights Act 1998 did not apply, because the relevant facts had occurred before it came into force, and the Act itself made it clear that it could not be invoked in an appeal occurring after its commencement against a decision reached before its commencement.[63] The House therefore interpreted the Limitation Act 1980 (which deals with the rules on adverse possession) without recourse to section 3 of the 1998 Act. Moreover, since the 1980 Act was not ambiguous, the common law principle that ambiguous legislation should be interpreted in a way which conformed with the European Convention did not apply either. Counsel for the claimants had argued[64] that, if the Convention were to be taken into account, the statutory interference with the claimants' property rights would be found not to have struck a fair balance between the interests of the owner and the interests of the community. Far from being a purely private law matter, said counsel, this was a complaint about the expropriation of property by legislation.[65] While holding against the claimants, Lord Bingham agreed with the reservations expressed by the trial judge, Neuberger J. For Lord Bingham the result was all the more unsatisfactory given that the land in question was registered: 'where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the

[60] [2002] UKHL 30, [2003] 1 AC 419. See Radley-Gardner (2005).

[61] [2000] Ch 676. But the learned judge did not think that the result he had arrived at accorded with justice or could be justified by practical considerations: 709F. It was also illogical and disproportionate: 710C–E.

[62] [2001] EWCA Civ 117, [2001] Ch 804.

[63] Human Rights Act 1998, s 22(4). See too Ch 3 above, at 51–4.

[64] [2003] 1 AC 419, 425G–426C.

[65] Counsel cited the Law Commission Consultative Document No 254, *Land Registration for the Twenty-First Century* (1998), but Part X of that paper did not suggest that the current law on adverse possession was in breach of the European Convention.

party losing it'.[66] Lord Hope expressed himself in similar terms.[67] That Parliament had already changed the law for the benefit of future registered land owners[68] only confirmed the injustice of the previous law.

When the case was taken to Strasbourg, the Chamber of the Court found a violation of Article 1 of Protocol No 1, the first time this had occurred in a case taken against the United Kingdom. In holding that a fair balance had not been struck between the interests of the individual and the interests of the community, the Chamber was particularly influenced by the fact that UK law had in the interim been reformed to enhance the protection provided to individuals' rights and by the view of the Law Commission and Land Registry that there were no cogent reasons to justify the pre-existing regime of adverse possession in the context of registered land.[69] However, the Chamber was split four to three, the dissenting judges believing that the real 'fault' in this case lay with the applicant company, not with the UK government.[70] The Chamber's decision caused a huge amount of alarm in both UK and Irish legal circles, not least because it threw into doubt many claims to land ownership that could only be based on the old adverse possession rules. But the UK government successfully pressed for the case to be re-heard before the European Court's Grand Chamber and, nearly two years later, obtained a judgment in its favour by 10 votes to seven.[71] The government argued that the case should be looked at only under Article 6 of the Convention (treating it as an access to justice dispute), but the Grand Chamber rejected this, albeit on the rather dubious basis that 'it would be unusual if the Court were to decline to deal with a complaint under one head solely because it were capable of raising different issues under a separate Article': in fact the Court commonly states that it finds it unnecessary to deal with an argument based on one article because it has already found a breach of another article. The Grand Chamber then held that this case was about the control of the use of land within Article 1(2) of Protocol No 1, not about the deprivation of possessions within Article 1(1): the statutory provisions 'were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals'.[72] This classification of the issue meant that the applicant company could not rely upon the absence of any compensation for the loss of its land, as compensation is required only in cases of deprivations under Article 1(1), in all but exceptional circumstances.

In the eyes of the Grand Chamber the rules on adverse possession pursued a legitimate aim and *did* strike a fair balance between the interests of individuals and the interests of the community: the property company knew that the adverse possession rules had been in existence for many decades and it could have stopped time running against

[66] [2003] 1 AC 419, [2].

[67] Ibid, [73]. Lords Mackay, Browne-Wilkinson, and Hutton also sat in the appeal.

[68] By the Land Registration Act 2002, Sch 6. This obliges a squatter to give formal notice of his or her wish to apply to be registered as the proprietor after 10 years of adverse possession, and requires special reasons to be adduced if he or she claims entitlement to the property where the legal owner opposes the application.

[69] (2006) 43 EHRR 3, para 74.

[70] Ibid, joint dissenting opinion, para 2. The UK judge, Sir Nicolas Bratza, was part of the majority.

[71] *JA Pye (Oxford) Ltd v UK* (2008) 46 EHRR 45. Sir Nicolas Bratza maintained the view he had supported in the Chamber.

[72] Ibid, para 66.

it by doing very little to assert its ownership rights. In contrast to the Chamber, the Grand Chamber downplayed the fact that Parliament had since chosen to amend the legislation in question: 'legislative changes in complex areas such as land law take time to bring about, and judicial criticism of legislation cannot of itself affect the conformity of the earlier provisions with the Convention'.[73] It also found that decisions about 'moral entitlement' and which party was more 'deserving' were within the state's margin of appreciation.[74] Commenting on the Grand Chamber's decision, Fox O'Mahony and Cobb have suggested that the Court sought 'to reposition the doctrine of adverse possession within a less morally contentious framework' than that found within UK political discourse or the Chamber's judgment,[75] but they claim that this approach was 'irrational' and 'problematic', preferring instead to justify the outcome by refocusing attention on the fault of the applicant company with regard to land stewardship. The authors are vague about what this concept of stewardship entails, especially as they say it is different from a duty to *use* the land,[76] but they argue that it can helpfully inform the courts when they are determining whether a fair balance has been struck between competing interests. To this writer, it does not make sense to try to resolve which of the parties in a case such as this has the more deserving claim on the basis of human rights considerations. Instead, the outcome should depend on a range of factors such as the conduct of each of the parties, the overall time that has elapsed, the location and nature of the land in question, the future plans of each party concerning the use of the land, etc. English common law, it is submitted, has not developed a decision-making process appropriate to the problem. If the Supreme Court Justices are not prepared to enunciate the required elements of such a process then Parliament should do so.

Article 1 of Protocol No 1 in the House of Lords

The first case in which arguments were directly presented to the House of Lords based on Article 1 of Protocol No 1 in the post-Human Rights Act era was *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*.[77] The appeal was heard just a week after the Human Rights Act 1998 came fully into force; neither side suggested that it did not apply, probably because what was at stake was the ongoing legality of a statutory instrument which the applicant company believed was *ultra vires*. The Rent Acts (Maximum Fair Rent) Order 1999[78] had applied a maximum limit to the fair rent increases which could be registered in relation to regulated tenancies under the Rent Act 1977. The applicant company owned flats which were affected by this limit and claimed that the Order had been made not so much to counter inflation as to help tenants who were having to pay higher rents as a result of earlier Court of Appeal decisions given in favour of landlords.[79] Most of the argument in the

[73] Ibid, para 81. [74] Ibid, para 83.
[75] Fox O'Mahony and Cobb (2008), 903.
[76] Ibid, 907. [77] [2001] 2 AC 349. [78] SI 1999/6.
[79] Including in a case brought by this very claimant: *Spath Holme Ltd v Greater Manchester and Lancashire Rent Assessment Committee* [1995] 28 HLR 107.

appeal therefore related to what was the purpose behind the Order-making power conferred on the Secretary of State by the enabling Act,[80] and how that purpose could be determined. The House's decision was that the purpose was not confined to the countering of inflation but extended to the protection of tenants from hardship caused by excessive rents and that the Order in question was therefore *intra vires*. As regards the Convention point, Lord Bingham could see no breach:

> The European Court of Human Rights has recognised the need for a wide measure of discretion in the implementation of policy in this field, as shown by *Mellacher v Austria*.[81] Any actions the ministers took, or any failure of the ministers to take action, were bound to be bitterly resented by those who were disadvantaged as a result. That does not mean that the action which the ministers did take in making the Order was unreasonable, unfair or disproportionate, disadvantageous to landlords though it certainly was.[82]

We see here a repeat reluctance on the part of domestic judges to interfere with government policy, as represented by legislation, merely on the basis that the human right to property had allegedly been disrespected. In doing so they were only reflecting the prevailing attitude within the European Court. And that was again obvious when the *Spath Holme* case went to that Court.[83] In Strasbourg the company argued that the 1999 Order did not pursue a legitimate aim and was disproportionate. It also complained that it had been discriminated against in breach of Article 14 of the Convention because the Order did not apply to regulated tenancies for which the rents were unregistered, nor to unregistered tenancies. The Court held that, as the effect of the 1999 Order was to impose a cap on rents, the rent which had been lost since the Order came into force was not a 'possession' for the purposes of Article 1 of Protocol No 1. However, the Order had deprived the company of part of the income from its property and this was 'control of use' for the purposes of Article 1(2). But the control was prescribed by law (and had been preceded by a consultation paper), it had a legitimate social policy aim (ie the protection of tenants from the hardship caused by increased or excessive rents), and it was proportionate (because, while it left some rents well below market levels, it still allowed increases up to a reasonable level above inflation). Besides, states had a wide margin of appreciation when dealing with social problems, particularly those of a housing nature.[84] There was also an objective and reasonable justification for differentiating between types of tenancies, so there was no violation of Article 14 either.

Article 1 of Protocol No 1 was also explicitly argued in conjoined appeals about taxation law in 2001: *R v Allen* and *R v Dimsey*.[85] At the Court of Appeal stage the Human Rights Act 1998 was not yet in force, but the appeal in the Lords took place in 2001, some months after the Act had fully commenced. The Lords allowed arguments to be

[80] Landlord and Tenant Act 1985, s 31.

[81] (1990) 12 EHRR 391. Here the applicants were property owners who complained unsuccessfully that legislation passed in 1981 had deprived them of rent due to them under prior tenancy agreements.

[82] [2001] 2 AC 349, 396A.

[83] *Spath Holme Ltd v UK* App No 78031/01, decision of 14 May 2002.

[84] Ibid, 5. See too *Antoniades v UK* App No 15434/89, decision of 15 February 1990, approving the House of Lords in *Antoniades v Villiers* [1990] 1 AC 417.

[85] [2001] UKHL 45 and 46, [2002] 1 AC 509.

raised based on Article 1 of Protocol No 1 and also on Article 6 of the Convention, but ruled in the end that the Act could not operate retrospectively on the facts before them, in line with the House's intermittent decision in *R v Lambert*.[86] Nonetheless they expressed a view on what the result would have been if those provisions did apply. In each case the appellant had been convicted of tax evasion arising out of the concealment of the fact that, through various transfers, certain companies were managed and controlled in the United Kingdom rather than in Jersey, a tax haven. In relation to Article 1 of Protocol No 1, Lord Scott said that deeming a transferee's income to be the income of a transferor (a tax avoider) for income tax purposes, while leaving the transferee to pay income or corporation tax on the amount transferred, 'is well within the margin of appreciation allowed to member states in respect of tax legislation. The public interest requires that legislation designed to combat tax avoidance should be effective'.[87] Nor was there any breach of Article 6 of the Convention in requiring a taxpayer to provide information about his or her income to the tax authorities.[88] Mr Allen complained to Strasbourg that his Convention rights had been violated, but his application was declared manifestly ill-founded.[89] As regards Article 1 of Protocol No 1 the applicant argued that the English courts had issued him with a confiscation order calculated by reference to the amount of his gain from his offences, but that as he was still at risk of being required to pay the outstanding tax this amounted to a double penalty for the same offence. But the European Court was not persuaded that the additional risk was a real one, given that the Inland Revenue had provided an undertaking that it would not pursue the outstanding tax.[90]

Obligations imposed by private or regulatory law

Between its decision in *Pye* and the ultimate confirmation of that decision by the European Court, the House was faced with another claim based on Article 1 of Protocol No 1. This was in the rather arcane appeal of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[91] where what was at issue was the liability of owners of 'former rectorial land' to pay for the repairs to the chancel of the local parish church, estimated at £95,000. The owners argued that to make them pay this sum would be a violation of their right to peaceful enjoyment of their possessions. They claimed, firstly, that the Parochial Church Council (PCC) was a public authority and so was prevented by the Human Rights Act 1998 from doing anything—including imposing liability for chancel repairs on others—which breached Convention rights, and, secondly, that even if the PCC was not a public authority, the 1998 Act operated within private law to protect the landowners' right to peaceful enjoyment of their possessions. As explained earlier in this book,[92] the House held that the PCC was not acting as a

[86] [2001] UKHL 7, [2002] 2 AC 545. See also Ch 3 above, at 52–3.
[87] *R v Dimsey* [2002] 1 AC 509, [71].
[88] *R v Allen* [2002] 1 AC 509, 530, [24]–[36] (per Lord Hutton).
[89] *Allen v UK* (2002) 35 EHRR CD289.
[90] Mr Allen's claims relating to Arts 5 and 6 were also found to be manifestly ill-founded.
[91] [2003] UKHL 37, [2004] 1 AC 546.
[92] See Ch 3 above, at 59–60.

public authority when it called upon the landowners to pay for the repairs. On the second issue the Court of Appeal had held that the landowners' property rights *had* been violated,[93] but the House said this was wrong. As Lord Hope put it, '[t]he enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank [the landowners]. It is not, as the Court of Appeal said, an outside intervention by way of a form of taxation'.[94] And in the words of Lord Hobhouse, the financial liability here was not arbitrary: 'it arises from [the landowners'] failure to perform a civil private law obligation which they had voluntarily assumed'.[95] Even Lord Scott, who alone amongst their Lordships thought that the PCC had acted as a public authority, held that there had been no infringement of Article 1.[96] The case is therefore a good example of the reluctance of the United Kingdom's top court to apply the Human Rights Act horizontally.[97]

Just two weeks after issuing their opinions in *Aston Cantlow* the same group of Law Lords came to a similar conclusion in *Wilson v First County Trust Ltd*,[98] an eagerly awaited decision which reversed a Court of Appeal ruling that a provision in the Consumer Credit Act 1974 barring a creditor from enforcing a credit agreement if it mis-stated the amount of money being lent was incompatible with Article 6(1) of the Convention as well as with Article 1 of Protocol No 1.[99] Leaving to one side the part of the case dealing with whether the Human Rights Act 1998 could affect contractual rights and obligations created before its commencement,[100] and also the discussion of section 3,[101] the point to note here is that the Law Lords unanimously held that Article 1 of Protocol No 1 had not been violated, because Parliament's decision that the appropriate way to protect borrowers was to deprive lenders of all their rights under the credit agreement was a proportionate means of achieving the legitimate aim of consumer protection, even though, as in this case, the small lending company had acted in good faith throughout and the borrower was being unjustly enriched by being allowed to keep both the £5,000 lent to her and also the BMW convertible which she had bought with that money.[102] The case gave the Lords their first opportunity to consider in depth the impact of the incorporation of 'the right to property' into English law and they were at pains to point out that it did not mean that existing Acts of Parliament which represented the legislator's preferred approach to matters of social policy were now at risk of being overturned by the judges. Lord Nicholls' words were typical of those used by his brethren:

> The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention

[93] [2001] EWCA Civ 713, [2002] Ch 51.
[94] [2004] 1 AC 546, [71].
[95] Ibid, [92].
[96] Ibid, [133]–[134].
[97] For more on this topic see Ch 3 above, at 85–8.
[98] [2003] UKHL 40, [2004] 1 AC 816.
[99] [2001] EWCA Civ 633, [2002] QB 74.
[100] The Lords held that it could not. See Ch 3 above, at 54.
[101] The Lords held that the 1974 Act could not be 'read down'.
[102] In fact the original parties to the county court case took no part in the House of Lords appeal: it was fought between the Secretary of State for Trade and Industry on the one hand and four providers of motor insurance and the Finance and Leasing Association on the other: see [2004] 1 AC 816 [81] (per Lord Hope).

> rights. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.[103]

Lord Hope did not address the compatibility issue because he felt that Article 1 rights were not even engaged, given that the credit agreement had not been enforceable from the outset and had never therefore created contractual rights. The outcome is fully consistent with that in the *Spath Holme* case, decided two-and-a-half years earlier:[104] the right to property must play second fiddle to the dictates of public policy concerning matters such a rent control and consumer protection.

The relevance of Article 1 of Protocol No 1 to land use was again before the House a few months later, in *Marcic v Thames Water Utilities Ltd*.[105] Both the trial judge and the Court of Appeal[106] had held that the owner of a house whose property had been repeatedly flooded by sewage discharged from pipes maintained by the defendants had been the victim of a breach of both Article 8 of the Convention and Article 1 of Protocol No 1. The Court of Appeal also held that the defendants were liable for common law nuisance.[107] But for the Law Lords such a result was unpalatable. Impressed by the elaborate nature of the statutory scheme of regulation imposed on the defendants by the Water Industry Act 1991, the Lords felt that civil liability, whether under the Human Rights Act 1998 or at common law, was inappropriate. This was not an area in which the courts should try to supplement the regulatory system put in place by Parliament, other than through hearing applications for judicial review of decisions by the regulator appointed under the 1991 Act. Lord Nicholls, giving the first opinion, did not however analyse the applicability of Article 1 in a systematic way. Instead he simply said that:

> [i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, 'the role of the domestic policy maker should be given special weight'. A fair balance must be struck between the interests of the individual and of the community as a whole.[108]

It looks as if Lord Nicholls was prepared to say that Article 1 was engaged, but that here the control of use of property was justifiable under Article 1(2). Lord Hoffmann adopted the same position[109] and Lord Hope, too, relied upon *Hatton v UK*[110] while

[103] [2004] 1 AC 816, [70]. See too [138] (per Lord Hobhouse) and [169] (per Lord Scott).
[104] See 351–2 above.
[105] [2003] UKHL 66, [2004] 2 AC 42.
[106] [2002] EWCA Civ 64, [2002] QB 929 (Lord Phillips of Worth Matravers MR was a member of the Court of Appeal).
[107] In a pre-1998 case the Lords had considered whether the construction of the Canary Wharf Tower, and of a link road in the area, had caused a nuisance to residents in London's Docklands, but held that it had not: *Hunter v Canary Wharf Ltd* [1997] AC 655. A large number of the residents then lodged an application in Strasbourg, where they alleged violations of Arts 8, 13, and 14, but not of Art 1 of Protocol No 1. The Commission held the claims inadmissible, basically because the general interests of the community could reasonably be said to trump the individual rights of the residents: *Khatun v UK* (1998) 26 EHRR CD212.
[108] [2004] 2 AC 42, [41]. The quotation is from the Grand Chamber's decision in a case concerning night flights at Heathrow Airport, *Hatton v UK* (2003) 37 EHRR 28, para 97.
[109] Ibid, [71].
[110] See n 108 above.

stressing even more than his brethren had done that the system set up by Parliament provided a fair enough balance of the interests involved (and bearing in mind that Mr Marcic had opted not to pursue the complaint mechanism within that system). Mr Marcic does not seem to have lodged an application in Strasbourg, perhaps convinced that the European Court would also have deferred to the national Parliament on this issue. Here too, as in the context of taxation, rent control and consumer protection, preferred public policy was held to take priority over an individual's private property rights.

Welfare benefits as property rights

One area of public policy in which the right to property *has* come to play a more significant role is that of social security law. The first of a number of cases coming to the Lords in which the principal issue was whether a claim to a welfare benefit was a 'possession' for the purposes of Article 1 of Protocol No 1 was *R (Hooper) v Secretary of State for Work and Pensions*.[111] This was actually four consolidated appeals, in all of which the claimants were widowers who had been refused statutory bereavement payments,[112] which would have been paid to them if they had been women whose husbands had died. The legislation had later been changed,[113] but only for the benefit of men who were bereaved on or after 9 April 2001. At first instance Moses J held that the three benefits being claimed all fell within the ambit of Article 8 of the European Convention, but not of Article 1 of Protocol No 1. But in the Court of Appeal and House of Lords the Secretary of State conceded that all of the benefits fell within Article 8 and/or Article 1 of Protocol No 1 and there was no further discussion of either provision in the judgments.[114] On the discrimination point, however, the House of Lords held, reversing the Court of Appeal, that as regards the benefit known as widow's pension the state was entitled to engage in positive discrimination in order to correct historical inequalities: as older widows were historically an economically disadvantaged class, they could be treated more favourably and it was up to Parliament, not the courts, to decide when such favourable treatment was no longer justified. As regards the two other benefits—widow's payment and widowed mother's allowance—the Secretary of State had been acting lawfully in paying them only to women because primary legislation required him to do so.[115] There had therefore been no breach of the claimants' right to a private and family life (under Article 8), read in conjunction with their right not to be discriminated against (under Article 14). Although the government had made extra-statutory payments to claimants in the same position who had lodged admissible applications in Strasbourg before the Human Rights Act 1998 came into force,[116] this did not require

[111] [2005] UKHL 29, [2005] 1 WLR 1681.

[112] Under the Social Security Contributions and Benefits Act 1992, ss 36–38.

[113] By the Welfare Reform and Pensions Act 1999. Widow's pension was effectively abolished altogether, being replaced by a bereavement allowance to men and women for one year.

[114] [2003] EWCA Civ 813, [2003] 1 WLR 2623 (again Lord Phillips MR sat in the Court of Appeal).

[115] Under the Human Rights Act 1998, s 6(2), it is not unlawful for a public authority to act in a way which is incompatible with a Convention right if primary legislation requires it so to act. For more on this defence, see Ch 3 above, at 83–5.

[116] In *Willis v UK* (2002) 35 EHRR 547, for example, the European Court found that the United Kingdom had discriminated against men in relation to widow's payment and widowed mother's allowance (on the basis

the government to do the same as regards claimants bringing domestic proceedings thereafter.

Throughout the appeal there was hardly any mention of Article 1 of Protocol No 1. Lord Scott made it clear that he doubted the correctness of the European Court's conclusion in *Willis v UK* that the bereavement benefits in question were 'a sufficiently pecuniary right to fall within the ambit of Article 1 of Protocol 1'.[117] It seemed to him that the statutory scheme deprived widowers of nothing:

> It no more deprives widowers of a 'possession' than it deprives a widow who does not make her application in time or whose deceased husband had not paid the requisite contributions of a 'possession'.[118]

And he warned against judicial extension of the reach of Article 14:

> Article 14 cannot be transformed by the jurisprudence of the Strasbourg court into a simple prohibition, along the lines of its Charter counterpart, against any discriminatory treatment. That would be an alteration, or extension, for Parliament, not the Strasbourg court, to make.[119]

On the broader issue of whether courts should involve themselves in decisions about social and economic policy, the Law Lords were unanimous and unequivocal: the achievement of equitable distribution of public resources should be a matter left to elected representatives of the people.[120]

Three of the four claimants in *Hooper* later lodged applications with the European Court of Human Rights. In addition, some applications which had already been lodged were postponed for consideration until the decision of the House of Lords in *Hooper* was issued. Chief amongst these was *Runkee and White v UK*,[121] which the European Court eventually decided in 2007. In that judgment the Court wholly endorsed the House of Lords' handling of the positive discrimination point in *Hooper* and so found that the Convention had not been violated in relation to the payment of widow's pension. But it did make clear that, had there not been an objective justification for the discrimination, there would have been a violation of Article 1 of Protocol No 1. The European Court affirmed the approach it had recently adopted in *Stec v UK*,[122] where it held that non-contributory as well as contributory welfare benefits qualified as 'possessions' for the purposes of Article 1 of Protocol No 1.

The first of the three applications emerging from *Hooper* itself was decided by the European Court in 2008: Leslie Withey accepted £5,549 by way of a friendly settlement

of Art 14 taken in conjunction with Art 1 of Protocol No 1), and it awarded the applicant £25,000 as compensation. In many other similar cases the UK government made payments by way of friendly settlements.

[117] (2002) 35 EHRR 547, para 36, cited by Lord Scott at [2005] 1 WLR 1681, [89].

[118] [2005] 1 WLR 1681, [89].

[119] Ibid. The EU's Charter on Fundamental Rights, in Art 21(1), provides that: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.

[120] Ibid, [32] (per Lord Hoffmann). Each of the other four Law Lords agreed with his reasoning.

[121] Application Nos 42949/98 and 53134/99, judgment of 25 July 2007.

[122] (2005) 41 EHRR SE18. This case had not come before the House of Lords, only the Court of Appeal. For a critique see Cousins (2009).

of his claim for widow's payment and widowed mother's allowance.[123] The government had written to the Court to say that, in view of the fact that the Human Rights Act defence which succeeded in *Hooper* was applicable only in the domestic arena, it was prepared, in principle, to settle all claims made by widowers for widow's payment or widowed mother's allowance prior to the change to the legislation in April 2001. But the Court again adopted a less sympathetic approach in relation to widow's pension, following its approach in *Runkee and White v UK*. An application from a second claimant in *Hooper*, Frank Naylor, was declared inadmissible in Strasbourg: he had not applied for widow's payment within the one-year domestic time limit, he did not qualify for widowed mother's allowance because he had no dependent children, and his claim for widow's pension was again defeated by the European Court's adherence to *Runkee and White v UK*.[124] The third *Hooper* applicant, Andrew Martin, accepted a payment of £2,431 in respect of his claim for widow's payment.[125]

In a comparable case, *Wilkinson*, another widower argued that his inability to claim a bereavement allowance ought to have been recognized by the tax system.[126] He claimed that the Inland Revenue should have granted him an extra-statutory concession because, had he been a widow, he would have been able to reduce his liability for income tax by deducting the amount of the bereavement allowance from the calculation of his taxable income. But the group of Law Lords who had dealt with *Hooper* came to the same conclusion in *Wilkinson*: the Inland Revenue had no power to do other than disallow the taxpayer's claim for an extra-statutory concession and so it had a defence, under section 6(2) of the Human Rights Act 1998, against a claim that it was violating Convention rights. Again, as in *Hooper*, the fact that the government had reached a friendly settlement of a comparable claim lodged by an applicant in Strasbourg did not mean that Mr Wilkinson had to be treated in a similar way in domestic proceedings. During the appeal in *Wilkinson* the Inland Revenue conceded that the tax reduction conferred on widows by legislation[127] came within the ambit of Article 1 of Protocol No 1,[128] and it did not even argue that the tax year for which the relief was being claimed had expired before the Human Rights Act 1998 came into force. On this occasion, although he did not say why, Lord Scott had no difficulty in accepting that the bereavement allowance in question was within the ambit of Article 1 of Protocol No 1.[129]

While *Wilkinson* was going through the English courts, several applications raising the same points were pending before the European Court. Judgment was eventually given in relation to these in *Hobbs, Richard, Walsh and Genn v UK*,[130] where the Court ruled that in relation to the widow's bereavement allowance there was a violation of Article 14 taken in conjunction with Article 1 of Protocol No 1. When the allowance was first introduced, married couples were taxed as a single entity, a tax allowance being made available to the husband with regard to his wife's earnings. A widowed man

[123] *Withey v UK* App No 28109/02, decision of 24 June 2008.
[124] *Naylor v UK* App No 28046/02, decision of 2 September 2008.
[125] *Martin v UK* App No 28032/02, decision of 9 December 2008.
[126] *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2005] 1 WLR 1718.
[127] Income and Corporation Taxes Act 1988, s 262(1).
[128] [2005] 1 WLR 1718, [5] (per Lord Hoffmann).
[129] Ibid, [35].
[130] (2007) 44 EHRR 54.

was allowed to claim this allowance in the year following his wife's death, but a widow received only a single person's allowance. Widow's bereavement allowance was intended to correct this inequality, but became obsolete when independent taxation of married men and women was introduced from 1990–91 and spouses were given the choice, from 1993–94, as to how to share the married couples allowance. The UK government did not attempt to justify the availability of the allowance only to widows between 1991 and its abolition in 2000, and the European Court did not consider that the difference in treatment between men and women in this context could be reasonably and objectively justified.[131] As with three of the claimants in *Hooper*, Adrian Wilkinson pursued his bereavement-related tax liability claim in Strasbourg and accepted a friendly settlement payment of €600.[132] The European Court applied the approach it had set out in *Hobbs, Richard, Walsh and Geen v UK*.

Discriminating between benefit recipients on the basis of sex is always going to be a difficult practice to justify. It is less so if the basis is place of residence. That was the issue arising in *R (Carson) v Secretary of State for Work and Pensions*,[133] already discussed in the chapter on discrimination,[134] where a British pensioner living in South Africa claimed that it was unlawful discrimination for the UK government to refuse to pay her an annual cost-of-living increase to her state retirement pension while paying it to pensioners living in the United Kingdom or in countries with which the government had entered into reciprocal arrangements.[135] Mrs Carson's weekly pension was effectively frozen at its 2000 level of £101.62; had it not been frozen it would have gone up to £115.77 by 2008. But Mrs Carson lost at every level of the domestic courts. In the House of Lords it was assumed that the pension was a 'possession' for the purposes of Article 1 of Protocol No 1, but Lord Hoffmann let it be known that he was not in complete agreement with such a position. Firstly, his instinct was not to regard a state pension as a possession until it had actually fallen due.[136] Secondly, he thought that the European Court was trying artificially to squeeze economic rights into the Convention through Article 1 of Protocol No 1.[137] Thirdly, he could not agree that a claim to contributory welfare benefits was analogous to a claim on a private pension fund, because in the case of the former the contributions were really a form of taxation rather than an attempt to buy a portion of a particular fund. He seemed alarmed that the Court was extending the concept of possession to include even non-contributory benefits, citing *Koua Poirrez v France*.[138] Since he wrote that judgment, of course, the Grand Chamber of the European Court has affirmed its approach in *Stec v UK*, which must now be briefly discussed.

In its admissibility decision in *Stec v UK* the Grand Chamber confirmed that non-contributory welfare benefits could constitute 'possessions' just as much as contributory welfare benefits could, the rationale being that both types of benefit are nowadays

[131] This account of the Court's reasoning is based on para 53 of its judgment.
[132] *Wilkinson v UK* App No 27869/05, decision of 18 November 2008.
[133] [2005] UKHL 36, [2006] 1 AC 173.
[134] See Ch 11 above, at 334–7.
[135] These countries included the United States, Bermuda, Jamaica, and Israel.
[136] [2006] 1 AC 173, [11].
[137] For the learned judge's views on the expansion of the Convention's reach by the European Court, see Hoffmann (2009).
[138] (2003) 40 EHRR 34.

paid for out of general taxation.[139] When it went on to consider the merits of the arguments in *Stec*, which were that in the United Kingdom the benefit known as reduced earnings allowance—intended to compensate people of working age for their loss of earning capacity due to an accident at work or occupational disease—was allocated on a discriminatory basis because it was linked to the normal state retirement age (60 for men and 65 for women), the Grand Chamber ruled that there was a reasonable and objective justification for the discrimination, namely that the state pension scheme was based upon a notional 'end of working life' and linking the two was easier to administer.[140] It pointed out, moreover, that the issue had already been examined in a case involving the same applicants which had been referred to the European Court of Justice, as it then was, by the Social Security Commissioner in 1998. The ECJ had held that it was necessary to adopt the same age limits in order to ensure consistency with the state pension scheme.[141] The European Court of Human Rights admitted that such a conclusion was not determinative of the issue under Article 14 of the Convention, but it thought that it was 'nonetheless of central importance' and of 'strong persuasive value'.[142] The Strasbourg Court added that:

> In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States, the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age.
>
> Having begun the move towards equality, moreover, the Court does not consider it unreasonable of the government to carry out a thorough process of consultation and review, nor can Parliament be blamed for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation.[143]

With the Strasbourg Court's decision in *Stec* in the background, and having lost in the House of Lords, Mrs Carson took her case to the Chamber of the European Court,[144] but again was unsuccessful. Her representatives succeeded in persuading a panel of judges to refer the case to the Grand Chamber for yet another hearing, but she lost there too.[145] At the Chamber level, the majority view accorded with that suggested by Lord Hoffmann, namely that: 'The fact that the applicants paid contributions to the National Insurance Fund, from which the state retirement pension is partially funded, does not provide a right under national law, comparable to a contractual right under a private pension scheme, to a state retirement pension of any particular amount'.[146] So a claim based only on Article 1 of Protocol No 1 was inadmissible since there was no 'possession' to engage that provision. This was not therefore an issue that could be

[139] (2005) 41 EHRR SE18.
[140] (2006) 43 EHRR 47, paras 56–7.
[141] *Hepple v Chief Adjudication Officer* C-196198, [2000] ECR I-3701.
[142] See n 140 above, para 58.
[143] Ibid, paras 64–5.
[144] *Carson v UK* (2009) 48 EHRR 41 (6 v 1).
[145] *Carson v UK* (2010) 51 EHRR 13 (11 v 6).
[146] (2009) 48 EHRR 41, para 68. Judge Garlicki, from Poland, dissented.

re-examined by the Grand Chamber.[147] But both the Chamber and the Grand Chamber agreed that, as regards Article 1 of Protocol No 1 read in conjunction with Article 14, there were sufficient differences between the position of the applicants and the position of others who did receive the annual pension increases to objectively justify the discriminatory treatment.

In *R (RJM) v Secretary of State for Work and Pensions*[148] the Lords ruled that a disability premium was a 'possession' for the purposes of Article 1 of Protocol No 1, but that removing entitlement to the premium from people who became homeless was justifiable discrimination because it pursued a legitimate aim (namely, to encourage such people to find accommodation) and was proportionate. The House accepted that in *Stec v UK* the Grand Chamber of the European Court had been unequivocal in holding, albeit as part of a decision that an application was inadmissible, that non-contributory welfare benefits, as well as contributory ones, were 'possessions'. In view of the obligation imposed on UK courts by section 2(1)(a) of the Human Rights Act, to 'take into account any judgment of the European Court of Human rights', Lord Neuberger said 'it would require the most exceptional circumstances before any national court should refuse to apply [*Stec v UK*]'.[149]

From the treatment accorded by the United Kingdom's top court and the two European Courts in these social security cases to arguments based on Article 1 of Protocol No 1, or on Article 14, we can deduce that none of the courts has any real appetite for interfering in the policy choices made by national legislatures as to the eligibility criteria for benefits and allowances. Indirect discrimination is acceptable if it is objectively justified and, when deciding what is objective in this context, considerable leeway is given to the discretion available to law-makers because of their democratic legitimacy. So unwilling are the judges to interfere with policy choices that the Strasbourg's ruling that even non-contributory welfare benefits are 'possessions' may not have that great an impact on eligibility criteria. The Supreme Court has held, for example, in *Patmalniece v Secretary of State for Work and Pensions*,[150] that the conditions of entitlement to state pension credit are compatible with the rule of EU law which prohibits discrimination between nationals of different Member States. The appellant was a 72-year-old Latvian living in the United Kingdom but without a 'right to reside' there (because she was a failed asylum seeker). Under the State Pension Regulations 2002 she therefore did not fall within the definition of someone 'in Great Britain'. The Justices said that the regulations were a proportionate response to the legitimate aim of protecting the UK public purse, a justification that is independent of the claimant's nationality.[151] It remains to be seen whether the EU's Charter of Fundamental Rights will make any appreciable difference in this conext, always assuming that in the United Kingdom 'solidarity rights' in Title IV of the Charter are considered justiciable.[152]

[147] (2010) 51 EHRR 13, para 57.
[148] [2008] UKHL 63, [2009] AC 311.
[149] Ibid, [31]. The other Law Lords in the case all agreed with this.
[150] [2011] UKHL 11, [2011] 1 WLR 783. Lord Walker dissented.
[151] The different treatment afforded to Irish nationals was protected by the Protocol on the Common Travel Area.
[152] Article 34 confers the right to social security benefits and social assistance, while Arts 20 and 21 confer, respectively, the rights to equality before the law and to non-discrimination. See too Ch 2 above, at 36–9.

Other claims to property rights

There have been several other ingenious efforts by lawyers to characterize a perceived injustice as a violation of the right to property guaranteed by Article 1 of Protocol No 1, but the United Kingdom's top court has not been persuaded by them. Thus, in *O'Brien v Independent Assessor*[153] two men who had been wrongfully convicted of a murder, and had spent 12 and 13 years in prison as a result, complained that the statutory compensation they were awarded[154] had been reduced to take account of, firstly, the money they would have had to spend to look after themselves if they had not been in prison and, secondly, their previous convictions. The Lords held against the two men, with Lord Rodger dissenting on the first point and Lord Scott on the second. Article 1 of Protocol No 1 did not feature in the appeal at all. But the men then lodged an application in Strasbourg, alleging, amongst other points, a violation of Article 1(1) of Protocol No 1 (because they had been deprived of a possession) and of Article 1(2) (because their possessions had been interfered with). However, precisely because they had not raised any Convention point in the domestic proceedings their application was declared inadmissible by the European Court on the ground that the applicants had not exhausted their domestic remedies.[155] So far as is known, the matter has not since returned to a UK court but, if this were to occur, it is unlikely that a domestic judge would decide that there has been any deprivation of, or unjustifiable interference with, a possession.

In *OBG Ltd v Allan*[156] the claimant company, which was in liquidation, was suing the receivers for losses the company had allegedly suffered as a result of interference with its contractual relations and/or conversion of its property. The House of Lords held against the company on both points, unanimously on the first and by three to two on the second. The company conceded that the Human Rights Act 1998 did not apply, because the unlawful taking of its property occurred before the Act came into force, but it nevertheless argued that the courts should develop domestic law in line with the European Court's jurisprudence on Article 1 of Protocol No 1.[157] However, none of their Lordships referred to Article 1 of Protocol No 1 in their opinions. In Strasbourg, an application lodged by the company (and by an associated company), as well as by two liquidators, was declared inadmissible.[158] The Court held that the loss of money on contracts was a 'possession' and that the receivers had been in 'control' of the applicants' property, but the state itself was not involved in that control and the decision of the House that the receivers were not liable to pay compensation to the companies or the liquidators was but an application of domestic private law. The refusal of the House to develop the law of tort in the way argued for by the applicants was compatible with the United Kingdom's positive obligations under Article 1 of Protocol No 1 because the House's judgment pursued a legitimate aim in the general interest (namely, maintaining

[153] [2007] UKHL 10, [2007] 2 AC 312.
[154] Under the Criminal Justice Act 1988, s 133. One brother was awarded £990,000, the other £506,220.
[155] *Hickey v UK* App No 39492/07, decision of 4 May 2010.
[156] [2007] UKHL 21, [2008] 1 AC 1.
[157] [2008] 1 AC 1, 10H–11A. On horizontality more generally, see Ch 3 above, at 85–8.
[158] *OBG Ltd v UK* App No 48407/07, decision of 29 November 2011.

reasonable limits on the liability in tort of third parties such as receivers) and struck a fair balance between that general interest and the interest of the applicants.[159]

Article 1 of Protocol No 1 was specifically relied upon by the applicants for judicial review in *R (Countryside Alliance) v Attorney General*,[160] where they alleged that the Hunting Act 2004 breached several of their Convention rights. The Lords accepted that Article 1 of Protocol No 1 was engaged, not because of any 'deprivation' (within Article 1(1)) but because the claimants were suffering a loss of control over their possessions (within Article 1(2)), however they unanimously held that once again the interference was for a legitimate aim (the prevention of unnecessary suffering of animals) and was within the state's wide margin of appreciation. As Lord Bingham put it: 'respect should be paid to the recent and closely-considered judgment of a democratic assembly, and no ground is shown for disturbing that judgment in this instance'.[161] The issue was then raised in Strasbourg, but on the right to property point (as on others) the European Court unanimously supported the House. It even added that there was nothing arbitrary or unreasonable in the fact that the 2004 Act did not provide for any compensation to be paid to those whose livelihoods might be affected by the hunting ban[162] and, in a rare expression of deference to a national court's authority, it stated:

> the domestic courts have given the greatest possible scrutiny to the applicants' complaints under the Convention and especially those complaints brought under Article 1 of Protocol 1. The Court also notes that the High Court, the Court of Appeal and the House of Lords (as well as, for the 2002 Act in Scotland, the Inner and Outer Houses of the Court of Session…) were each unanimous in finding that the ban was proportionate for the purpose of Article 1 of Protocol 1. Serious reasons would be required for this Court to depart from the clear findings of those courts. From the applicant's submissions, it can discern no such reasons.[163]

As in the *O'Brien* and *OBG* cases,[164] Article 1 of Protocol No 1 was not raised in the House of Lords whenever challenges were made to the application of the Limitation Act 1980 in cases of historical child sex abuse. Instead, the arguments in *A v Hoare*[165] were all limited to whether, as a matter of statutory interpretation, section 11 of the 1980 Act applied to actions relating to intentional assaults. The Law Lords held that it did, thereby departing from the decision it had reached some 15 years earlier in *Stubbings v Webb*.[166] Given that the earlier decision had been approved by the European Court of Human Rights,[167] it is a little strange that the Lords were not prompted to consider whether a reversal of the decision would continue to be compatible with Convention

[159] Ibid, paras 88–93; the European Court adopted the same approach as in *JA Pye (Oxford) Ltd v UK*, 350–1 above.
[160] [2007] UKHL 52, [2008] 1 AC 719.
[161] Ibid, [47]. See too [78] (per Lord Hope), [129] (per Lady Hale), and [155] (per Lord Brown).
[162] *Countryside Alliance v UK* (2010) 50 EHRR SE6, para 57.
[163] Ibid, para 58. As in the *OBG* case, the European Court did not even allow the application to pass the admissibility stage.
[164] See 362 above.
[165] [2008] UKHL 6, [2008] 1 AC 844. The case involved five consolidated appeals.
[166] [1993] AC 498.
[167] *Stubbings v UK* (1997) 23 EHRR 213.

rights. They could certainly have anticipated that the losing party would lodge an application in Strasbourg, and that is indeed what occurred.[168] Hoare had been convicted of attempting to rape a woman in 1988, but she decided to sue him only in 2004, after he had won £7 million in the national lottery. When the Lords remitted that claim to the High Court for further consideration on the merits, Coulson J awarded the rape victim £50,000 in compensation and ordered Mr Hoare to pay the costs of all the proceedings before the lower courts in addition to the costs before the Court of Appeal and House of Lords, a sum amounting to more than £777,000.[169] The applicant complained under Article 1 of Protocol No 1 that the costs order was an unlawful interference with his right to peaceful enjoyment of his possessions (and also that the process whereby he had, in effect, been required to pay for a change in the law was unfair within the terms of Article 6(1) of the Convention). But the European Court declared the application inadmissible, on the ground that the national legal system's choice regarding the imposition of costs pursued a legitimate aim, was not disproportionate, and had not been arbitrary: it struck a fair balance between the interests of the individual and the interests of the community at large. The Court noted that Mr Hoare had refused an offer of settlement made by Mrs A and that Mrs A's costs (£538,000!) did not appear unreasonable considering that they covered three levels of jurisdiction. Moreover, there was no breach of Article 6 because the House had not arbitrarily changed the law on limitation of actions—it was always a possibility that it might do so.[170]

In *Jain v Trent Strategic Health Authority* the owners of a nursing home sued the local health authority for the negligent way it conducted an investigation into practices at the home, which eventually led to the cancellation of the home's registration as a nursing home and the ruin of the business.[171] The House of Lords, confirming the view of the Court of Appeal,[172] held that the local authority had not owed the claimants a duty of care under the common law, because the purpose of the statutory power under which it had acted was the protection of residents of nursing homes, not anyone else. However, Lord Scott and Baroness Hale expressly suggested that, had the Human Rights Act been in force at the time of the events in this case, the claimants would have had a claim for a breach of their rights under Article 1 of Protocol No 1, as well as under Article 6 of the Convention.[173] The UK government clearly had sympathy with Mr and Mrs Jain, because when they lodged an application in Strasbourg they were offered, and accepted, a payment of more than £854,000 in settlement of their claim.[174]

[168] *Hoare v UK* (2011) 53 EHRR SE1.

[169] Ibid, paras 33–6.

[170] The European Court followed its approach concerning law-making in common law courts laid out in *SW and CR v UK* (1996) 21 EHRR 363.

[171] [2009] UKHL 4, [2009] AC 853. See too Ch 7 above, at 202.

[172] [2007] EWCA Civ 1186, [2008] QB 246.

[173] [2009] AC 853, [11]–[18] and [43]–[44] respectively. Lord Carswell agreed with Lord Scott on this ([49]), and Lord Neuberger agreed with both Lord Scott and Baroness Hale ([54]). Lord Rodger preferred not to speculate on the point because counsel had not made any submissions on it: [41].

[174] *Jain v UK* App No 39598/09, decision of 9 March 2010. Blom-Cooper (2008) observes that the Court of Appeal's procedures for granting permission to appeal to the Supreme Court need to be changed to allow appeals to be heard more quickly.

Ofulue v Bossert was another case which turned on limitation of action rules.[175] The claimants argued, unsuccessfully at all three levels of the domestic proceedings, that the defendants could not rely on the rules of adverse possession in relation to a house in London because on two occasions the 12-years time limit had been interrupted by the defendants' acknowledgement of the claimants' title to the house. The Law Lords held that these acknowledgements were protected by the concept of 'without prejudice communications' and that it would not be appropriate to create further exceptions to that concept. Mrs Ofulue then complained in Strasbourg that her right to peaceful enjoyment of her house had been improperly interfered with, arguing that the House of Lords had applied the 'without prejudice' rule in an unforeseeable and unlawful way, that in any event it did not serve a legitimate public interest, and that the interference with her rights did not strike a fair balance between the demands of the general interest of the community and the requirements of the protection of her individual fundamental rights. But the Court rejected these arguments,[176] applying the principles enunciated by the Grand Chamber in *Pye v UK*.[177] English law's current rules on the doctrine of adverse possession now seem doubly secure from condemnation in Strasbourg, although it would still be open to the Supreme Court to interpret some of the common law's preconditions for the doctrine in a way which gives greater recognition to the original owner's Convention right to property.

Finally, in *M v Secretary of State for Work and Pensions*[178] a lesbian woman who had left her husband for another woman complained that, when her income was being assessed for the purposes of calculating the amount she was required to pay to her former husband as maintenance for the two children to that marriage, who were still mostly living with him, her partner's contribution to her housing costs were taken into account, when it would not have been if she had left her husband to live with another man, whether she was married to him or not. Perhaps because it was unduly influenced by the fact that Strasbourg jurisprudence had not yet fully recognized gay and lesbian relationships for the purposes of Article 8 of the Convention, the House of Lords thought the discrimination in this situation was objectively justifiable. Moreover, the claimant's complaint was not 'within the ambit or scope' of either Article 8 or Article 1 of Protocol No 1. Lord Bingham was quite adamant as regards the latter: 'I regard application of a rule governing a non-resident parent's liability to contribute to the costs incurred by the parent with care, even if it results in the non-resident parent paying more than she would under a different rule, as altogether remote from the sort of abuse at which Article 1 of Protocol 1 is directed'.[179] But this approach seems, with respect, to misrepresent the degree of connection required by the 'scope or ambit' test. In the view of Baroness Hale, dissenting, there was a clear connection between the child support scheme and the right to a family life[180] and therefore the scheme could be found to be operating in a discriminatory fashion under Article 14. She did not expressly say that

[175] [2009] UKHL 16, [2009] AC 990.
[176] *Ofulue v UK* App No 52512/09, decision of 23 November 2010.
[177] (2008) 46 EHRR 45.
[178] [2006] UKHL 11, [2006] 2 AC 91.
[179] Ibid, [5]. See too [33] (per Lord Nicholls), [89]–[90] (per Lord Walker), and [159] (per Lord Mance).
[180] Ibid, [107].

there was the same connection between the child support scheme and the right to property, but she implied as much. When the case reached Strasbourg the European Court held that there had indeed been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No 1.[181] If the UK government was prepared to enter into a friendly settlement with Mr Wilkinson in relation to his complaint about its failure to allow him to deduct the sum he should have been paid as bereavement allowance from his taxable income,[182] one wonders why the government did not accept that it discriminated against lesbians in insisting that one partner's contribution to housing costs should be taken into account when calculating the other's disposable income for child support purposes?

These various attempts by litigants to resort to Article 1 of Protocol No 1 in contexts which appear at first glance to be far removed from its remit might to some be a sign of desperation. But they might just be the first tentative knockings on the door of established principles. In due course the Supreme Court or, more likely, the Strasbourg Court, may allow that door to open a little so as to accommodate arguments based on 'peaceful enjoyment of possessions'. Down the years the concept of property has been a flexible one, and we now live in an age when all sorts of interests are acquiring legal protection which in years gone by would have been denied to them.[183] While judges in both national and international courts may retain their reluctance to second-guess resource allocations made by elected politicians, they may at some stage see a justification for further limiting community interests and instead giving greater prominence to individual freedoms. Moreover, right to property arguments are likely to surface in unexpected places, as occurred in the recent Supreme Court case of *R v Waya*.[184] This was first argued before a panel of seven Justices in May 2011, when the focus was on how the court should measure the benefit accruing to a convicted criminal as a result of his deception (he had obtained a mortgage on a London flat by making false statements about his income). But during the course of that hearing their Lordships realized that Article 1 of Protocol No 1 might be relevant, so the case was listed for rehearing in March 2012, this time before a bench of nine Justices. In its decision, the court emphasized the need for confiscation orders to be proportionate, and on the facts of the case the majority of Justices reduced the Court of Appeal's order (which was for £1.11 million) to £392,000.[185] The consensus was that the proportionality of confiscation orders should no longer be governed by the common law's abuse of process doctrine[186] but by the standards required by the European Convention.[187] This was the first occasion on which the United Kingdom's top court applied Article 1 of Protocol No 1 in a way which altered existing domestic legal rules.

[181] Ibid, [106].

[182] See 358–9 above.

[183] The concepts of 'copyright' and 'trade marks', for example, have expanded considerably in recent times.

[184] [2012] UKSC 51, [2012] 3 WLR 1188.

[185] Lord Phillips and Lord Reed dissented, preferring to send the case back to the Crown Court for a recalculation to take place there.

[186] On which see Ch 7 above, at 191–3.

[187] [2012] 3 WLR 1188, [18] and [83], in the latter of which Lord Phillips and Lord Reed refer to the use of Art 1 of Protocol No 1 in this context as 'novel and imaginative'.

The right to education

Article 2 of Protocol No 1 to the European Convention guarantees protection, albeit limited, to the right to education. It states:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The provision says nothing about the level of education to which the right extends, or about whether there are any lower or upper age limits to the entitlement. It does not oblige the state to provide education but merely says that to the extent that it does provide education the state must respect certain wishes of the parents of those being educated. Given these lacunae, the European Court has had to elaborate upon Article 2 quite considerably.[188] Within the United Kingdom, domestic courts must also be aware that this is the only provision in the Convention in respect of which the United Kingdom maintains a reservation, which is also set out in the Human Rights Act 1998:

> [I]n view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.[189]

The United Kingdom's top court has had to consider Article 2 of Protocol No 1 in any detail in only three appeals (two of which were heard together), although in the run up to the commencement of the 1998 Act there were two other occasions on which Article 2 might have been considered but was not. The first of these was *R v East Sussex County Council, ex parte Tandy*,[190] where a girl who suffered from myalgic encephalomyelitis (ME) challenged a decision of her local education authority to reduce the home tuition she was receiving each week from five hours to three hours. The authority had adopted a policy to that effect because of a reduction in government funding. Reversing the Court of Appeal,[191] the Law Lords held unanimously that, as Parliament had imposed a duty, not a power, on local education authorities to provide 'suitable education', the authorities could not rely upon scarcity of resources as an excuse for not performing that duty. The relevant statutory provision stated that each local education authority was required to make arrangements for the provision of suitable full-time or part-time education for children of compulsory school age who, because of illness, exclusion, or other reason, may not otherwise receive suitable education, and it defined 'suitable education' as 'efficient education suitable to [the child's] age, ability and aptitude and to any special educational needs [the child] may have'.[192] Lord Browne-Wilkinson, with whom the other four Law Lords concurred, held that the wording of this provision made it unlawful for

[188] See Reid (2012), 384–92.
[189] Schedule 3, Pt II. The reservation has been in existence since 20 March 1952.
[190] [1998] AC 714.
[191] Ibid.
[192] Education Act 1993, s 298(7).

the local education authority to take financial resources into account when deciding what would be 'suitable education', although he stressed that 'if there is more than one way of providing "suitable education" the local education authority would be entitled to have regard to its resources in choosing between different ways of providing [it]'.[193] He distinguished the Lords' decision taken the previous year in *R v Gloucestershire County Council, ex parte Barry*,[194] where they had held that, under the legislation applying there,[195] a local authority could have regard to financial resources when deciding if it was necessary, in order to meet the needs of a disabled person, to make arrangements for providing assistance of various kinds for that person. Lord Browne-Wilkinson said that the statutory provision in *Barry* was a strange one, whereas the one in *Tandy* imposed an immediate obligation to make arrangements to provide suitable education.[196] No regard was had to Article 2 of Protocol No 1, even though the decision was announced at a time when the Human Rights Bill was before Parliament.

In the second pre-Human Rights Act case, *B v Harrow London Borough Council*,[197] the mother of a child with severe learning difficulties challenged her local education authority's decision to place her daughter in a school maintained by itself rather than in one maintained by a neighbouring authority which the mother preferred. The House held that the authority had acted correctly because the legislation in question made each local education authority responsible for the special educational needs of children in its own area and allowed it to go against a parent's preferred choice of school if doing so was 'incompatible with . . . the efficient use of resources'.[198] This time it was Lord Slynn who gave the only judgment and, like Lord Browne-Wilkinson in *Tandy*, he dealt with the matter as a question of statutory interpretation and had no regard at all for the European Convention, even though the Human Rights Act 1998 was by then on the statute book, although not in force.

Remarkably, in a later case involving judicial review of a head teacher's decision to provide segregated education for a pupil who had been reinstated in the school after a period of exclusion, Article 2 again played a very limited role. This was in *R (L (A Minor)) v Governors of J School*,[199] and was a narrowly split decision, the differences of opinion turning on the interpretation of the specific legislative provisions dealing with 'reinstatement'.[200] The pupil had been permanently excluded for having allegedly kicked another pupil several times, but he had successfully appealed against his exclusion to an independent appeal panel, which had ordered his reinstatement. The question was whether proper 'reinstatement' had actually occurred. Lords Hobhouse, Scott, and Walker thought that it had, while Lords Bingham and Hoffmann thought it had not. However, even the judges in the minority did not find that the failure to reinstate amounted to a violation of Article 2 of Protocol No 1.[201] None of the judges in the

[193] [1998] AC 714, 747B.
[194] [1997] AC 584. See, generally, Palmer (2007a) and (2000); King (2007).
[195] Chronically Sick and Disabled Persons Act 1970, s 2(1).
[196] [1998] AC 714, 748D and 748F.
[197] [2000] 1 WLR 223.
[198] Education Act 1993, Sch 27, para 3(3)(b).
[199] [2003] UKHL 9, [2003] 2 AC 633.
[200] School Standards and Framework Act 1998, s 67(4).
[201] [2003] 2 AC 633, [26] (per Lord Bingham); Lord Hoffmann agreed with Lord Bingham: [28].

majority referred to Article 2 at all (despite counsel's reliance upon it[202]), remaining satisfied with holding that the precise arrangements as to how a pupil should be reinstated in a school were a matter for the discretion of the head teacher. So, even though the 'reinstated' pupil in this case received face-to-face tuition in only one subject, took no part in sports, and could not associate with his fellow pupils at any other times, including meal times and acts of worship,[203] the majority held that reinstatement had occurred. Even the fact that the arrangements were made in this way so as to avoid a threatened strike by teachers in the school was not enough to render them less than 'reinstatement'. Somehow one feels that, had Baroness Hale been sitting in this case in place of one of the majority, the decision might have gone the other way because of the rights of the child involved. As it stands, the decision is not a ringing endorsement of the top court's commitment to the right to education.

It was in two appeals heard together in 2006 that the House first got a direct opportunity to interpret the Convention right to education. In *A v Head Teacher and Governor of Lord Grey School*[204] a teenager who had been excluded from school claimed damages for breach of his right to education, relying squarely on the Human Rights Act 1998. The Court of Appeal held in his favour, at least as regards the six-month period following the pupil's initial 45-day temporary exclusion.[205] But the Law Lords, by a majority, held that Article 2 had not been breached. They found that the teenager had not in fact been denied access to other educational facilities: his parents had rejected the offer of such facilities. In explicating what was guaranteed by Article 2, it is clear that the majority of Law Lords thought it was not a very demanding provision. Lord Bingham cited the description of the article used by the European Court as far back as 1968 in the *Belgian Linguistic Case (No 2)*[206] and confirmed that in comparison with most other Convention guarantees the right to education is a weak one.[207] Its central weakness perhaps, as demonstrated particularly clearly in Lord Hoffmann's opinion, is that, unlike many other provisions in the European Convention which refer to rights guaranteed 'according to law' or 'in accordance with the law', Article 2 of Protocol No 1 does not make a breach of a state's domestic education law a violation of a Convention right. The contrary view was supported by Sedley LJ and his colleagues in the Court of Appeal, but Lord Hoffmann rejected it: 'The principle, as stated by the European Court of Human Rights in the *Belgian Linguistic Case (No 2)*, is that Article 2 of the First Protocol does not confer a right to an education which the domestic system does not provide'.[208]

Baroness Hale, however, dissented from her brethren's views to the extent of holding that Article 2 *had* been breached, although she would have restricted the claimant to a declaration rather than awarding him damages. As she so often does in cases where children are at the centre of the legal dispute, she looked at the situation from

[202] Cherie Booth QC also relied unsuccessfully upon Art 3 of the European Convention, suggesting that the boy in question had been subjected to humiliating or degrading treatment: ibid, 636B and [77].
[203] Ibid, [74].
[204] [2006] UKHL 14, [2006] 2 AC 363.
[205] [2004] EWCA Civ 382, [2004] QB 1231.
[206] (1979–80) 1 EHRR 252 (decided in 1968).
[207] [2006] 2 AC 363, 379B.
[208] Ibid, 385H. Lord Nicholls agreed with both Lord Bingham and Lord Hoffmann.

the teenager's point of view. It was not the boy's fault that his parents had refused to take up the offers of alternative facilities, nor that they had delayed deciding what they wanted to do, and the school had not done all that was reasonable after the initial 45-day suspension. Accepting Lord Bingham's remark that the object of Article 2 was to guarantee fair and non-discriminatory access to the educational system established in each state, she said that that was exactly what was denied to the teenager in this case.[209] The difference of opinion between the Law Lords is a reflection of the fact that the letter of Article 2 suggests that the right to education is one which belongs to the parents of a child, while of course the spirit of the provision presupposes that it belongs to the child. This might explain the apparent contradiction between the attitudes struck by both Lords Bingham and Hoffmann in the *J School* case on the one hand and in the *Lord Grey School* case on the other.

The appeal heard alongside the *Lord Grey School* case was *R (SB) v Governors of Denbigh High School*, which has already been discussed in earlier chapters of this book.[210] The girl who was excluded from school for two years because of her refusal to comply with its school uniform policy also argued that her rights under Article 2 of Protocol No 1 had been breached. This time the bench was unanimous in concluding that there had been no denial of access to the educational system as a whole and that the girl herself had not availed of alternative educational provision. Baroness Hale did not make it explicit why in this case Article 2 had not been violated, even though she thought it had been in the *Lord Grey School* case; the teenage girl in the *Denbigh High School* might have been just as much a pawn in the hands of others as the boy appeared to be in the *Lord Grey School* case.

So the United Kingdom's top court has not yet issued a decision finding that Article 2 of Protocol No 1 has been violated. This perhaps reflects an unspoken reluctance to allow human rights claims to proliferate within a school setting, mirroring the populist view that today's children need to be more aware of their responsibilities than of their rights. But it is more likely a function of the adventitiousness of the litigation process: the top court has not yet been confronted with a set of facts that clearly demonstrate a breach of the Convention guarantee. If that guarantee is deemed not to be a strong enough one, the court should itself develop the common law in this area.

The right to free elections

If Article 2 of Protocol No 1 is a weak provision, Article 3 of the same Protocol is even more so.[211] It reads:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Appellate Committee of the House of Lords was required to consider this provision only in the last month of its existence, and when judgment came to be issued in the

[209] Ibid, 392G.
[210] See Ch 2 above, at 43–8, and Ch 9, at 267–8.
[211] See Reid (2012), 393–408.

case the Lords had become Justices. This was *R (Barclay) v Lord Chancellor*,[212] already mentioned in the context of the European Convention's extra-territorial application.[213] It concerned a challenge to a new law for the island of Sark, in the Channel Islands. The Barclay brothers argued that the law violated Article 3 of Protocol No 1 in that it permitted two unelected officials to serve in the island's legislature; a further resident of the island argued that the new law was discriminatory because, while it allowed him, as a Slovenian national, to vote in the election for the legislature it did not permit him to stand for election. But the Supreme Court rejected both complaints, seeing nothing in Article 3 of Protocol No 1 (even when taken in conjunction with Article 14) to support them.

Neither the House of Lords nor the Supreme Court has had to deal with the vexed question of whether prisoners should have the right to vote in UK elections. In 2005 the Grand Chamber of the European Court ruled against the United Kingdom on this issue,[214] but domestically the case had gone only as far as the Divisional Court in England and Wales, not even to the Court of Appeal (leave to appeal was denied by the Divisional Court). The domestic application had been for a declaration under section 4 of the Human Rights Act 1998 that section 3 of the Representation of the People Act 1983, which bans most prisoners from voting in parliamentary or local elections, is incompatible with the European Convention on Human Rights.[215] In Strasbourg the European Court ruled that the ban *was* too wide and in a subsequent case gave the UK government until 22 November 2012 to produce reforms that would be compatible with the Convention.[216] The Prime Minister, and Parliament as a whole, have been resentful of this perceived interference with a state's democratic autonomy,[217] but the Joint Committee on Human Rights, and even the Ministry of Justice, have recognized that reform must nevertheless occur.[218] On 22 November 2012 the Lord Chancellor presented legislative options to Parliament in the shape of the Voting Eligibility (Prisoners) Draft Bill, but he made it clear that he would prefer to make no change at all to the existing law.[219]

Article 3 of Protocol No 1 played no part in *Robinson v Secretary of State for Northern Ireland*,[220] where the question was whether the election of a First Minister and deputy First Minister in Northern Ireland was valid, even though it had occurred outside the six-week period allowed for such an election by the Northern Ireland Act 1998.[221] By what may look to some as a contortion of the statutory words, the Law Lords held by

[212] [2009] UKSC 9, [2010] 1 AC 464.
[213] See Ch 3 above, at 62.
[214] *Hirst v UK (No 2)* (2006) 42 EHRR 41. The decision was by a majority of 12 v 5. This followed a unanimous judgment to the same effect by a Chamber of the Court: (2004) 38 EHRR 40.
[215] [2001] EWHC (Admin) 239.
[216] *Scoppola v Italy (No 3)*, App No 126/05, judgment of 22 May 2012.
[217] On 3 November 2010 David Cameron said it made him physically ill even to contemplate giving votes to prisoners: HC Debs, vol 517, col 921. On 10 February 2011 MPs voted by 234 to 22 to oppose the Grand Chamber's judgment in *Hirst*, n 214 above: HC Debs, vol 523, col 584. See Nicoll (2011) and White (2012).
[218] Joint Committee (2008), paras 47–63; Ministry of Justice (2012), 17–8. See too Briant (2011).
[219] White (2012).
[220] [2002] UKHL 32, [2002] NI 390.
[221] Section 16(8).

three to two that the election was actually valid. Counsel do not seem to have seen any point in basing an argument on the European Convention.

Conclusion

There will continue to be arguments over what constitutes a 'possession' for the purposes of Article 1 of Protocol No 1, as well as over what amounts to a deprivation of that possession and a control of its use. It is likely that the Supreme Court will continue for some time to feel safe with the notion that Member States have a wide margin of appreciation in this context. It will therefore be able to answer those questions in accordance with domestic public policy, which includes well-established laws protecting the existing owners of property. But a lot depends on how the European Court decides to develop its jurisprudence. If the saga of the right to family life in the context of evictions of tenants from social housing is anything to go by,[222] and if Strasbourg's expansive approach to both the definition of 'possession' and the applicability of Article 14 continues, the Supreme Court may well find itself having to re-examine some traditional legal givens with a view to reconciling them with the twenty-first century conceptualization of an individual right to property. The more that that right is considered by the European Court to apply to social entitlements such as welfare benefits, or to services such as health care and education, as opposed to the more conventional forms of property such as land, goods, and intangibles, the likelier it is that the Supreme Court will need to re-frame its thinking. The Supreme Court is less likely to have to consider arguments based on Articles 2 or 3 of Protocol No 1, unless the European Court unexpectedly decides to greatly expand its interpretation of these provisions so as to give the protection of individual rights a higher priority in relation to public policy and community interests.

[222] See Ch 8 above, at 242–56.

13

Conclusion

The Court's relationship with Strasbourg

The establishment of the UK Supreme Court in October 2009 marked the start of a new era in the history of English law. It severed the formal institutional link between the United Kingdom's top court and a chamber of Parliament and it provided an opportunity for the personnel of the new court to consider what changes they should make to the way they process appeals and deliver their judgments. In the specific context of human rights law, however, the creation of the Supreme Court was a much less significant event than the enactment of the Human Rights Act 1998. Having come fully into force in October 2000, the Act had been considered by Lords of Appeal on numerous occasions prior to the Supreme Court's formation, and many views had been expressed at considerable length on a wide range of issues thrown up by the Act. Within a year of its establishment the Supreme Court made it clear that it intended to deal with earlier decisions of the House of Lords in the same way as the House of Lords itself had done,[1] by applying the Practice Statement of 1966.[2] The new court thereby confirmed that the position of the House of Lords on human rights would be the one it would itself adopt unless the conditions set out in the Practice Statement obtained. These conditions are that it appears right to depart from the precedent if there would otherwise be injustice in a particular case or if the proper development of the law would be restricted. The Statement added that their Lordships would bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The preceding chapters of this book have tried to convey a picture of where the Supreme Court currently stands on the human rights set out in the European Convention on Human Rights. To a large extent that stance has been inherited from the House of Lords. The conclusion reached at the end of most of the chapters is that the top court has made some good progress in guaranteeing protection to each of the rights in question but that more still remains to be done. Measuring the progress made against the standards set by the European Court of Human Rights—which admittedly is not the yardstick that many critics of the European Court would apply—it is clear that the United Kingdom's top court continues to fall short of what would be the optimum ruling in every appeal. Appendix 3 to this book attempts to display in tabular form how

[1] *Austin v Southwark London Borough Council* [2010] UKSC 28, [2010] 3 WLR 144, [25] (per Lord Hope), with whom none of the other Justices disagreed (Lord Brown, Lord Kerr, Lord Walker, and Baroness Hale).

[2] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

the top court has fared when its decisions have been reviewed in Strasbourg. Taking only the slightly longer than three-year period which has elapsed since the Supreme Court began its work in 2009, there have been no fewer than 10 occasions on which the European Court of Human Rights has issued a judgment which is at variance with that which was earlier reached by the House of Lords. Apart from *Horncastle* (below), no decision by the Supreme Court has yet been considered by the European Court, but there is no reason to believe that the flow of applications will diminish.

Indeed, there is little to suggest that within the United Kingdom's top court the general attitude to the concept of human rights has altered much during the last decade or so.[3] If anything, there are signs that the Supreme Court Justices may be more prepared than their predecessors to 'stand up' to the European Court on points of domestic law which they feel the judges in Strasbourg do not fully understand. Having largely won over the Grand Chamber of the European Court during the 'dialogue' surrounding the use of hearsay evidence in criminal cases (the *Horncastle* and *Al-Khawaja* affair),[4] the Supreme Court may have gained some confidence in its ability to trim the sails of the Strasbourg Court. On the other hand, a review of the way in which the Supreme Court eventually capitulated to the European Court over the extent to which the right to respect for a home must be taken into account when social landlords seek a court order reclaiming possession of their property from tenants (the *Kay* and *Pinnock* affair)[5] demonstrates clearly that persistent pressure from Strasbourg can grind down the Justices into complying with its requirements.

To an extent it does not matter very much that decisions of the Supreme Court are later overturned by the European Court, so long as the Supreme Court can then accommodate the European Court's approach when it later has occasion to look at the same area of law again. This is what occurred in *R (GC) v Commissioner of Police for the Metropolis*,[6] where the Supreme Court, having seen the Law Lords' decision in *S and Marper* concerning retention of fingerprints and biometric data overturned by a unanimous decision of the Grand Chamber in Strasbourg,[7] was able to apply the Grand Chamber's principles by using its interpretative power under section 3 of the Human Rights Act. This kind of adaptability was evident again in *Tariq v Home Office*,[8] where an eight-judge bench had to consider the effect in domestic law of the Grand Chamber's decision in *A v UK* relating to the use of secret evidence in civil law cases.[9] The Supreme Court will no doubt be able to adjust in a similar fashion if it is again faced with claims concerning alleged human rights violations committed by British forces abroad (following the *Al-Skeini* and *Al-Jedda* decisions[10]) or with claims that transferring someone to a foreign jurisdiction would amount to a flagrant denial of his or her Convention

[3] See too Fenwick et al (2007), where again the persistent influence of traditional legal reasoning processes is highlighted.

[4] See Ch 3 above, at 57–9.

[5] See Ch 8 above, at 242–56

[6] [2011] UKSC 21, [2011] 1 WLR 1230 (seven Justices; Lord Rodger and Lord Brown dissenting).

[7] See Ch 8 above, at 236–7.

[8] [2011] UKSC 35, [2012] 1 AC 452 (Lord Kerr dissenting).

[9] See Ch 7 above, at 219–22.

[10] See Ch 3 above, at 94–8.

rights (following the *Abu Qatada* case).[11] In these instances the European Court went further than it had previously gone in protecting Convention rights, so a national court can hardly be blamed for not having predicted such a turn of events.

Yet that statement presupposes that the Supreme Court could not decide of its own motion that Convention rights should be protected in the United Kingdom in a more comprehensive way than in other European states or in the European Court. We have encountered a few examples in this book of situations in which the House of Lords did 'push the envelope' in this manner, either because the issue in question was already covered by common law principles (such as abuse of process, natural justice, or unfairness) or because the Law Lords felt they were operating within the margin of appreciation accorded to each national legal system by the European Court itself. But these are exceptional cases, for in general the top court has wedded itself to the 'no more, no less' approach first articulated by Lord Bingham in *Ullah v Special Adjudicator*.[12] This self-denying ordinance is a hindrance to the Supreme Court's freedom of action on human rights, even if from time to time it seems to be forgotten by the very judges who on other occasions have strongly supported it. As the Court moves forward under the leadership of its second President, it is notable that at least two of the Justices who potentially have many more years of active service on the Court ahead of them have already published extra-judicial statements which distance them from a strict application of the *Ullah* principle.[13]

The Court's relationship with Parliament

A deduction that can safely be made from the analyses in earlier chapters is that, when human rights are in play, judges in the United Kingdom's top court are very reluctant to create new law on matters of significant social policy. They occasionally declare primary legislation to be incompatible with Convention rights (this has happened in six cases so far[14]), and even less frequently they declare secondary legislation to be invalid (two instances so far[15]), but in such situations they give no guidance as to how exactly the legislation should be amended. *Bellinger v Bellinger*, the case about the rights of transsexuals, is perhaps the best example of such judicial restraint.[16] In several other situations the top judges have expressed a clear view that, while it would be possible to strike the balance between individuals' rights and society's interests in a way which is more favourable to the former, that is a step which should be taken by elected representatives rather than by unelected judges. *R (Pretty) v DPP* and *R (Purdy) v DPP* are good illustrations,[17] with the latter—the last ever decision of the Appellate Committee of the House of Lords—displaying a slightly more remedial approach than the former,

[11] See Ch 5 above, at 147–9.
[12] [2004] UKHL 26, [2004] 2 AC 323. See Ch 2 above, at 39–43.
[13] Hale (2012); Kerr (2012c).
[14] See Ch 3 above, at 73–6.
[15] See Ch 3 above, at 70–2.
[16] See Ch 3 above, at 74, and Ch 8 above, at 233.
[17] See Ch 4 above, at 114–8.

thereby signalling to some that the successor Court might be much more prepared to nudge law reform in a certain direction rather than leave it entirely to the legislature's whim. We also witnessed this 'hands off' approach in *Al-Rawi v Security Services*,[18] where an eight-judge bench unanimously declined to develop the common law relating to the use of 'closed material procedures' in civil cases, preferring to leave such a step to Parliament. We have encountered further instances of this form of deference to the legislature in cases concerning the control of rents,[19] the imposition of income tax,[20] the treatment of children in care,[21] the types of images that can be shown on our television screens,[22] the regulation of consumer credit[23] and the water industry,[24] the liability of the police towards victims and witnesses of crime,[25] the allocation of resources to pension and welfare recipients,[26] the objective justification for indirect sex discrimination,[27] and the banning of fox-hunting.[28]

There have been relatively few cases in which the House of Lords or Supreme Court has dared to protect individual human rights in the face of legislation which appears to explicitly deny those rights. *R v A (No 2)*,[29] on the cross-examination of rape victims, and *Ghaidan v Godin-Mendoza*,[30] on the rights of gay tenants, spring most obviously to mind, but we should also note the decisions on the right of asylum seekers to be protected against destitution,[31] the right of unmarried couples to apply to adopt a child,[32] the right of unmarried fathers to attend hearings about their children's future,[33] and, most recently, the right of criminal suspects not to have their biometric data retained for too long a period.[34] We know from the judgment of Lord Nicholls in *Ghaidan v Godin-Mendoza* that, when exercising its interpretative power under section 3 of the Human Rights Act 1998, the courts should not 'adopt a meaning inconsistent with a fundamental feature of the legislation' or 'make decisions for which they are not equipped'.[35] There is even a sense that, despite section 4 of the Human Rights Act 1998 being considered an option of last resort, it may in fact be more to the top court's liking

[18] [2011] UKSC 34, [2012] 1 AC 531.

[19] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349.

[20] *R v Allen (No 2) and Rv Dimsey* [2001] UKHL 45 and 46, [2002] 1 AC 509.

[21] *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291.

[22] *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

[23] *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816.

[24] *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42.

[25] *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225.

[26] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173; *R (McDonald) v Kensington and Chelsea Royal LBC* [2011] UKSC 33, [2011] 4 All ER 881; *R (KM) v Cambridgeshire County Council* [2012] UKSC 23, [2012] 3 All ER 1218.

[27] *R v Secretary of State for Employment, ex parte Seymour-Smith* [2000] 1 WLR 435; *Humphreys v HM Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545.

[28] *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719.

[29] [2001] UKHL 25, [2002] 1 AC 45.

[30] [2004] UKHL 30, [2004] 2 AC 557.

[31] *R (Limbuela) v Secretary of State for the Home Dept* [2005] UKHL 66, [2006] 1 AC 396.

[32] *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173.

[33] *Principal Reporter v K* [2010] UKSC 56, [2011] 1 WLR 18.

[34] *R (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21, [2011] 1 AC 1230.

[35] [2004] 2 AC 557, [32]–[33]. See Ch 3 above, at 66–70.

because a declaration of incompatibility does not have the effect of changing the law, even for the parties to the dispute at hand: instead, it passes the responsibility to government and Parliament to consider what kind of long-term remedial measure would be appropriate in the circumstances. The reluctance of the top court to trespass on Parliament's patch has been very marked in the years to date since the commencement of the 1998 Act and there is little reason to believe that this attitude is likely to change in the years to come.

The future

From the middle of 2013 there will be only four Justices on the Supreme Court who have previously sat as Lords of Appeal in the House of Lords: Lord Neuberger, the President, served in that capacity from 2007 to 2009 before taking up the role of Master of the Rolls for three years; Lord Kerr was the last Lord of Appeal ever to be appointed, in June 2009, and he heard just two appeals and delivered no judgments there before becoming a Justice of the Supreme Court; Lord Mance was appointed a Lord of Appeal in 2005; Baroness Hale was appointed a year earlier and by June 2013 will be the Justice who has served the longest period in the country's top court. Barring unexpected events, or the appointment of new Justices who are already within five years of their compulsory retirement age, there may not be any further appointments to the Supreme Court between June 2013 and January 2018, when Lord Neuberger is due to retire. That means that there could be a four-and-a-half year period of stability in terms of the personnel of the Court, which may engender some deeper collective effort to move the jurisprudence of the Court forward in a more programmed way. The power to grant permission to appeal may perhaps be exercised more strategically, so that cases are selected which touch upon areas of law which the Court thinks are most in need of reform. The retirement in 2013 of such stalwarts as Lord Walker and Lord Hope may likewise be a trigger for some fresh initiatives, as may the designation of a new Deputy President upon Lord Hope's departure. On the other hand, it is unlikely that new appointees will be cut from a cloth that is very different from that which has already been used to supply previous senior judges, and this will inevitably reduce the chances of any sense of a new beginning. There are still opportunities for presidential leadership, however, so that by 2018 the outputs of the previous six years may well be designated as those of 'the Neuberger Court'.

Given the *relative* lack of experience of most of the known post-2013 Justices, it is difficult at this juncture to predict what their personal approach to human rights issues is likely to be. It is in any event always dangerous to seek to deduce from a series of decisions reached by a particular judge what his or her stance may be in a future appeal, if only because decisions are so dependent on the facts in question and on the strength of the advocacy by counsel. The interesting work by Poole and Shah in this context demonstrates that there are 'significant variations between the judges in human rights cases' but that 'the figures do not reveal an ideological split along party-political lines'; they do, however, contend that top judges who are 'more familiar with human rights' are 'more prone to vote for a human rights win', and that those who have been on the court longer are 'less likely to vote for human rights claims than those who came onto the

court later'.[36] In addition, the way in which the Supreme Court operates in the United Kingdom militates against the development of individual judicial approaches to human rights issues, or indeed to any other issues. Paradoxical though it may seem, the fact that, unlike the US Supreme Court, the UK Supreme Court never sits completely *en banc* (ie as a bench of all 12 Justices), means that it is difficult for 'camps' or 'alliances' to develop within the Court. Groups of judges cannot 'gang up' on other judges in the way that we sometimes see in other top courts. Quite apart from this, the UK Supreme Court Justices are not in any way 'vetted' for their views on controversial issues before being appointed to the top court. Although there have been some calls for parliamentary hearings to be conducted into the candidature of judges for the top role,[37] these have been consistently rebuffed,[38] chiefly on the ground that they would run the risk of politicizing the appointments process, even if, in this context, 'politicizing' does not refer to differentiating between candidates on the basis of their party political allegiances or voting preferences so much as distinguishing between them on issues such as their approach to principles of statutory interpretation and precedent, their willingness to create legal rules in areas which other judges think are better left to Parliament, or their preparedness to consider whether English law should be influenced by developments in the law of other countries or by international law.

As far as is known, a selection commission for a new Justice is *not* presented with a synopsis of each applicant's previous judicial decisions or of the views the applicant may have expressed extra-judicially, whether about human rights law or other issues. At times a person will be appointed partly because he or she can help to plug a gap in the expertise of the Court: given that the Supreme Court can deal with cases covering virtually any legal field (often far removed from constitutional law or human rights law), it will often be necessary to give preference to a candidate for judicial office who is a recognized expert in, say, commercial law, intellectual property law, or taxation law. Moreover, when it comes to appointments to roles that also carry administrative and representative responsibilities—as do the posts of President and Deputy President of the Supreme Court—a candidate's previous experience in leading a court will understandably play a part in the selection process. This is likely to be one reason why Lord Neuberger of Abbotsbury, who had served for three years as Master of the Rolls (having previously been a Law Lord), was appointed to be the President of the Supreme Court in succession to Lord Phillips in October 2012 (who himself, like his predecessor Lord Bingham, had previously been the Master of the Rolls as well as Lord Chief Justice). Apparently there were two other candidates for the position who were already sitting on the Supreme Court, Baroness Hale and Lord Mance, but they did not have the same administrative or leadership experience as Lord Neuberger.[39]

[36] Poole and Shah (2011), 100.

[37] eg Paterson (2012), 151, where he suggests that, after being nominated for appointment to the Supreme Court, nominees should appear before a parliamentary select committee for pre-appointment confirmation.

[38] Most recently, in March 2012, by the House of Lords' Select Committee on the Constitution: *Judicial Appointments*, 25th Report of 2010–12, HL 272, paras 39–46.

[39] See the article by Joshua Rozenberg on the website of the *Guardian*: <http://www.guardian.co.uk/law/2012/jul/12/lord-neuberger-announced-supreme-court-president> (last accessed 15 January 2013).

So it is safe to assume that judges are not appointed to the UK Supreme Court because of their views on particular issues, including human rights. But observers are still entitled to ask whether, once appointed, justices begin to display certain views which allow a prediction to be made as to how they would respond when faced with a novel human rights claim. The frequency with which benches of seven or nine judges are convened to hear an appeal means that 'like-thinking' may become more obvious. Nevertheless, Supreme Court Justices are no doubt more conscious than anyone else of the undesirability of creating an impression that they may have pre-judged a particular line of argument. They need to sustain the idea that they come to each new appeal with a completely open mind. They are therefore very careful not to be too explicit, either in judgments or in lectures, about issues that may well come before them in the future. Their adeptness at reaching conclusions in particular appeals without closing off their options when faced with related points in later cases is very impressive and is probably a result of their years of practice at the bar, where it is imperative to deal specifically with the facts of cases as they are, not as one might like them to be.

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APPENDIX 1

Law Lords and Justices in office since the enactment of the Human Rights Act 1998

Who succeeded whom between 1998 and 2013?

As of 1 October 1998		As of 1 January 2013
Browne-Wilkinson (1991) →	Bingham (2000) → Phillips (2008)	→ Neuberger (2012)
Slynn (1992) →		→ Walker (2002)
Lloyd (1993) →	Phillips (1999) → Scott (2000)	→ Clarke (2009)
Nicholls (1994)→	Neuberger (2007)→Dyson (2010; resigned 2012)	→
Steyn (1995) →		→ Mance (2005)
Hoffmann (1995) →	Collins (2009)	→ Sumption (2012)
Hope (1996) →		→ Hope (1996)
Clyde (1996) →	Rodger (2001)	→ Reed (2012)
Hutton (1997)→	Carswell (2004)	→ Kerr (2009)
Saville (1997) →		→ Wilson (2011)
Hobhouse[1] (1998) →		→ Hale (2004)
Millett[2] (1998)→	Brown (2004)	→ Carnwath (2012)

Appointments to the Supreme Court since its creation in October 2009

	Name of judge	Date of appointment	Date demitting office
1	Lord Phillips of Worth Matravers (President)	1 October 2009	Retired 30 September 2012
2	Lord Hope of Craighead (Deputy President)	1 October 2009	Must retire by 27 June 2013
3	Lord Saville of Newdigate	1 October 2009	Retired 30 September 2010
4	Lord Rodger of Earlsferry	1 October 2009	Died 26 June 2011
5	Lord Walker of Gestingthorpe	1 October 2009	Must retire by 17 March 2013
6	Lady Hale of Richmond	1 October 2009	Must retire by 31 January 2020
7	Lord Brown of Eaton-under-Heywood	1 October 2009	Retired 9 April 2012
8	Lord Mance	1 October 2009	Must retire by 6 April 2018
9	Lord Collins of Mapesbury	1 October 2009	Retired 7 May 2011
10	Lord Kerr of Tonaghmore	1 October 2009	Must retire by 22 February 2023
11	Lord Clarke of Stone-cum-Ebony	1 October 2009	Must retire by 13 May 2018
12	Lord Dyson (succeeding Lord Neuberger)	19 April 2010	Resigned 30 September 2012
13	Lord Wilson of Culworth (succeeding Lord Saville)	26 May 2011	Must retire by 9 May 2020
14	Lord Sumption	11 January 2012	Must retire by 9 December 2018

(*Continued*)

(*Continued*)

	Name of judge	Date of appointment	Date demitting office
15	Lord Reed (succeeding Lord Rodger)	6 February 2012	Must retire by 7 September 2026
16	Lord Carnwath of Notting Hill (succeeding Lord Brown)	15 May 2012	Must retire by 15 March 2020
17	Lord Neuberger of Abbotsbury (President; succeeding Lord Phillips)	1 October 2012	Must retire by 10 January 2018
18	Lord Hughes (succeeding Lord Dyson)	9 April 2013	Must retire by 11 August 2018
19	Lord Toulson (succeeding Lord Walker)	9 April 2013	Must retire by 23 September 2016
20	Lord Hodge (succeeding Lord Hope)	1 October 2013	Must retire by 19 May 2023

[1] Lord Hobhouse replaced Lord Goff on 1 October 1998.
[2] Lord Millett replaced Lord Nolan on 1 October 1998.

APPENDIX 2

Biographies of current Supreme Court Justices[1]

Lord Neuberger of Abbotsbury, President of the Supreme Court

Born on 10 January 1948, David Neuberger attended Westminster School and read chemistry at Christ Church, Oxford, before turning to the law and being called at Lincoln's Inn in 1974. He practised in Chancery matters and was as a Recorder from 1990 until 1996. In that year he was appointed a judge of the Chancery Division of the High Court of England and Wales. He was the Supervising Chancery Judge for the Midland, Wales and Chester, and Western Circuits between 2001 and 2004. He served as a Lord Justice of Appeal from 2004 to 2007, when he was made a Lord of Appeal in Ordinary. From 1 October 2009 until 30 September 2012 he held the office of Master of the Rolls and Head of Civil Justice, the second most senior judicial appointment in England and Wales. He set up and chaired a committee which reported in May 2011 on the practice and procedure relating to 'super-injunctions'. Lord Neuberger has been President of the Supreme Court since 1 October 2012.

Lord Hope of Craighead, Deputy President of the Supreme Court

Born on 27 June 1938, David Hope was appointed a Lord of Appeal in Ordinary in 1996, and is one of two Scottish Justices of the Supreme Court. At present he is the longest serving top court judge in the United Kingdom. When he retires in June 2013 he will have served for 17 years. He was educated at the Edinburgh Academy and Rugby School. After national service with the Seaforth Highlanders he studied at Cambridge University, where he read classics, and at the University of Edinburgh, where he read law. In 1965 he was admitted to the Faculty of Advocates. He became a Queen's Counsel in 1978. After serving as Advocate Depute since 1978, he was in 1986 elected Dean of the Faculty of Advocates. In addition he was Chairman of the Medical Appeal Tribunal and the Pensions Appeal Tribunal from 1985 to 1986. In 1989 he was appointed to the Bench as Lord Justice General of Scotland and Lord President of the Court of Session. He has been Chancellor of the University of Strathclyde since 1998.

Lord Walker of Gestingthorpe

Born on 17 March 1938, Robert Walker was appointed a Lord of Appeal in Ordinary in 2002. Educated at Downside School and Trinity College, Cambridge, he was called to the Bar at Lincoln's Inn in 1960 and took silk in 1982. He served as a Judge of the High Court of Justice (Chancery Division) from 1994 to 1997, and as Lord Justice of Appeal from 1997 to 2002. He is due to retire from the Supreme Court in March 2013, after 11 years of service in the country's top court.

Lady Hale of Richmond

Born on 31 January 1945, Brenda Hale became the United Kingdom's first woman Lord of Appeal in Ordinary in January 2004. She is now the first, and so far only, woman Justice of the Supreme Court. After attending Richmond High School for Girls in North Yorkshire and graduating from Girton College, Cambridge, in 1966, she taught law at Manchester University from 1966 to 1984, also qualifying as a barrister and practising for a while at the Manchester Bar. She specialized in

[1] Much of the information in this Appendix is reproduced, with grateful acknowledgement, from the website of the UK Supreme Court and from *Who's Who*.

family and social welfare law and was founding editor of the Journal of Social Welfare and Family Law. In 1984 she was the first woman to be appointed to the Law Commission of England and Wales, a statutory body which promotes the reform of the law. Important legislation resulting from the work of her team during her nine years at the Commission includes the Children Act 1989 and the Family Law Act. In 1994 she became a High Court judge, the first to have made her career as an academic and public servant rather than a practising barrister. In 1999 she was the second woman to be promoted to the Court of Appeal, before becoming the first woman Law Lord. She is Chancellor of the University of Bristol, Visitor of Girton College, Cambridge, and Visiting Professor at King's College London.

Lord Mance

Jonathan Mance was born on 6 June 1943 and became a Lord of Appeal in Ordinary in 2005. He was from 1999 to 2005 a Lord Justice of Appeal and from 1993 to 1999 a Judge of the High Court, Queen's Bench Division. Jonathan Mance was a pupil at Charterhouse and then read law at University College, Oxford. He spent time with a Hamburg law firm and practised at the commercial bar and sat as a Recorder until 1993. He also chaired various Banking Appeals Tribunals. He represents the United Kingdom on the Council of Europe's Consultative Council of European Judges and currently chairs the International Law Association as well as the Lord Chancellor's Advisory Committee on Private International Law. He served from 2007 to 2009 on the House of Lords' European Union Select Committee, chairing sub-committee E which scrutinizes proposals concerning European law and institutions. In 2008 he led an international delegation for the All Party Parliamentary Group on the Great Lakes Region and the Swedish Foundation for Human Rights, reporting on the problems of impunity in relation to violence against women in the Congo. Lord Mance is married to Dame Mary Arden, a Lady Justice of Appeal since 2000.

Lord Kerr of Tonaghmore

Lord Kerr served as Lord Chief Justice of Northern Ireland from 2004 to 2009, and was the last Lord of Appeal in Ordinary to be appointed before the creation of the Supreme Court. Born on 22 February 1948, Brian Kerr was educated at St Colman's College in Newry, County Down, and read law at Queen's University Belfast. He was called to the Bar of Northern Ireland in 1970 and to the Bar of England and Wales at Gray's Inn in 1974. He served as Junior Crown Counsel from 1978 to 1983, at which point he took silk and served as Senior Crown Counsel from 1988 to 1993. In 1993 he was appointed a Judge of the High Court of Northern Ireland, succeeding Sir Robert Carswell as Lord Chief Justice in 2004 and again as Northern Ireland's Lord of Appeal in Ordinary in 2009.

Lord Clarke of Stone-cum-Ebony

Anthony Clarke, born on 13 May 1943, was educated at Oakham School before reading law and economics at King's College, Cambridge. He spent 27 years at the bar, specializing in maritime and commercial law, and became a Recorder in 1985, sitting in both criminal and civil courts. He was appointed to the High Court in 1993 and in the same year succeeded Mr Justice Sheen as the Admiralty Judge. He also sat in the Commercial Court and the Crown Court trying commercial and criminal cases respectively. Appointed to the Court of Appeal in 1998, he conducted the Thames Safety Inquiry and in the following year the *Marchioness* and *Bowbelle* Inquiries. Anthony Clarke was appointed Master of the Rolls and Head of Civil Justice in 2005 and in 2009 was the first Justice to be appointed directly to the Supreme Court.

Lord Wilson of Culworth

Born on 9 May 1945, Nicholas Wilson read law at Worcester College, Oxford, and was called to the Bar of England and Wales in 1967. For the next 26 years, during which he took silk in 1987,

he practised almost exclusively in the field of family law. From 1993 until 2005 he was a judge of the Family Division of the High Court and from 2005 until 2011 served as a judge of the Court of Appeal. He became a Justice of the Supreme Court in May 2011.

Lord Sumption

Born on 9 December 1948, Jonathan Sumption attended Eton College and took a first class degree in history at Magdalen College, Oxford, in 1970. He then served for four years as a history Fellow of that College, Lord Sumption was called to the Bar (Inner Temple) in 1975 and took Silk in 1986. His practice covered all aspects of commercial law, EU law, competition law, and public and constitutional law. He was appointed as a Deputy High Court Judge in 1992 and served as a Recorder between 1993 and 2001. He was appointed as a Judge of the Courts of Appeal of Jersey and Guernsey in 1995. Lord Sumption was a Judicial Appointments Commissioner from 2006 to 2011 and he himself became a Justice of the Supreme Court in January 2012, the first person to be appointed directly from the Bar since Lord Radcliffe in 1949. He is the author of a multi-volume history of the Hundred Years War between England and France.

Lord Reed

Born on 7 September 1956, Robert Reed is one of the two Scottish Justices of the Supreme Court. After schooling at George Watson's College in Edinburgh, he studied law at the Universities of Edinburgh and Oxford (where he obtained a doctorate on legal control of government assistance to industry). He was admitted to the Faculty of Advocates in 1983, where he undertook a wide range of civil work. He served as a senior judge in Scotland for 13 years, being appointed to the Outer House of the Court of Session in 1998 and promoted to the Inner House in January 2008. During 1999 he sat as an ad hoc judge of the European Court of Human Rights

Lord Carnwath of Notting Hill

Born on 15 March 1945, Robert Carnwath attended Eton College and studied law at Trinity College, Cambridge. He was called to the Bar (Middle Temple) in 1968 and took silk in 1985. He served as Attorney General to the Prince of Wales from 1988 to 1994. He was a judge of the Chancery Division from 1994 to 2002, during which time (1998 to 2002) he was also Chair of the Law Commission. Lord Carnwath was appointed to the Court of Appeal in 2002 and between 2007 and 2012 was Senior President of Tribunals. He led the implementation of the reforms to the tribunal system following the Leggatt report in 2001.

APPENDIX 3

Decisions by the House of Lords or Supreme Court considered by the European Commission or Court of Human Rights

Part A: House of Lords decisions not based on the Human Rights Act 1998

	Date of decision in House of Lords and law report	Name of case (in HL and → in Strasbourg)	ECHR Articles primarily at issue	Date of decision in Strasbourg and application number or law report[1]
				←Approved[2] Not approved→
1	31 January 1973 [1973] AC 729	*R v Kilbourne* → *X v UK*	Art 6	7 July 1975 (ECm) (Inad) App No 6172/73
2	25 July 1973 [1974] AC 273	*Attorney General v Times Newspapers Ltd* → *Sunday Times v UK*	Art 10	26 April 1979 (ECt) (1979–80) 2 EHRR 245
3	21 February 1979 [1979] AC 617	*R v Lemon* → *X Ltd and Y v UK*	Arts 7, 9, 10, 14	7 May 1982 (ECm) (Inad) (1982) 28 DR 77
4	17 December 1979 [1980] 1 WLR 172	*Farrell v Secretary of State for Defence* → *Farrell v UK*	Arts 2, 13	11 December 1982 (ECm) (FS) (1983) 5 EHRR 466
5	17 July 1980 [1980] AC 930	*Zamir v Secretary of State for the Home Dept* → *Zamir v UK*	Art 5	11 October 1983 (ECm) App No 9174/80
6	7 May 1981 [1981] 1 WLR 732	*Gold Star Publications Ltd v DPP* → *X Co v UK*	Arts 10, A1P1	5 March 1983 (ECm) (Inad) (1983) 32 DR 231
7	4 February 1982 [1983] 2 AC 352	*BP Exploration Co (Libya) Ltd v Hunt* → *H v UK*	Arts 6, 14, A1P1	4 July 1983 (ECm) (Inad) (1983) 33 DR 247
8	11 February 1982 [1983] 1 AC 280	*Home Office v Harman* → *Harman v UK*	Art 10	15 May 1986 (ECm) (FS) (1984) 38 DR 53
9	24 March 1983 [1983] 2 AC 180	*Cheall v APEX* → *Cheall v UK*	Art 11	13 May 1985 (ECm) (Inad) (1985) 42 DR 178
10	15 November 1984 [1985] AC 318	*Re Findlay* → *Hogben v UK*, *H v UK* and *F v UK*	Arts 3, 5, 7	3 March 1986 (ECm) (SO) (1986) 46 DR 231; App No 11732/85; 2 December 1986 (Cm) (SO) App No 12066/86
11	22 November 1984 [1985] AC 374	*Council of Civil Service Unions v Minister for the Civil Service (GCHQ case)* → *CCSU v UK*	Arts 11, 13	20 January 1987 (ECm) (Inad) (1987) 50 DR 228
12	25 July 1985 [1986] AC 41	*R v Blastland* → *Blastland v UK*	Art 6	7 May 1987 (ECm) (Inad) App No 12045/86
13	12 December 1985 [1986] AC 368	*Rumasa SA v Multinvest (UK) Ltd* →	Arts 6, 13, 14, A1P1	8 September 1988 (ECm) (Inad) App No 13021/87
14	14 May 1987 [1987] 2 All ER 417	*Kay v Ayrshire and Aran Health Board* → *Kay v UK*	Art 6	2 May 1989 (ECm) (Inad) App No 13475/87

[1] In this column 'ECm' means European Commission; 'ECt' means European Court; 'FS' means Friendly Settlement; 'GC' means Grand Chamber; 'Inad' means Inadmissible; 'SO' means 'Struck Out'. Decisions by the Commission and judgments of the Court are on the merits unless otherwise indicated.

[2] In the few instances where decisions were partly approved, the author has used his discretion to decide whether, overall, they were approved or not.

	Date of decision in House of Lords and law report	Name of case (in HL and → in Strasbourg)	ECHR Articles primarily at issue	Date of decision in Strasbourg and application number or law report[1]
				←Approved[2] Not approved→
15	13 August 1987 [1987] 1 WLR 1248	*AG v Guardian Newspapers Ltd (Spycatcher No 1)* → *Observer and Guardian v UK*	Art 10	26 November 1991 (ECt) (1992) 14 EHRR 153
16	11 December 1987 [1988] AC 958	*R v Secretary of State for Home Dept, ex parte Sivakumaran* → *Vilvarajah v UK*	Arts 3, 13	30 October 1991 (ECt) (1992) 14 EHRR 248
17	18 February 1988 [1988] AC 806	*Re KD (A Minor)* → *Davidson v UK*	Arts 6, 8	14 December 1988 (ECm) (Inad) App No 14114/88
18	25 May 1988 [1988] 1 WLR 692	*Murray v Ministry of Defence* → *Murray (Margaret) v UK*	Art 5	28 October 1994 (ECt, GC) (1995) 19 EHRR 193
19	28 July 1988 [1990] 1 AC 686	*In re M and H (Minors)* → *RM v UK*	Arts 6, 8	8 June 1990 (ECm) (FS) App No 14558/89
20	13 October 1988 [1990] 1 AC 109	*AG v Guardian Newspapers Ltd (No 2) (Spycatcher No 2)* → *Times Newspapers Ltd v UK*	Arts 10, 13, 14	8 October 1991 (ECm) (M) App No 14644/89
21	10 November 1988 [1990] 1 AC 417	*Antoniades v Villiers* → *Antoniades v UK*	A1P1	15 February 1990 (ECm) (Inad) App No 15434/89
22	8 December 1988 [1989] AC 995	*Greenwich LBC v Powell* → *P v UK*	Arts 6, 8, 14	12 December 1990 (ECm) (Inad) App No 14751/89
23	18 May 1989 [1989] 2 All ER 1100	*Re Lonrho plc* → *Fayed v UK*	Arts 6, 13	21 September 1994 (ECt) (1994) 18 EHRR 393
24	8 February 1990 [1990] 2 AC 663	*Guinness plc v Saunders* → *W v UK*	Art 6	1 October 1990 (ECm) (Inad) App No 16680/90
25	4 April 1990 [1991] 1 AC 1	*X Ltd v Morgan Grampian (Publishers)* Ltd → *Goodwin v UK*	Art 10	27 March 1996 (ECt) (1996) 22 EHRR 123
26	7 February 1991 [1991] 1 AC 696	*R v Secretary of State for Home Dept, ex parte Brind* → *Brind and McLaughlin v UK*	Art 10	9 May 1994 (ECm) (Inad) (1994) 77-A DR 42
27	11 April 1991 [1992] AC 191	*AG v Times Newspapers Ltd (Spycatcher No 3)* → *Times Newspapers Ltd v UK*	Arts 7, 10	12 October 1992 (ECm) (Inad) App No 18897/91
28	23 October 1991 [1992] 1 AC 599	*R v R* → *CR v UK*	Art 7	22 November 1995 (ECt) (1996) 21 EHRR 363
29	14 November 1991 [1992] 2 AC 343	*Telnikoff v Matusevitch* → *Matusevitch v UK*	Arts 10, 14	5 September 1993 (ECm) (Inad) App No 20169/92
30	29 October 1992 [1994] 1 WLR 1	*Murray v DPP* → *KSM v UK*	Art 6	2 December 1997 (ECm) App No 22384/93
31	16 December 1992 [1993] AC 498	*Stubbings v Webb* → *Stubbings v UK*	Arts 6, 14	22 October 1996 (ECt) (1997) 23 EHRR 213
32	21 January 1993 [1993] AC 401	*Canterbury City Council v Colley* → *Colley v UK*	Art 13, A1P1	6 April 1994 (ECm) (Inad) App No 22245/93

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(*Continued*)

	Date of decision in House of Lords and law report	Name of case (in HL and → in Strasbourg)	ECHR Articles primarily at issue	Date of decision in Strasbourg and application number or law report[1]
				←Approved[2] Not approved→
33	11 March 1993 [1994] 1 AC 212	*R v Brown → Laskey, Jaggard and Brown v UK*	Art 8	19 February 1997 (ECt) (1997) 24 EHRR 39
34	4 November 1993 [1994] 2 AC 130	*R v Preston → Preston v UK*	Arts 6, 8, 13	2 July 1997 (ECm) (Inad) App No 24193/94
35	3 February 1994 [1994] 2 AC 238	*AG v Associated Newspapers Ltd → Associated Newspapers Ltd v UK*	Art 10	30 November 1994 (ECm) (Inad) App No 24770/94
36	21 July 1994 [1995] 2 AC 355	*R v Kingston → Kingston v UK*	Arts 6, 7	9 April 1997 (ECm) (Inad) App No 27837/95
37	17 November 1994 (1994) TC 166	*NAP Holdings UK Ltd v Whittles → NAP Holdings UK Ltd v UK*	Art 14, A1P1	12 April 1996 (ECm) (Inad) App No 27721/95
38	16 March 1995 [1995] 2 AC 454	*Associated Newspapers Ltd v Wilson → Wilson, NUJ v UK*	Art 11	2 July 2002 (2002) 35 EHRR 20
39	29 June 1995 [1995] 2 AC 633	*Keating v Bromley LBC → Keating v UK*	Art 6	10 September 1997 (ECm) (Inad) App No 39787/96
40	29 June 1995 [1995] 2 AC 633	*X (Minors) → TP and KM v UK*	Arts 6, 8, 13	10 May 2001 (GC) (2002) 34 EHRR 2
41	29 June 1995 [1995] 2 AC 633	*X (Minors) → Z v UK*	Arts 3, 6, 13	10 May 2001 (GC) (2002) 34 EHRR 3
42	18 January 1996 [1996] 1 WLR 104	*R v Latif → KL v UK*	Art 6	22 October 1997 (ECm) (Inad) App No 32715/96
43	21 March 1996 [1997] AC 16	*Re L (A Minor) → L v UK*	Arts 6, 8	7 September 1999 (Inad) App No 34222/96
44	22 May 1996 [1996] AC 742	*Tilmatine v Secretary of State for Home Dept → Tilmatine v UK*	Arts 2, 3, 5, 6, 13	25 February 1997 (ECm) (SO) App No 33707/96
45	2 July 1996 [1997] AC 558	*R v Khan → Khan v UK*	Art 8	12 May 2000 (2001) 31 EHRR 45
46	4 July 1996 1997 SC (HL) 1	*Brixey v Lynas → ML v UK*	Arts 6, 13, 14, 17	20 March 2001 (Inad) App No 35705/97
47	12 December 1996 [1997] AC 430	*Abnett (known as Sykes) v British Airways plc → Sykes v UK* and *Manners v UK*	Arts 1, 2, 3, 5, 6, 8, 13, 14	21 May 1998 (ECm) (Inad) App No 38698/97 and App No 37650/97
48	12 December 1996 [1997] AC 296	*O'Hara v Chief Constable of the RUC → O'Hara v UK*	Art 5	16 October 2001 (2002) 34 EHRR 32
49	24 April 1997 [1997] AC 655	*Hunter v Canary Wharf Ltd → Khatun v UK*[3]	Arts 8, 13, 14	1 July 1998 (ECm) (Inad)
50	24 April 1997 [2002] 1 WLR 107	*Turner v Grovit → FG v UK*	Art 6	20 April 1999 (Inad) App No
51	21 May 1997 [1997] 1 WLR 839	*R v Secretary of State for Home Dept, ex parte Launder → Launder v UK*	Arts 1, 2, 3, 5, 6, 7, 8, 13,14	8 December 1997 (ECm) (Inad) App No 27279/95

[3] The applicants in the European Court were not the same as the claimants in the House of Lords, but the issues at stake were the same.

	Date of decision in House of Lords and law report	Name of case (in HL and → in Strasbourg)	ECHR Articles primarily at issue	Date of decision in Strasbourg and application number or law report[1]
				←Approved[2] Not approved→
52	21 May 1997 [1998] AC 92	*R v Wicks → Wicks v UK*	Arts 6, 7, 13	11 January 2000 (Inad) App No 39479/98
53	12 June 1997 1997 SC (HL) 111	*Smith v Bank of Scotland → Bank of Scotland v UK*	A1P1	21 October 1998 (Inad) App No 37857/97
54	12 June 1997 [1998] AC 188	*O'Rourke v Camden LBC → O'Rourke v UK*	Arts 3, 8, 13	26 June 2001 (Inad) App No 39022/97
55	12 June 1997 [1998] AC 407	*R v Secretary of State for Home Dept, ex parte Venables → V v UK* and *T v UK*	Art 6	16 December 1999 (GC) (2000) 30 EHRR 121
56	24 July 1997 [1998] AC 382	*R v Mills and Poole → Mills v UK* and *Poole v UK*	Arts 5, 6, 10, 13	16 September 2003 (SO) App Nos 44299/98 and 40708/98
57	16 December 1997 [1998] AC 917	*R v Martin (Alan) → Martin v UK*	Art 6	24 October 2006 (2007) 34 EHRR 31
58	25 June 1998 [1999] 1 AC 458	*R v Bournewood Community and Mental Health NHS Trust, ex parte L → HL v UK*	Art 5	5 October 2004 (2005) 40 EHRR 32
59	23 July 1998 [1999] 2 AC 38	*R v Secretary of State for Home Dept, ex parte Stafford → Stafford v UK*	Art 5	28 May 2002 (GC) (1994) 19 EHRR 333
60	3 December 1998 [1999] 2 AC 512	*Reid v Secretary of State for Scotland → Hutchison Reid v UK*	Art 5	20 February 2003 (2003) 37 EHRR 9
61	30 March 2000 [2001] AC 340	*R v Antoine → Antoine v UK*	Arts 3, 6	13 May 2003 (Inad) App No 62960/00
62	27 July 2000 [2001] 1 AC 268	*AG v Blake → Blake v UK*	Art 6	26 September 2006 (2007) 44 EHRR 29
63	7 December 2000 [2001] 2 AC 349	*R v Secretary of State for Environment, Transport and Regions, ex parte Spath Holme → Spath Holme v UK*	Arts 6, 13, 14, A1P1	14 May 2002 (Inad) App No 78031/01
64	11 October 2001 [2001] UKHL 45	*R v Allen (No 2) → Allen v UK*	Arts 5, 6, A1P1	10 September 2002 (Inad) App No 76574/01
65	27 November 2001 [2001] UKHL 62	*R v Kansal (No 2) → Kansal v UK*	Art 6	27 April 2004 (2004) 39 EHRR 31
66	20 February 2002 [2002] UKHL 6	*R v Jones (Anthony) → Jones v UK*	Art 6	9 September 2003 (Inad) App No 30900/02
67	14 March 2002 [2002] UKHL 10	*Re S (Minors) → C, D and S v UK*	Arts 6, 8, 13	31 August 2004 (Inad) App Nos 34407/02 and 34593/02
68	4 July 2002 [2002] UKHL 30	*JA Pye (Oxford) Ltd v Graham → JA Pye (Oxford) Ltd v UK*	A1 P1	30 August 2007 (M) (GC) (2008) 46 EHRR 45
69	14 November 2002 [2002] UKHL 447	*R v Lyons → Lyons v UK*	Arts 6, 13	8 July 2003 (Inad) App No 15227/03
70	16 October 2003 [2003] UKHL 53	*Wainwright v Home Office → Wainwright v UK*	Art 8	26 September 2006 (2007) 44 EHRR 809

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Part B: House of Lords decisions based on the Human Rights Act 1998

	Date of decision in House of Lords/Law report	Name of case	ECHR Articles primarily at issue	Date of decision in Strasbourg Law report or application number
				←Approved Not approved→
71	8 March 2001 [2001] UKHL 12	*R (Wardle) v Crown Court at Leeds → Wardle v UK*	Art 5	27 March 2003 (Inad) App No 72219/01
72	9 May 2001 [2001] UKHL 23	*R (Alconbury Developments Ltd) v Secretary of State for Environment, Transport and Regions → Holding and Barnes plc v UK*	Art 6	12 March 2002 App No 2352/02
73	29 November 2001 [2001] UKHL 61	*R (Pretty) v DPP → Pretty v UK*	Arts 2, 3, 8, 9, 14	29 April 2002 (2002) 35 EHRR 1
74	13 December 2001 [2001] UKHL 67	*Porter v Magill → Porter v UK*	Arts 6, 7, 9, 10, 11, 14, A1P1	8 April 2003 (Inad) App No 15814/02
75	18 July 2002 [2002] UKHL 31	*R v Boyd → Cooper v UK*	Art 6	16 December 2003 (GC) (M) (2004) 39 EHRR 8
76	31 October 2002 [2002] UKHL 41	*R (Saadi) v Secretary of State for the Home Dept → Saadi v UK*	Art 5	29 January 2008 (GC) (2007) 44 EHRR 50
77	25 November 2002 [2002] UKHL 47	*R v Pyrah → Pyrah v UK*	Arts 3, 5	25 August 2005 (SO) App No 17413/03
78	13 February 2003 [2003] UKHL 3	*Matthews v Ministry of Defence → Roche v UK*[4]	Arts 6, 8, 10, 13, 14, A1P1	19 October 2005 (GC) (2006) 42 EHRR 30
79	10 April 2003 [2003] UKHL 21	*Bellinger v Bellinger → Bellinger v UK*	Arts 8, 12, 13, 14	11 July 2006 (SO) App No 43113/04
80	8 May 2003 [2003] UKHL 25	*R v Drew → Drew v UK*	Art 3	7 March 2006 (Inad) App No 35679/03
81	19 June 2003 [2003] UKHL 34	*MacDonald v Ministry of Defence → MacDonald v UK*	Arts 8, 13, 14	6 February 2007 (SO) App 301/04
82	31 July 2003 [2003] UKHL 43	*Harrow LBC v Qazi*	Art 8	(Inad), but not in HUDOC
83	13 November 2003 [2003] UKHL 59	*R (H) v Secretary of State for Home Dept → IH v UK*	Arts 5, 13	21 June 2005 (Inad) App No 17111/04
84	26 February 2004 [2004] UKHL 6	*R (Green) v Police Complaints Authority → Green v UK*	Arts 2, 3, 13, 14	19 May 2005 (Inad) App No 28079/04
85	11 March 2004 [2004] UKHL 11	*R (Sacker) v West Yorkshire Coroner → Sacker v UK*	Art 2	5 May 2009 (FS) App No 15651/07
86	6 May 2004 [2004] UKHL 22 and 20 October 2005 [2005] UKHL 61	*Campbell v MGN Ltd* and *No 2 → MGN Ltd v UK*	Art 10	18 January 2011 (2011) 53 EHRR 5
87	22 July 2004 [2004] UKHL 38	*R (Uttley) v Secretary of State for Home Dept → Uttley v UK*	Art 7	29 November 2005 (Inad) App No 36946/03

[4] See n 2 above.

	Date of decision in House of Lords/Law report	Name of case	ECHR Articles primarily at issue	Date of decision in Strasbourg Law report or application number
				←Approved Not approved→
88	22 July 2004 [2004] UKHL 39	*R (S and Marper) v Chief Constable of South Yorkshire Police → S v UK*	Art 8	4 December 2008 (GC) (2009) 48 EHRR 50
89	16 December 2004 [2004] UKHL 56	*A v Secretary of State for Home Dept (Belmarsh 1) → A v UK*	Arts 5, 14	19 February 2009 (GC) (2009) 49 EHRR 29
90	10 February 2005 [2005] UKHL 10	*Polanski v Condé Nast Publications Ltd → Condé Nast Publications Ltd v UK*	Arts 6, 10, 18	8 January 2008 (Inad) App No 29746/05
91	17 March 2005 [2005] UKHL 21	*R (R) v Durham Constabulary → R v UK*	Art 6	4 January 2007 (Inad) App No 33506/05
92	21 April 2005 [2005] UKHL 23	*D v East Berkshire Community Health NHS Trust East → RK and AK v UK*	Arts 3, 6, 8, 13	30 September 2008 (2009) 48 EHRR 29
93	21 April 2005 [2005] UKHL 23	*D v East Berkshire Community Health NHS Trust East → MAK v UK*	Arts 8, 13	23 March 2010 (2010) 51 EHRR 14
94	5 May 2005 [2005] UKHL 29	*R (Hooper) v Secretary of State for Work and Pensions → Martin v UK*	Arts 6, 14, A1P1	9 December 2008 (FS) App No 28302/02
95	5 May 2005 [2005] UKHL 30	*R (Wilkinson) v Inland Revenue Commissioners → Wilkinson v UK*	Arts 14, A1P1	18 November 2008 (FS) App No 27869/05
96	5 May 2005 [2005] UKHL 31	*N v Secretary of State for the Home Dept → N v UK*	Art 3	27 May 2008 (GC) (2008) 47 EHRR 39
97	26 May 2005 [2005] UKHL 37	*R (Carson) v Secretary of State for Work and Pensions → Carson v UK*	Arts 14, A1 P1	16 March 2010 (GC) (2010) 51 EHRR 13
98	14 July 2005 [2005] UKHL 48	*R (Kehoe) v Secretary of State for Work and Pensions → Kehoe v UK*	Arts 6, 13	17 June 2008 (2009) 48 EHRR 2
99	28 July 2005 [2005] UKHL 52	*R (Dudson) v Secretary of State for Home Dept → Dudson v UK*	Arts 6, 14	25 August 2009 (Inad) App No 39586/05
100	13 October 2005 [2005] UKHL 57	*R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs → Quark Fishing Ltd v UK*	A1 P1	19 September 2006 (Inad) (2007) 44 EHRR SE4
101	13 October 2005 [2005] UKHL 58	*R (Munjaz) v Mersey Care NHS Trust → Munjaz v UK*	Arts 3, 5, 8, 14	17 July 2012 App No 2913/06
102	8 March 2006 [2006] UKHL 10	*Kay v Lambeth LBC → Kay v UK*	Art 8	21 September 2010 (2012) 54 EHRR 30
103	8 March 2006 [2006] UKHL 11	*M v Secretary of State for Work and Pensions → JM v UK*	Art 14	28 September 2010 (2011) 53 EHRR 6

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	Date of decision in House of Lords/Law report	Name of case	ECHR Articles primarily at issue	Date of decision in Strasbourg Law report or application number
				←Approved Not approved→
104	8 March 2006 [2006] UKHL 12	*R (Gillan) v Commissioner of Police for the Metropolis → Gillan and Quinton v UK*	Art 8	12 January 2010 (2010) 50 EHRR 45
105	22 March 2006 [2006] UKHL 14	*A v Head Teacher and Governors of Lord Grey School → Ali v UK*	A2 P1	11 January 2011 (2011) 53 EHRR 12
106	29 March 2006 [2006] UKHL 17	*Watkins v Secretary of State for the Home Dept → Watkins v UK*	Arts 6, 8, 13	6 October 2009 (Inad) App No 35757/06
107	12 July 2006 [2006] UKHL 36	*Down Lisburn Health and Social Service Trust v H → R and H v UK*	Art 8	31 May 2011 (2012) 54 EHRR 2
108	26 July 2006 [2006] UKHL 42	*R (O) v Crown Court at Harrow → O'Dowd v UK*	Arts 5, 14	21 September 2010 (Inad) App No 7390/07
109	11 October 2006 [2006] UKHL 44	*Jameel v Wall Street Journal Europe → Wall Street Journal Europe v UK*	Arts 6, 10, 13	10 February 2009 (Inad) (2009) 48 EHRR SE19
110	16 November 2006 [2006] UKHL 51	*In re D (A Child) (Abduction: Rights of Custody) → Deak v Romania and UK*	Arts 6, 8, A5P7	3 June 2008 App No 19055/05
111	13 December 2006 [2006] UKHL 54	*R (Clift) v Secretary of State for Home Dept → Clift v UK*	Art 14	13 July 2010 App No 7205/07
112	14 March 2007 [2007] UKHL 10	*O'Brien v Independent Assessor → Hickey v UK*	Arts 8, 14, A1P1	4 May 2010 (Inad) App No 39492/07
113	28 March 2007 [2007] UKHL 13	*R (Hurst) v Commissioner of Police for the Metropolis → Hurst v UK*	Arts 2, 13	29 November 2011 (SO) App No 42577/07
114	3 May 2007 [2007] UKHL 21	*OBG Ltd v Allan → OBG Ltd v UK*	A1P1	29 November 2011 (Inad) App No 48407/07
115	13 June 2007 [2007] UKHL 26	*R (Al-Skeini) v Secretary of State for Defence → Al-Skeini v UK*	Arts 1, 2	7 July 2011 (GC) (2011) 53 EHRR 18
116	4 July 2007 [2007] UKHL 21	*Seal v Chief Constable of South Wales Police → Seal v UK*	Art 6	7 December 2010 (2012) 54 EHRR 6
117	28 November 2007 [2007] UKHL 52	*R (Countryside Alliance) v AG → Countryside Alliance v UK*	Arts 8, A1P1	24 November 2009 (Inad) (2010) 50 EHRR SE6
118	12 December 2007 [2007] UKHL 59	*R (Al-Jedda) v Secretary of State for Defence → Al-Jedda v UK*	Art 5	7 July 2011 (GC) (2011) 53 EHRR 23
119	30 January 2008 [2008] UKHL 6	*A v Hoare → Hoare v UK*	Arts 6, A1P1	12 April 2011 (Inad) (2011) 53 EHRR SE1

	Date of decision in House of Lords/Law report	Name of case	ECHR Articles primarily at issue	Date of decision in Strasbourg Law report or application number
				←Approved Not approved→
120	18 June 2008 [2008] UKHL 37	*R v G → G v UK*	Arts 6, 8	30 August 2011 (Inad) (2011) 53 EHRR SE25
121	25 June 2008 [2008] UKHL 42	*AL (Serbia) v Secretary of State for the Home Department → Lame v UK*	Arts 8, 14	11 May 2010 (SO) App No 30739/08
122	30 July 2008 [2008] UKHL 53	*Van Colle v Chief Constable of Hertfordshire Police → Van Colle v UK*	Arts 2, 8	13 November 2012 App No 7678/09
123	30 July 2008 [2008] UKHL 53	*R (Baiai) v Secretary of State for Home Dept → O'Donoghue v UK*	Arts 9, 12, 14	14 December 2010 (2011) 53 EHRR 1
124	22 October 2008 [2008] UKHL 61	*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs → Chagos Islanders v UK*	Arts 3, 6, 8, 13, A1P1	20 December 2012 (Inad) App No 35622/04
125	12 November 2008 [2008] UKHL 66	*Re E (A Child) → PF and EF v UK*	Arts 3, 8, 13, 14	23 November 2010 (Inad) App No 28326/09
126	10 December 2008 [2008] UKHL 72	*R (Wellington) v Secretary of State for Home Dept → Wellington v UK*	Art 3	5 October 2010 (FS) App No 60682/08
127	21 January 2009 [2009] UKHL 1	*R (Black) v Secretary of State for Justice → Black v UK*	Art 5	29 November 2011 (FS) App No 37685/09
128	21 January 2009 [2009] UKHL 4	*Jain v Trent Strategic Health Authority → Jain v UK*	Arts 13, A1P1	9 March 2010 (FS) App No 39598/09
129	28 January 2009 [2009] UKHL 5	*Austin v Metropolitan Police Commissioner → Austin v UK*	Art 5	15 March 2012 App No 39692/09
130	18 February 2009 [2009] UKHL 10	*RB (Algeria) v Secretary of State for the Home Dept → Othman v UK*	Arts 3, 6	17 January 2010 (2012) 55 EHRR 1
131	4 March 2009 [2009] UKHL 13	*R v G → Jobe v UK*	Arts 7, 10	14 June 2011 (Inad) App No 48278/09
132	11 March 2009 [2009] UKHL 16	*Ofulue v Bossert → Ofulue v UK*	Arts 6, A1P1	23 November 2010 (Inad) App No 52512/09
133	6 May 2009 [2009] UKHL 22	*R (Walker) v Secretary of State for the Home Dept → James, Well and Lee v UK*	Art 5	18 September 2012 App Nos 25119/09, 57715/09 and 57877/09

Part C: House of Lords and Supreme Court decisions pending consideration in Strasbourg

	Date of decision in House of Lords or Supreme Court	Name of case and law report	ECHR Articles primarily at issue	State of play in Strasbourg
134	14 June 2006 [2006] UKHL 26	*Jones v Ministry of the Interior of Saudi Arabia* → *Jones v UK*		
135	12 March 2008 [2008] UKHL 15	*R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* → *Animal Defenders International v UK*	Art 10	Oral hearing took place in the Grand Chamber on 7 March 2012
136	21 January 2009 [2009] UKHL 3	*R (Wright) v Secretary of State for Health* → *Wright v UK*	Arts 6, 8, 13	24 November 2011 (adjourned) App No 19064/07 et al
137	6 July 2011 [2011] UKSC 33	*R (McDonald) v Kensington and Chelsea Royal LBC* → *McDonald v UK*	Art 8	
138	13 July 2011 [2011] UKSC 35	*Tariq v Home Office* → *Tariq v UK*	Art 6	

Bibliography

Alder, J (2000) 'Dissents in courts of last resort: tragic choices?' *Oxford Journal of Legal Studies* 20: 221.

Allan, T (2006a) 'Human rights and judicial review: a critique of "due deference"' *Cambridge Law Journal* 65: 671.

Allan, T (2006b) 'Parliament's will and the justice of the common law: the Human Rights Act in constitutional perspective' *Current Legal Problems* 59: 27.

Allen, T (2005) *Property and the Human Rights Act*, Oxford and Portland, Hart Publishing.

Alston, P (ed) (1999) *The EU and Human Rights*, Oxford, Oxford University Press.

Amos, M (2007) 'Separating human rights adjudication from judicial review: *Huang v Secretary of State for the Home Department and Kashmiri v Secretary of State for the Home Department*' *European Human Rights Law Review* 679.

Amos, M (2009) 'Problems with the Human Rights Act 1998 and how to remedy them: is a Bill of Rights the answer?' *Modern Law Review* 72: 883.

Amos, M (2012) 'The dialogue between United Kingdom courts and the European Court of Human Rights' *International and Comparative Law Quarterly* 61: 557.

Andenas, M (2012) 'Leading from the front: human rights and tort law in *Rabone* and *Reynolds*' *Law Quarterly Review* 128: 323.

Andenas, M and Fairgrieve, D (eds) (2009) *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, Oxford University Press.

Anthony, G (2009) 'Positive obligations and policing in the House of Lords' *European Human Rights Law Review* 538.

Anthony, G (2013) 'Article 6, civil rights, and the enduring role of the common law' *European Public Law* 19: 75.

Anthony, G and Mageean, P (2007) 'Habits of mind and "truth-telling": Article 2 ECHR in post-conflict Northern Ireland' in J Morison, K McEvoy, and G Anthony (eds) *Judges, Transition and Human Rights*, Oxford, Oxford University Press, 181–200.

Arden, M (2004) 'The interpretation of UK domestic legislation in the light of the European Convention on Human Rights' *Statute Law Review* 24: 165.

Arden, M (2005) 'Human rights in the age of terrorism' *Law Quarterly Review* 121: 604.

Arden, M (2008) 'The changing judicial role: human rights, community law and the intention of Parliament' *Cambridge Law Journal* 67: 487.

Arden, M (2009) 'On liberty and the European Convention on Human Rights', in M Andenas and D Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, Oxford University Press, 3–15.

Arden, M (2010) 'Human rights and civil wrongs: tort law under the spotlight' *Public Law* 140.

Arden, M (2012) 'Media intrusion and human rights: striking the balance', public lecture at Cardiff Law School, 15 March 2012, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-arden-speech-media-intrusion-cardiff.pdf>.

Ashworth, A (1998) 'Should the police be allowed to use deceptive practices?' *Law Quarterly Review* 114: 108.

Ashworth, A (1999) 'Article 6 and the fairness of trials' *Criminal Law Review* 261.

Ashworth, A (2002) 'Re-drawing the boundaries of entrapment' *Criminal Law Review* 161.

Bagehot, W (1993) *The English Constitution*, London, Fontana Press, 1993 edn.

Bailey, S (1982) 'The Contempt of Court Act 1981' *Modern Law Review* 45: 301.

Bailey, SH (2009) 'Due Process Rights' in D Feldman (ed) *English Public Law*, Oxford, Oxford University Press, Ch 12.

Bainham Bainham, A (2001) 'Resolving the unresolvable: the case of the conjoined twins' *Cambridge Law Journal* 60: 1.

Baker, A (2006) 'The enjoyment of rights and freedoms: a new conception of the "ambit" under Article 14 ECHR' *Modern Law Review* 69: 714.

Baker, A (2007) 'Article 14 ECHR: a protector, not a prosecutor' in H Fenwick, G Phillipson, and R Masterman (eds) *Judicial Reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press, 348–76.

Baker, S (2011) *A Review of the United Kingdom's Extradition Arrangements*, London, Home Office.

Bamforth, N (1999) 'The application of the Human Rights Act 1998 to public authorities and private bodies' *Cambridge Law Review* 58: 159.

Bamforth, N (2003) 'A constitutional basis for anti-discrimination protection?' *Law Quarterly Review* 119: 215.

Bamforth, N (2004), 'Conceptions of anti-discrimination law' *Oxford Journal of Legal Studies* 24: 693.

Barendt, E (2005) *Freedom of Speech*, Oxford, Oxford University Press, 2nd edn.

Barendt, E (2009) 'Libel, privacy and freedom of expression' in L Blom-Cooper, B Dickson and G Drewry (eds) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, 653–69.

Barmes, L (2009) 'Equality law and experimentation: the positive action challenge' *Cambridge Law Journal* 68: 623.

Barnard, C and Hepple, B (1999) 'Indirect discrimination: interpreting *Seymour-Smith*' *Cambridge Law Journal* 58: 399.

Bates, E (2003) 'The Al-Adsani case, state immunity and the international legal prohibition on torture' *Human Rights Law Review* 3: 193.

Bates, E (2010) *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press.

Bates, E (2012) 'British sovereignty and the European Court of Human Rights' *Law Quarterly Review* 128: 382.

Beatson, J (1997) 'Has the common law a future?' *Cambridge Law Review* 56: 291.

Beatson, J (2006) 'Common law, statute law, and constitutional law' *Statute Law Review* 27: 1.

Beatson, J, Grosz, S, Hickman, T, Singh, R, and Palmer, S (2008) *Human Rights: Judicial Protection in the United Kingdom*, London, Sweet & Maxwell.

Beattie, K (2007) 'New life for the *Reynolds* "public interest defence"? *Jameel v Wall Street Journal Europe*' *European Human Rights Law Review* 81.

Beattie, K (2009) '*S and Marper v United Kingdom*: privacy, DNA and crime prevention' *European Human Rights Law Review* 229.

Beck, G (2008) 'Human rights adjudication under the ECHR between value pluralism and essential contestability' *European Human Rights Law Review* 214.

Bennion, F (2000) 'What interpretation is "possible" under section 3(1) of the Human Rights Act?' *Public Law* 77.

Beyleveld, D and Pattinson, S (2002) 'Horizontal applicability and horizontal effect' *Law Quarterly Review* 118: 623.

Bianchi, A (2005) *'Ferrini v Federal Republic of Germany*' *American Journal of International Law* 99: 242.

Bingham, T (1993) 'The European Convention on Human Rights: time to incorporate' *Law Quarterly Review* 109: 390.

Bingham, T (2006) 'The judges: active or passive?' *Proceedings of the British Academy* 139: 55; reprinted in Bingham, T (2011) *Lives of the Law*, Oxford, Oxford University Press, 127–43.

Bingham, T (2009) *The Rule of Law*, London, Allen Lane.

Bingham, T (2010) 'The Human Rights Act: a view from the bench' *European Human Rights Law Review* 568.

Bjorge, E (2011) 'Exceptionalism and internationalism in the Supreme Court: *Horncastle* and *Cadder*' *Public Law* 475.

Blom-Cooper, L (2008) 'What the role for the Court of Appeal in granting leave to appeal to the House of Lords' *Public Law* 203 (and Postscript, 645).

Blom-Cooper, L, Dickson, B, and Drewry, G (2010), 'The First Year of the UK Supreme Court' *Northern Ireland Legal Quarterly* 61: 295.

Blom-Cooper, L, Dickson, B, and Drewry, G (eds) (2011) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, rev edn.

Bonner, D, Fenwick, H, and Harris-Short, S (2003) 'Judicial approaches to the Human Rights Act' *International and Comparative Law Quarterly* 52: 549.

Bradley AW and Ewing, K (2011) *Constitutional and Administrative Law*, Harlow: Pearson Education.

Bradney, A (2003) 'Developing human rights? The Lords and transsexual marriages' *Family Law* 33: 585.

Brady, P (2012) 'Convention compatible statutory interpretation: a comparison of British and Irish approaches' *Statute Law Review* 33: 24.

Bratza, N (2011) 'The relationship between the UK courts and Strasbourg' *European Human Rights Law Review* 505.

Brems, E (1997) 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' *Human Rights Quarterly* 19: 136.

Briant, S (2011) 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' *European Human Rights Law Review* 243.

Browne-Wilkinson, N (1998) 'The impact on judicial reasoning' in B Markesinis (ed) *The Impact of the Human Rights Bill on English Law*, Oxford, Oxford University Press, 21.

Burbach, R (2003) *The Pinochet Affair: State terrorism and global justice*, London and New York, Zed Books in association with The Transnational Institute.

Burn, E and Cartwright, J (2011) *Cheshire and Burn's Modern Law of Real Property*, Oxford, Oxford University Press, 18th edn.

Burton, F and Carlen, P (1979) 'The judicial discourse' in *Official Discourse: On discourse analysis, government publications, ideology and the state*, London, Boston, and Henley, Routledge and Kegan Paul, 69–77.

Bustone, R (1999) in *The Human Rights Act and the Criminal Justice and Regulatory Process*, Oxford, Hart Publishing, 47.

Buxton, R (2000a) 'The Human Rights Act and private law' *Law Quarterly Review* 116: 48.

Buxton, R (2000b) 'The Human Rights Act and the substantive criminal law' *Criminal Law Review* 331.

Buxton, R (2009) 'Private life and the English judges' *Oxford Journal of Legal Studies* 29: 413.

Buxton, R (2011) 'Asylum and the doctrine of internal flight in the light of *HJ (Iran)*' *Cambridge Law Journal* 70: 41.

Calvert-Smith, D and O'Doherty, S (2003) 'Legislative technique and human rights: a response' *Criminal Law Review* 384.

Caplan, L (2003) 'State immunity, human rights and *ius cogens*: A critique of the normative hierarchy theory' *American Journal of International Law* 97: 741.

Carnwath, R (2000) 'ECHR remedies from a common law perspective' *International and Comparative Law Quarterly* 49: 517.

Carswell, R (1999) 'Human rights and the rule of law' *Journal of Clinical Forensic Medicine* 6: 249.

Chakrabarti, S (2005) 'Rights and rhetoric: the politics of asylum and human rights culture in the United Kingdom' *Journal of Law and Society* 32: 131.

Charlesworth, H, Chinkin, C, and Wright, S (1991) 'Feminist approaches to international law' *American Journal of International Law* 85: 613.

Chen-Wishart, M (1997) 'The *O'Brien* principle and substantive unfairness' *Cambridge Law Journal* 556: 60.

Choudhry, S and Fenwick, H (2005) 'Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act' *Oxford Journal of Legal Studies* 25: 453.

Clarke, A and Kohler, P (2005) *Property Law: Commentary and Materials*, Cambridge, Cambridge University Press.

Clayton, R (2002) 'The limits of what's "possible": statutory construction under the Human Rights Act' *European Human Rights Law Review* 559.

Clayton, R (2005) 'Damage limitation: the courts and Human Rights Act damages' *Public Law* 429.

Clayton, R and Sachdeva, V (2003) 'The role of judicial review in curing breaches of Article 6' *Judicial Review* 90.

Clayton, R and Tomlinson, H (eds) (2009a) *The Law of Human Rights*, Oxford: Oxford University Press, 2nd edn.

Clayton, R and Tomlinson, H (2009b) 'Lord Bingham and the Human Rights Act 1998— the search for democratic legitimacy during the "war on terror"' in M Andenas and D Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, Oxford University Press, 61–71.

Collins, L (2002) 'Foreign relations and the judiciary' *International and Comparative Law Quarterly* 51: 485.

Cooke, R (2004) 'The road ahead for the common law' *International and Comparative Law Quarterly* 53: 273.

Cooper, D (1998) *Governing Out of Order: Space, Law and the Politics of Belonging*, London, Rivers Oram Press.

Cornes, R (2011) 'Gains (and dangers of losses) in translation—the leadership function in the United Kingdom's Supreme Court, parameters and prospects' *Public Law* 509.

Cousins, M (2009) 'The European Convention on Human Rights, non-discrimination and social security: great scope, little depth?' *Journal of Social Security Law* 16: 120.

Cowan, D and Hunter, C (2012) 'Yeah but, no but—*Pinnock* and *Powell* in the Supreme Court' *Modern Law Review* 75: 78.

Craig, P (1997) 'Formal and substantive conceptions of the rule of law: an analytical framework' *Public Law* 567.

Craig, P (2001) 'The courts, the Human Rights Act and judicial review' *Law Quarterly Review* 117: 589.

Craig, P (2009) 'Administrative Law' in L Blom-Cooper, B Dickson and G Drewry (eds) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, 524–40.

Cram, I (2009) 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' *Cambridge Law Journal* 68: 118.

Darbyshire, P (2011) *Sitting in Judgment: The Working Lives of Judges*, Oxford and Portland, Hart Publishing.

Davies, G (2005) 'Banning the jilbab: reflections on restricting religious clothing in the light of the Court of Appeal in *SB v Denbigh High School*' *European Constitutional Law Review* 1: 511.

Davis, H (2005) 'Public authorities as "victims" under the Human Rights Act' *Cambridge Law Journal* 64: 315.

De Burca, G and de Witte, B (eds) (2005) *Social Rights in Europe*, Oxford, Oxford University Press.

Dembour, M-B (2006) *Who Believes in Human Rights: Reflections on the European Convention*, Cambridge, Cambridge University Press.

Dennis, I (2005) 'Reverse onuses and the presumption of innocence: in search of principle' *Criminal Law Review* 901.

Dennis, I (2011) 'The Human Rights Act and the law of criminal evidence: ten years on' *Sydney Law Review* 33: 333.

Dicey, AV (1959) *An Introduction to the Study of the Law of the Constitution*, London, Melbourne, and Toronto, Macmillan, 10th edn.

Dickson, B (1999) 'The horizontal application of human rights law' in A Hegarty and S Leonard (eds) *Human Rights: An Agenda for the 21st Century*, London and Sydney, Cavendish Publishing Ltd, 59–78.

Dickson, B (2005) 'Law versus terrorism: can law win?' *European Human Rights Law Review* 111.

Dickson, B (2006a) 'Safe in their hands? Britain's Law Lords and human rights' *Legal Studies* 26: 329.

Dickson, B (2006b) 'The role of judges in the development of constitutions' *Northern Ireland Legal Quarterly* 57: 332.

Dickson, B (2007a) 'The processing of appeals in the House of Lords' *Law Quarterly Review* 123: 571.
Dickson, B (2007b) *Judicial Activism in Common Law Supreme Courts*, Oxford, Oxford University Press.
Dickson, B (2009a) 'The detention of suspected terrorists in Northern Ireland and Great Britain' *University of Richmond Law Review* 43: 927.
Dickson, B (2009b), 'Socio-economic rights and judges' in P Facey, B Rigby, and A Runswick (eds), *Unlocking Democracy: 20 Years of Charter 88*, London, Politico's, 100–14.
Dickson, B (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland*, Oxford, Oxford University Press.
Dickson, B (2011a) 'The influence of European law on the protection of fundamental human rights in United Kingdom law' in P Popelier, C Van de Heyning, and P Van Nuffel (eds) *Human Rights Proection in the European Legal Order: The interaction between the European and the national courts*, Cambridge, Antwerp and Portland, Intersentia, 343–63.
Dickson, B (2011b) 'Close calls in the House of Lords' in J Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging*, Oxford and Portland, Hart Publishing, 283–302.
Dickson, B (2012a) 'The record of the House of Lords in Strasbourg' *Law Quarterly Review* 128: 354.
Dickson, B (2012b) 'A supreme year' *New Law Journal* 162: 257.
Diplock, K (1981) *Report of the Committee on the Interception of Communications in Great Britain*, Cmnd 8191.
Dixon, M (2010) *Modern Land Law*, Abingdon, Routledge, 7th edn.
Donald, A, Bennett, K, and Leach, P (2012) *Religion or Belief, Equality and Human Rights in England and Wales*, London, Equality and Human Rights Commission.
Doran, S (1987) 'The use of force by the security forces in Nortehrn Ireland: a legal perspective' *Legal Studies* 7: 291.
Doswald-Beck, L (2011) *Human Rights in Times of Conflict and Terrorism*, Oxford, Oxford University Press.
Douzinas, C (2000) *The End of Human Rights*, Oxford, Hart Publishing
Doyle, O (2007) 'Direct discrimination, indirect discrimination and autonomy' *Oxford Journal of Legal Studies* 27: 537.
Duxbury, N (2011) 'Lord Radcliffe out of time' *Cambridge Law Journal* 69: 41.
Dworkin, R (1984) 'Rights as trumps' in J Waldron (ed) *Theories of Rights*, Oxford, Oxford University Press, 153.
Dyson, J (2006) 'Some thoughts on judicial deference' *Judicial Review* 103.
Dyzenhaus, D (2005) 'An unfortunate outburst of Anglo-Saxon parochialism' *Modern Law Review* 68: 673.
Dzehtsiarou, K (2011) 'Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights' *Public Law* 534.
Eady, D and Smith, ATH (2011), *Arlidge, Eady and Smith on Contempt*, London, Sweet & Maxwell, 4th edn.
Edwards, R (2002) 'Judicial deference under the Human Rights Act' *Modern Law Review* 65: 859.
Ekins, R (2003) 'Judicial supremacy and the rule of law' *Law Quarterly Review* 119: 127.
Elliott, M (2009) 'Torture, deportation and extra-judicial detention: instruments of the "war on terror"' 68 *Cambridge Law Journal* 245.
Elliott, M and Perreau-Saussine, A (2009) 'Pyrrhic public law: *Bancoult* and the sources, status and content of common law limitations on prerogative power' *Public Law* 697.
Ewing, K (2001) 'The unbalanced constitution' in T Campbell, K Ewing, and A Tomkins (eds) *Sceptical Essays on Human Rights*, Oxford, Oxford University Press, 103–18.
Ewing, K (2003) 'The implications of *Wilson and Palmer*' *Industrial Law Journal* 32: 1.
Ewing, K (2004) 'The futility of the Human Rights Act' *Public Law* 829.
Ewing, K (2010) *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law*, Oxford, Oxford University Press.

Ewing, K and Gearty, C (1990) *Freedom Under Thatcher: Civil Liberties in Modern Britain*, Oxford, Clarendon Press.
Ewing, K and Tham, J (2008) 'The continuing futility of the Human Rights Act' *Public Law* 668.
Fairgrieve, D, Andenas, M, and Bell, J (eds) (2002) *Tort Liability of Public Authorities in Comparative Perspective*, London, British Institute of International and Comparative Law.
Feintuck, M (2005) 'Precautionary maybe, but what's the principle? The precautionary principle, the regulation of risk, and the public domain' *Journal of Law and Society* 32: 371.
Feldman, D (2003) 'Civil Liberties' in V Bogdanor (ed) *The British Constitution in the Twentieth Century*, Oxford: Oxford University Press and The British Academy, Ch 11.
Feldman, D (2008a) 'Deprivation of liberty in anti-terrorism law' *Cambridge Law Journal* 67: 4.
Feldman (2008b) 'The territorial scope of the Human Rights Act 1998' *Cambridge Law Journal* 67: 8.
Feldman, D (2009a) 'Rights to life, physical and moral integrity, freedom of lifestyle and religion or belief' in D Feldman (ed) *English Public Law*, Oxford, Oxford University Press, Ch 8.
Feldman, D (2009b) 'Political rights' in D Feldman (ed), *English Public Law*, Oxford, Oxford University Press, Ch 9.
Feldman, D (2009c) 'Human rights' in L Blom-Cooper, B Dickson, and G Drewry (eds), *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, Ch 30.
Fellman, D (1957) 'Cruel and unusual punishments' *Journal of Politics* 19: 34.
Fennell, P (2005) 'Convention compliance, public safety, and the social inclusion of mentally disordered people' *Journal of Law and Society* 32: 90.
Fenwick, H (1999) 'The right to protest, the Human Rights Act and the margin of appreciation' *Modern Law Review* 62: 491.
Fenwick, H (2004) 'Clashing rights, the welfare of the child and the Human Rights Act' *Modern Law Review* 67: 888.
Fenwick, H (2010a) 'Recalibrating ECHR rights, and the role of the Human Rights Act post 9/11: reasserting international human rights norms in the "war on terror"' *Current Legal Problems* 63: 153.
Fenwick, H (2010b) Review of K Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law*, *Journal of Law and Society* 37: 682.
Fenwick, H and Phillipson, G (2006) *Media Freedom under the Human Rights Act*, Oxford, Oxford University Press.
Fenwick, H, Phillipson, G, and Masterman, R (eds) (2007) *Judicial Reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press.
Fordham, M (2011) 'Common law rights' *Judicial Review* 16: 14.
Forsyth, C (2008) 'Control orders, conditions precedent and compliance with Article 6(1)' *Cambridge Law Journal* 67: 1.
Fortin, J (2006) 'Accommodating children's rights in a post Human Rights Act era' *Modern Law Review* 69: 299.
Fox, H (2006a) 'State immunity and the international crime of torture' *European Human Rights Law Review* 2: 142.
Fox, H (2006b) 'In defence of state immunity: Why the UN Convention on State Immunity is important' *International and Comparative Law Quarterly* 55: 399.
Fox, H, O'Mahony, L, and Cobb, N (2008) 'Taxonomies of squatting: unlawful occupation in a new legal order' *Modern Law Review* 71: 878.
Fredman, S (2006) 'From deference to democracy: the role of equality under the Human Rights Act 1998' *Law Quarterly Review* 122: 53.
Fredman, S (2011) *Discrimination Law*, Oxford, Oxford University Press, 2nd edn.
Fredman, S and Wesson, M (2009) 'Social, economic and cultural rights' in D Feldman (ed), *English Public Law*, Oxford, Oxford University Press, Ch 10.
Freeman, M (2010) 'The human rights of children' *Current Legal Problems* 63: 1.
Friedman, D (2006) 'Torture and the common law' *European Human Rights Law Review* 180.
Gardner, J (1996) 'Discrimination as injustice' *Oxford Journal of Legal Studies* 16: 353.

Gardner, J (2010) 'How to be a good judge' *London Review of Books*, 32 (13: 8 July), 15.
Gardner, P and Wickremasinghe, C (1997) 'England and Wales and the European Convention' in B Dickson (ed) *Human Rights and the European Convention*, London, Sweet & Maxwell, 47–112.
Garrod, M (2010) 'Deportation of suspected terrorists with "real risk" of torture: the House of Lords decision in *Abu Qatada*' *Modern Law Review* 73: 631.
Gattini, A (2005) 'War crimes and state immunity in the *Ferrini* Decision' *Journal of International Criminal Law* 3: 224.
Gearty, C (2002a) 'Reconciling parliamentary democracy and human rights' *Law Quarterly Review* 118: 248.
Gearty, C (2002b) '*Osman* unravels' *Modern Law Review* 65: 87.
Gearty, C (2004) *Principles of Human Rights Adjudication*, Oxford, Oxford University Press.
Gearty, C (2005) '11 September 2001, counter-terrorism and the Human Rights Act' *Jounal of Law and Society* 32: 18.
Gearty, C (2006) *Can Human Rights Survive?* Cambridge, Cambridge University Press.
Gearty, C (2010) 'The Human Rights Act: an academic sceptic changes his mind but not his heart' *European Human Rights Law Review* 582.
Geddis, A (2002) 'What future for political advertising on the United Kingdom's television screens?' *Public Law* 615.
Goymour, A (2011) 'Possession proceedings and human rights—the final word?' *Cambridge Law Journal* 70: 9.
Gray, K (2002), 'Land law and human rights' in L Tee (ed), *Land Law: Issues, Debates, Policy*, Cullumpton and Portland, Willan Publishing, 211–45.
Greasley, K (2010) 'A negligent blow to children at risk: *MAK and RK v United Kingdom*' *Modern Law Review* 73: 1026.
Green, L (2008) *The Contemporary Law of Armed Conflict*, Manchester, Juris Publishing and Manchester University Press, 3rd edn.
Greer, D (1980) 'Legal control of military operations—a missed opportunity' *Northern Ireland Legal Quarterly* 31: 151.
Grief, N (2006) 'The exclusion of foreign torture evidence: a qualified victory for the rule of law' *European Human Rights Law Review* 200.
Griffith, J (1993) *Judicial Politics Since 1920: A Chronicle*, Oxford UK and Cambridge US, Blackwell.
Griffith, J (1997) *The Politics of the Judiciary*, London, Fontana Press, 5th edn.
Griffith, J (2000) 'The brave new world of Sir John Laws' *Modern Law Review* 63: 159.
Griffith, J (2001) 'The common law and the political constitution' *Law Quarterly Review* 117: 42.
Hadden, T (1993) 'Legal controls on the use of lethal force: options for reform' in *Annual Report of the Standing Advisory Commission on Human Rights 1991–1992*, London, Her Majesty's Stationery Office, HC 54, 245–66.
Hale, B (1999) 'The view from court 45' *Child and Family Law Quarterly* 11: 377.
Hale, B (2001a) 'Equality and the judiciary: why should we want more women judges?' *Public Law* 489.
Hale, B (2001b) 'The value of life and the cost of living – damages for wrongful birth' *British Actuarial Journal* 7: 747.
Hale, B (2004a) 'What can the Human Rights Act 1998 do for my mental health?', Paul Sieghart Memorial Lecture, available at <http://www.bihr.org.uk/documents/paul-sieghart-lectures/what-can-the-human-rights-act-do-for-my-mental-health>.
Hale, B (2004b) 'Homosexual rights' *Child and Family Law Quarterly* 16: 125.
Hale, B (2005) 'The House of Lords and women's rights, or am I really a Law Lord?' *Legal Studies* 25: 72.
Hale, B (2007) 'Same sex relationships and the House of Lords: one step forward and two steps back?' *Juridical Review* 247.
Hale, B (2009a) 'Non-discrimination and Equality' in L Blom-Cooper, B Dickson, and G Drewry (eds) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, Ch 31.

Hale, B (2009b) 'A supreme judicial leader' in M Andenas and D Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, Oxford University Press, 209–20.
Hale, B (2010) in R Hunter, C McGlynn, and E Rackley (eds), *Feminist Judgments: From Theory to Practice*, Oxford and Portland, Hart Publishing, Foreword.
Hale, B (2011) 'Common law and Convention law: the limits to interpretation' *European Human Rights Law Review* 534.
Hale, B (2012) '*Argentoratum locutum*: is Strasbourg or the Supreme Court supreme?' *Human Rights Law Review* 12: 65.
Hall, C (2006) 'UN Convention on State Immunity: The need for a human rights protocol' *International and Comparative Law Quarterly* 55: 411.
Halliday, PD (2010) *Habeas Corpus: From England to Empire*, Cambridge, Mass, Harvard University Press.
Hamer, D (2007) 'The presumption of innocence and reverse burdens: a balancing act' *Cambridge Law Review* 67: 142.
Hare, I (2009) 'Extreme speech under international and regional human right standards' in I Hare and J Weinstein (eds) *Extreme Speech and Democracy*, Oxford, Oxford University Press, 62–80.
Harris, J (2001) 'Human beings, persons and conjoined twins: an ethical analysis of the judgment in *Re A*' *Medical Law Review* 9: 221.
Harris, DJ, O'Boyle, M, Bates, E, and Buckley, C (2009), *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2nd edn.
Harris, JW (2004) 'Human rights and mythical beasts' *Law Quarterly Review* 120: 428.
Harris, P, George, R, and Herring, J (2011) 'With this ring I thee wed (terms and conditions apply)' *Family Law* 367.
Harris-Short, S (2008) 'Making and breaking family life: adoption, the state and human rights' *Journal of Law and Society* 35: 28.
Hathaway, J (1991) *The Law of Refugee Status*, Toronto and Vancouver, Butterworths Canada.
Hathaway, J (2005) *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press.
Haydon, D and Scraton, P (2000) '"Condemn a little more, understand a little less": the political context and rights implications of the domestic and European rulings in the Venables-Thompson case' *Journal of Law and Society* 27: 416.
Hepple, B (ed) (2002) *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, Cambridge, Cambridge University Press.
Hepple, B (2008) 'The aim of equality law' *Current Legal Problems* 61: 1.
Herring, J, Harris, P and George, R (2011) 'Ante-nuptial agreements: fairness, equality and presumptions' *Law Quarterly Review* 127: 335.
Heydon JD (2006) 'Limits to the powers of ultimate appellate courts' *Law Quarterly Review* 122: 399.
Hickman, T (2005a) 'Constitutional dialogue, constitutional theories and the Human Rights Act' *Public Law* 306.
Hickman, T (2005b) 'Between human rights and the rule of law: indefinite detention and the derogation model of constitutionalism' *Modern Law Review* 68: 655.
Hickman, T (2008) 'The substance and structure of proportionality' *Public Law* 694.
Hickman, T (2010) *Public Law after the Human Rights Act*, Oxford and Portland, Hart Publishing.
Higgins, R (2009) 'International Law' in L Blom-Cooper, B Dickson, and G Drewry, *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, 457–82.
Himsworth, C (2011) 'Human rights at the interface of state and sub-state: the case of Scotland' in T Campbell, K Ewing, and A Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays*, Oxford, Oxford University Press, 66–86.
Hoffman, D (ed) (2011) *The Impact of the UK Human Rights Act on Private Law*, Cambridge, Cambridge University Press.

Hoffmann, L (1999) 'Human rights and the House of Lords' *Modern Law Review* 62: 159.
Hoffmann, L (2002) 'Separation of powers' *Judicial Review* 7: 137.
Hoffmann, L (2009) 'The universality of human rights' *Law Quarterly Review* 125: 416.
Holt, J (1992) *Magna Carta*, Cambridge, Cambridge University Press, 2nd edn.
Hope, D (2004) 'Torture' *International and Comparative Law Quarterly* 53: 807.
House of Lords (2007), *Relations between the executive, the judiciary and Parliament*, Report of the House of Lords Select Committee on the Constitution, HL Paper 151.
Howell, J (2007) 'The Human Rights Act 1998: land, private citizens and the common law' *Law Quarterly Review* 123: 618.
Hughes, K (2012) 'The right to know the case against you in civil claims' *Cambridge Law Journal* 71: 21.
Huls, N, Adams, M, and Bomhoff, J (eds) (2009) *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond*, The Hague, TMC Asser Press.
Hunt, M (1997) *Using Human Rights Law in English Courts*, Oxford, Hart Publishing.
Hunt, M (1998) 'The "horizontal effect" of the Human Rights Act' *Public Law* 423.
Hunt, M (2003) 'Sovereignty's blight: why contemporary public law needs the concept of "due deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution*, Oxford and Portland, Hart Publishing, 337–70.
Hunter, R (2008) 'A conversation with Baroness Hale' *Feminist Legal Studies* (2008) 16: 237.
Hunter, R, McGlynn, C, and Rackley, E (eds) (2010) *Feminist Judgments: From Theory to Practice*, Oxford and Portland, Hart Publishing.
Ip, J (2008) 'The rise and spread of the special advocate' *Public Law* 717.
Irvine, D (1998) 'The development of human rights in Britain under an incorporated Convention on human rights' *Public Law* 221.
Irvine, D (2003a) 'The spirit of Magna Carta continues to resonate in modern law' *Law Quarterly Review* 119: 227.
Irvine, D (2003b) *Human Rights, Constitutional Law and the Development of the English Legal System*, Oxford, Oxford University Press.
Irvine, D (2012) 'A British interpretation of Convention rights' *Public Law* 237.
Ishay, MR (2008) *The History of Human Rights*, Berkeley, Los Angeles and London, University of California Press.
Jackson, J and Summers, S (2012) *The Internationalisation of Criminal Evidence: Beyond the Common Law*, Cambridge, Cambridge University Press.
Jenks, E (1902) 'The story of habeas corpus' *Law Quarterly Review* 18: 64.
Jennings, A (1988) 'Shoot to kill: the final courts of justice' in A Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland*, London, Pluto Press, 104–30.
Joint Committee (2003a) *Criminal Justice Bill: Further Report*, 11th Report of the Parliamentary Joint Committee on Human Rights, 2002–03, HL 118/HC 724.
Joint Committee (2003b) *Draft Gender Recognition Bill*, 19th Report of the Parliamentary Joint Committee on Human Rights, 2002–03, HL 188-I/HC 1276-I.
Joint Committee (2004) *The Meaning of Public Authority under the Human Rights Act*, 7th Report of the Parliamentary Joint Committee on Human Rights, 2003–04, HL 39/HC 382.
Joint Committee (2006a) *Legislative Scrutiny: Final Progress Report*, 31st Report of the Parliamentary Joint Committee on Human Rights, 2005–06, HL 277/HC 1715.
Joint Committee (2006b) *Legislative Scrutiny: Thirteenth Progress Report*, 25th Report of the Parliamentary Joint Committee on Human Rights, 2005–06, HL 241, HC 1577.
Joint Committee (2006b) *Implementation of Strasbourg Judgments: First Progress Report*, 13th Report of the Parliamentary Joint Committee on Human Rights, 2005–06, HL 133/HC 954.
Joint Committee (2007a) *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, 16th Report of the Parliamentary Joint Committee on Human Rights, 2006–07, HL 128/HC 728.
Joint Committee (2007b) *The Meaning of Public Authority under the Human Rights Act*, 9th Report of the Parliamentary Joint Committee on Human Rights, 2006–07, HL 77/HC 410.

Joint Committee (2008) *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, 31st Report of the Parliamentary Joint Committee on Human Rights, 2007–08, HL 173/HC 1078.

Joint Committee (2009a) *Demonstrating Respect for Rights? A human rights approach to policing protest*, 7th Report of the Parliamentary Joint Committee on Human Rights, 2008–09, HL 47I, 47II/HC 320I, 320II.

Joint Committee (2009b) *Demonstrating Respect for Rights? Follow-up*, 22nd Report of the Parliamentary Joint Committee on Human Rights 2008–09, HL 141/HC 522.

Joint Committee (2011a), *The Human Rights Implications of UK Extradition Policy*, 15th Report of the Parliamentary Joint Committee on Human Rights, 2010–12, HL 156/HC 767.

Joint Committee (2011b) *Facilitating Peaceful Protest*, 10th Report of the Parliamentary Joint Committee on Human Rights, 2010–12, HL 123/HC 684.

Jones, DL (2009) 'The judicial role of the House of Lords before 1870' in L Blom-Cooper, B Dickson, and G Drewry (eds) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, Ch 1 3–12.

Jones, R (2011) *Mental Health Act Manual*, London, Sweet & Maxwell, 14th edn.

Jowell, J (1994) 'Is equality a constitutional principle?' *Current Legal Problems* 47: 1.

Jowell, J (2000) 'Beyond the rule of law: towards constitutional review' *Public Law* 669.

Jowell, J (2003) 'Judicial deference: servility, civility or institutional capacity' *Public Law* 592.

Jowell, J (2009) 'What decisions should judges not take?' in M Andenas and D Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, Oxford, Oxford University Press, 129–36.

Juss, S (2006) 'Constitutionalising rights without a constitution: the British experience under Article 6 of the Human Rights Act 1998' *Statute Law Review* 27: 29.

Kavanagh, A (2004) 'The elusive divide between interpretation and legislation under the Human Rights Act 1998' *Oxford Journal of Legal Studies* 24: 259.

Kavanagh, A (2005) 'Unlocking the Human Rights Act: the "radical" approach to section 3(1) revisited' *European Human Rights Law Review* 259.

Kavanagh, A (2006) 'The role of parliamentary intention in adjudication under the Human Rights ct 1998' *Oxford Journal of Legal Studies* 26: 179.

Kavanagh, A (2009a) *Constitutional Review under the Human Rights Act*, Cambridge, Cambridge University Press.

Kavanagh, A (2009b) 'Constitutional review, the courts and democratic scepticism' *Current Legal Problems* 62: 102.

Kavanagh, A (2010) 'Special advocates, control orders and the right to a fair trial' *Modern Law Review* 73: 836.

Kavanagh, A (2011) 'Constitutionalism, counter-terrorism, and the courts: changes in the British constitutional landscape' *International Journal of Constitutional Law* 9: 172.

Keane, R (2009) 'Ireland' in L Blom-Cooper, B Dickson, and G Drewry (eds), *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, 295–303.

Keene, D (2007) 'Principles of deference under the Human Rights Act' in H Fenwick, G Phillipson, and R Masterman (eds) *Judicial Reasoning under the UK Human Rights Act*, Cambridge, Cambridge University Press, 206–12.

Kentridge, S (1996) 'Freedom of speech: Is it the primary right?' *International and Comparative Law Quarterly* 45: 253.

Kerr, B (2007) 'The reality of judicial independence: lions under the throne', paper given at the Franco-Irish-British Judicial Co-operation Committee Colloquium, available at <http://www.courdecassation.fr/IMG/File/pdf_2007/10–05–2007/10–05–2007_kerr.pdf>.

Kerr, B (2009), 'The conversation between Strasbourg and national courts—dialogue or dictation?' *Irish Jurist* 44: 1.

Kerr, B (2012a) 'Dissenting judgments—self indulgence or self sacrifice?' The Birkenhead Lecture, 8 October; available at: <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>.

Kerr, B (2012b) 'European arrest warrants: a European understanding of "judicial authority" as highlighted in *Assange v Swedish Prosecution Authority*' The Boydell Lecture, 13 June; available at: <http://www.supremecourt.gov.uk/docs/speech-120613.pdf>.

Kerr, B (2012c) 'The UK Supreme Court: the modest underworker of Strasbourg?' Clifford Chance Lecture, 25 January; available at <http://http://www.supremecourt.gov.uk/docs/speech_120125.pdf>.

King, J (2007) 'The justiciability of resource allocation' *Modern Law Review* 70: 197.

King, J (2008) 'Institutional approaches to judicial restraint' *Oxford Journal of Legal Studies* 28: 409.

Kissinger, H (2001) 'The pitfalls of universal jurisdiction' *Foreign Affairs*, July/August.

Klug, F and Wildbore, H (2010) 'Follow or lead? The Human Rights Act and the European Court of Human Rights' *European Human Rights Law Review* 621.

Knight, CJS (2011) 'Striking down legislation under bi-polar sovereignty' *Public Law* 90.

Komárek, J (2009) 'Questioning judicial deliberations' *Oxford Journal of Legal Studies* 29: 805.

Lakin, S (2008) 'Debunking the idea of parliamentary sovereignty: the controlling factor of legality in the British constitution' *Oxford Journal of Legal Studies* 28: 709.

Langbein, J (1976) *Torture and the Law of Proof: Europe and England in the Ancien Regime*, Chicago, University of Chicago.

Lasser, M (1995) 'Judicial (self-) portraits: judicial discourse in the French legal system' *Yale Law Journal* 104: 1325.

Latham, A (2011) 'Talking without speaking, hearing without listening? Evictions, the UK top court and the European Court of Human Rights' *Public Law* 730.

Law Commission (2000) *Damages under the Human Rights Act 1998*, Report No 266, Cm 4853, London, The Stationery Office.

Law Commission (2010) *Administrative Remedies: Public Bodies and the Citizen*, Report No 322, HC 6, London, The Stationery Office.

Laws, J (1996) 'The constitution: morals and rights' *Public Law* 622.

Laws, J (2003) 'Beyond rights' *Oxford Journal of Legal Studies* 23: 265.

Laws, J (2008) 'Constitutional guarantees' *Statute Law Review* 29: 1.

Le Sueur, A (2009) 'From Appellate Committee to Supreme Court: A narrative' in L Blom-Cooper, B Dickson, and G Drewry (eds) *The Judicial House of Lords 1876–2009*, Oxford, Oxford University Press, Ch 5.

Leach, P (2011) *Taking a Case to the European Court of Human Rights*, Oxford, Oxford University Press, 3rd edn.

Leach, P, Hardman, H, Stephenson, S, and Blitz, B (2010) *Responding to Systemic Human Rights Violations*, Antwerp, Oxford and Portland, Intersentia.

Lee, J (2012) 'The doctrine of precedent and the Supreme Court', Inner Temple Academic Fellow's Lecture, 23 April 2011; on file with the author.

Lee, S (1988) *Judging Judges*, London and Boston, Faber & Faber.

Leigh, I and Lustgarten, L (1999) 'Making rights real: the courts, remedies, and the Human Rights Act' *Cambridge Law Review* 58: 509.

Lennan, J (2010) 'A Supreme Court for the United Kingdom: a note on early days' *Civil Justice Quarterly* 29: 139.

Lester, A (1999) 'UK acceptance of the Strasbourg jurisdiction: what really went on in Whitehall in 1965' *Public Law* 237.

Lester, A and Pannick, D (2000) 'The impact of the Human Rights Act on private law: the knight's move' *Law Quarterly Review* 116: 380.

Lester A, Pannick, D and Herberg, J (eds) (2009) *Human Rights Law and Practice*, London, LexisNexis, 3rd edn.

Letsas, G (2006) 'Two concepts of the margin of appreciation' *Oxford Journal of Legal Studies* 26: 705.

Letsas, G (2008) 'No human right to adopt?' *UCL Human Rights Review* 1: 135.

Leverick, F (2002a) 'Is English self-defence law incompatible with Article 2 of the ECHR?' *Criminal Law Review* 347.

Leverick, F (2002b) 'The use of force in public or private defence and Article 2: a reply to Professor Sir John Smith' *Criminal Law Review* 963.

Leveson, B (2012) *An Inquiry into the Culture, Practices and Ethics of the Press*, London, The Stationery Office, HC 780I–IV.

Lewis, J (2007a) 'The European ceiling on human rights' *Public Law* 720.

Lewis, T (2007b) 'Rights lost in translation? Fact-insensitive laws, the Human Rights Act and the United Kingdom's ban on broadcast political advertising' *European Human Rights Law Review* 663.

Leyland, P (2012) *The Constitution of the United Kingdom: A Contextual Analysis*, Oxford and Portland, Hart Publishing.

Lipscombe, S (2012) 'Retention of fingerprints and DNA data', Standard Note for MPs, SN/HA/4049, available at <http://www.parliament.uk/briefing-papers/SN04049.pdf>.

Livingstone, S (1994) 'The House of Lords and the Northern Ireland conflict' *Modern Law Review* 57: 333.

Lock, G (1989) 'The 1688 Bill of Rights' *Political Studies* XXXVII (4): 541.

Loveland, I (2003) 'Does homelessness decision-making engage Article 6(1) of the European Convention on Human Rights?' *European Human Rights Law Review* 176.

Loveland, I (2009) 'A tale of two trespassers: reconsidering the impact of the Human Rights Act on rights of residence in rented housing' *European Human Rights Law Review* 148 (part one) and 495 (part two).

Loveland, I (2011) 'The shifting sands of Article 8 jurisprudence in English housing law' *European Human Rights Law Review* 151.

Lowell, AL (1897) 'The judicial use of torture (Part II: The Treatment of Criminals in England)' *Harvard Law Review* 11: 290.

Lunn, J (2012) *The Chagos Islanders*, House of Commons Library Note SN04463 (20 April).

Mac Síthigh, D (2010) 'Pensioners over prisoners: amending the Scotland Act in response to *Somerville* and *Napier*' *Juridical Review* 1.

Mackenzie, A (2006) '*R v Secretary of State for the Home Department, ex p Limbuela*' *European Human Rights Law Review* 67.

Mackenzie, S and Stoljar, N (2000) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, New York, Oxford University Press.

MacKinnon, C (2006) *Are Women Human?: And Other International Dialogues*, Cambridge, Mass and London, Harvard University Press.

MacKinnon, C (2007) *Women's Lives, Men's Laws*, Cambridge, Mass and London, Harvard University Press.

Maer, L and Gay, O (2009) *The Bill of Rights 1689*, House of Commons Library Note SN/PC/0293.

Malik, M (2000) 'Governing after the Human Rights Act' *Modern Law Review 63:* 281.

Malleson, K (2011) 'The evolving role of the UK Supreme Court' *Public Law* 754.

Mance, J (2006) 'Constitutional reforms, the Supreme Court and the Law Lords' *Civil Justice Quarterly* 25: 155.

Marder, N (1997) 'Deliberations and disclosures: a study of post-verdict interviews of jurors' *Iowa Law Review* 82: 465.

Markesinis, B (1999) 'Privacy, freedom of expression, and the horizontal effect of the Human Rights Bill: lessons from Germany' *Law Quarterly Review* 115: 47.

Martens, S (1998) 'Incorporating the European Convention: the role of the judiciary' *European Human Rights Law Review* 5.

Masterman, R (2005a) 'Determinative in the abstract? Article 6(1) and the separation of powers' *European Human Rights Law Review* 628.

Masterman, R (2005b) 'Taking Strasbourg jurisprudence into account: developing a "municipal law of human rights" under the Human Rights Act' *International and Comparative Law Quarterly* 54: 907.

McColgan, A (2006) 'Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons' *European Human Rights Law Review* 650.
McCrudden, C (2000) 'A common law of human rights? Transnational judicial conversations on constitutional rights' *Oxford Journal of Legal Studies* 20: 499.
McCrudden, C (2009) 'Equality and non-discrimination' in D Feldman (ed), *English Public Law*, Oxford, Oxford University Press, Ch 11.
McDermont, M, Carr, H, and Hunter, C (2010) '*YL v Birmingham City Council and Others*' in R Hunter, C McGlynn, and E Rackley (eds), *Feminist Judgments: From Theory to Practice*, Oxford and Portland, Hart Publishing, 311–28.
McFarlane, B (2008) *The Structure of Property Law*, Oxford and Portland, Hart Publishing.
McGregor, L (2006) 'State immunity and jus cogens' *International and Comparative Law Quarterly* 55: 437.
McGregor, L (2007) 'Torture and state immunity: deflecting impunity, distorting sovereignty' *European Journal of International Law* 18: 903.
McHarg, A (1999) 'Reconciling human rights and the public interest: conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights' *Modern Law Review* 62: 671.
McHarg, A (2011) 'Final appeals in Scots criminal cases', UKSCBlog 5 October 2011.
McIvor, C (2010) 'Getting defensive about police negligence: the *Hill* principle, the Human rights Act 1998 and the House of Lords' *Cambridge Law Journal* 69: 133.
McKittrick, D, Kelters, S, Feeny, B, Thornton C, and McVea, D (2004) *Lost Lives*, Edinburgh and London, Mainstream Publishing.
Mead, D (2010) *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era*, Oxford and Portland, Hart Publishing.
Mead, D (2011) '"Don't make us get a warrant . . . we only want a quick look at your husband's shed": The Article 8 issues rasied by the domestic legal framework on police entries and searches by consent' *European Human Rights Law Review* 552.
Mead, D (2012) 'Outcomes aren't all: defending process-based review of public authority decisions under the Human Rights Act' *Public Law* 61.
Meehan, A (2010) '*Radmacher* in the Supreme Court: what does it all mean?' *Family Law* 1284.
Michaelsen, C (2012) 'The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights' *International and Comparative Law Quarterly* 61: 750.
Michalowski, S (2002) 'Sanctity of life – are some lives more sacred than others?' *Legal Studies* 22: 377.
Milanovic, M (2011) 'Applicability of the ECHR to British soldiers in Iraq' *Cambridge Law Journal* 70: 4.
Mildenberger, J (2009) 'Waldron, Waluchow and the merits of constitutionalism' *Oxford Journal of Legal Studies* 29: 71.
Ministry of Justice (2012) *Responding to human rights judgments*, Report to the Joint Committee on Human Rights 2011–12, London, Cm 8432.
Moeckli, D (2007) 'Stop and search under the Terrorism Act 2000: a comment on *R (Gillan) v Commissioner of Police for the Metropolis*' *Modern Law Review* 70: 659.
Möller, K (2009) 'Two conceptions of positive liberty: towards an autonomy-based theory of constitutional rights' *Oxford Journal of Legal Studies* 29: 757.
Monaghan, K (2007), *Equality Law*, Oxford: Oxford University Press.
Monaghan, K (2008) 'Constitutionalising equality: new horizons' *European Human Rights Law Review* 20.
Moon, G and Allen, R (2006) 'Dignity discourse in discrimination law: a better route to equality?' *European Human Rights Law Review* 610.
Morgan, J (2003) 'The alchemists' search for the philosophers' stone: the status of registered social landlords under the Human Rights Act' *Modern Law Review* 66: 700.
Morris, D (2003) 'Assisted suicide under the European Convention on Human Rights: a critique' *European Human Rights Law Review* 65.

Mullender, R (2003a) 'Tort, human rights and common law culture' *Oxford Journal of Legal Studies* 23: 301.

Mullender, R (2003b) 'Hegel, human rights, and particularism' *Journal of Law and Society* 30: 554.

Munro, V (2001) 'Square pegs in round holes: the dilemma of conjoined twins and individual rights' *Social and Legal Studies* 10: 459.

Murkens, J (2009) 'The quest for constitutionalism in UK public law discourse' *Oxford Journal of Legal Studies* 29: 427.

Murray, R, Steinerte, E, Evans, M, and Hallo de Wolf, A (2011) *The Optional Protocol to the UN Convention Against Torture*, Oxford, Oxford University Press.

Neuberger, D (2009a) 'The Supreme Court: is the House of Lords losing part of itself?' Lecture for the young legal group of the British friends of the Hebrew University, 2 December, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-supreme-court-lecture-dec-2009.pdf>.

Neuberger, D (2009b) 'The equity of human rights' The Atkin Lecture, 5 November, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-atkin-lecture-nov2009.pdf>.

Neuberger, D (2011a) 'Who are the masters now?' Second Lord Alexander of Weedon lecture, 6 April, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf>.

Neuberger, D (2011b) 'Protecting human rights in an age of insecurity' Lecture at Commonwealth Law Conference, Hyderabad, 7 February, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-cla-07022011.pdf>.

Neuberger, D (2011c) 'Open justice unbound?' Judicial Studies Board Annual Lecture, 16 March, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-jsb-lecture-march-2011.pdf>.

Nicol, D (2011) 'Legitimacy of the Commons debate on prisoner voting' *Public Law* 681.

Nicolaou, G (2011) 'The jurisprudence of the European Court of Human Rights on special advocates' in D Spielmann, M Tsirli, and P Voyatzis (eds), *The European Convention on Human Rights, a living instrument: Essays in Honour of Christos L Rozakis*, Brussels, Bruylant, 431–51.

Nobles, R and Schiff, D (2010) 'Disobedience to law—Debbie Purdy's case' *Modern Law Review* 73: 295.

Nowak, M and McArthur, E (2008) *The United Nations Convention Against Torture: A Commentary*, Oxford, Oxford University Press.

Oberdiek, J (2008) 'Specifying rights out of necessity' *Oxford Journal of Legal Studies* 28: 127.

O'Cinneide, C (2008) 'A modest proposal: destitution, state responsibility and the European Convention on Human Rights' *European Human Rights Law Review* 583.

O'Connell, R (2009) 'Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR' *Legal Studies* 211.

O'Connell, R (2012) 'The Right to Work in the European Convention on Human Rights' *European Human Rights Law Review* 176.

O'Neill, A (2002) 'Fundamental rights and the constitutional supremacy of Community law in the United Kingdom after devolution and the Human Rights Act' *Public Law* 724.

O'Neill, A (2009) 'Limited government, fundamental rights and the Scottish constitutional tradition' *Juridical Review* 85.

Orakhelashvili, A (2007) 'State immunity and hierarchy of norms: Why the House of Lords got it wrong' *European Journal of International Law* 18: 955.

Ormerod, D and Birch, D (2004) 'The evolution of the discretionary exclusion of evidence' *Criminal Law Review* 767.

Otty, T (2012) 'The slow creep of complacency and the soul of justice: observations on the proposal for English courts to adopt "closed material procedures" for the trial of civil damages claims' *European Human Rights Law Review* 267.

Padfield, N (2007) 'Distinguishing the unlawful from the unjustifiable in the rules on early release from prison' *Cambridge Law Journal* 67: 255.

Palmer, E (2000) 'Resource allocation, welfare rights—mapping the boundaries of judicial control in public administrative law' *Oxford Journal of Legal Studies* 20: 63.
Palmer, E (2007) *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Oxford and Portland, Hart Publishing.
Palmer, S (2005) 'AIDS, expulsion and Article 3 of the European Convention on Human Rights' *European Human Rights Law Review* 533.
Palmer, S (2009) 'Protecting the right to respect for family life in "foreign" cases' *Cambridge Law Journal* 68: 498.
Palmer, S (2009) 'Military intervention, public inquiries and the right to life' *Cambridge Law Journal* 68: 17.
Parlett, K (2006) 'Immunity in civil proceedings for torture: the emerging exception' *European Human Rights Law Review* 49.
Pateman, C (1987) 'Feminist critiques of the public/private dichotomy', in A Phillips (ed) *Feminism and Equality*, Oxford, Blackwell.
Paterson, A (2012) *Lawyers and the Public Good: Democracy in Action?* Cambridge, Cambridge University Press.
Phillips, N (2008) 'The Supreme Court and other constitutional changes in the UK', Lecture to Jersey Law Society, 2 May, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_jersey_law_soc_020508.pdf>.
Phillips, N (2012) 'The birth and first steps of the UK Supreme Court' *Cambridge Journal of International and Comparative Law* 1: 9.
Phillipson, G (1999) 'The Human Rights Act, "horizontal effect" and the common law: a bang or a whimper?' *Modern Law Review* 62: 824.
Phillipson, G (2003) '(Mis-)Reading section 3 of the Human Rights Act' *Law Quarterly Review* 119: 183.
Phillipson, G (2007) 'Deference, discretion and democracy in the Human Rights Act era' *Current Legal Problems* 60: 40.
Pickup, A and Gask, A (2009) '*EM (Lebanon) v Secretary of State for the Home Department*' *European Human Rights Law Review* 84.
Poole, T (2004) 'Back to the future? Unearthing the theory of common law constitutionalism' *Oxford Journal of Legal Studies* 24: 435.
Poole, T (2005a) 'Of headscarves and heresies: the *Denbigh High School* case and public authority decision-making under the Human Rights Act' *Public Law* 685.
Poole, T (2005b) 'Legitimacy, rights and judicial review' *Oxford Journal of Legal Studies* 25: 697.
Poole, T (2005c) 'Harnessing the power of the past? Lord Hoffmann and the *Belmarsh Detainees* case' *Journal of Law and Society* 32: 534.
Poole, T and Shah, S (2011) 'The Law Lords and human rights' *Modern Law Review* 74: 79.
Posner, R (2008) *How Judges Think*, Cambridge, Mass and London, Harvard University Press.
Prime, T and Scanlan, G (2008) 'Limitation and personal injury in the House of Lords—problem solved?' *Statute Law Review* 29: 111.
Quinn, K (2004) 'Jury bias and the European Convention on Human Rights: a well-kept secret?' *Criminal Law Review* 998.
Rackley, E (2006) 'Difference in the House of Lords' *Social and Legal Studies* 15: 163.
Radley-Gardner, O (2005) 'Civilized squatting' *Oxford Journal of Legal Studies* 25: 727.
Rainsbury, T (2008) 'Their Lordships' timorous souls' *UCL Human Rights Review* 1: 32.
Rasmussen, H (1986) *On Law and Policy in the European Court of Justice—A Comparative Study in Judicial Policy-Making*, Dordrecht, Martinus Nijhoff Publishers.
Reed, R (2008) 'Foreign precedents and judicial reasoning: the American debate and British practice' *Law Quarterly Review* 124: 253.
Reed, R and Murdoch, J (2011) *Human Rights Law in Scotland*, London, Bloomsbury Publishing, 3rd edn.
Reeve, L (1986) 'The legal status of the Petition of Right' *The Historical Journal* 29: 257.

Reid, K (2012) *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet & Maxwell, 4th edn.
Roberts, P (2002) 'The presumption of innocence brought home: *Kebilene* deconstructed' *Law Quarterly Review* 118: 41.
Robertson, G (1993) *Freedom, the Individual and the Law*, London: Penguin Books, 7th edn.
Rodger, A (2005) 'A time for everything under the law: some reflections on retrospectivity' *Law Quarterly Review* 121: 57.
SACHR (1977) Standing Advisory Commission of Human Rights, *The Protection of Human Rights in Northern Ireland*, London, HMSO, Cmnd 7009.
Sales, P (2012) 'Strasbourg jurisprudence and the Human Rights Act—a response to Lord Irvine' *Public Law* 358.
Samuels, A (2008) 'Human Rights Act 1998 section 3: a new dimension to statutory interpretation?' *Statute Law Review* 29: 130.
Sandell, A (2008) 'Liberty, fairness and the UK control order cases: two steps forward, two steps back' *European Human Rights Law Review* 120.
Sanders, A, Young, R and Burton, M (2010) *Criminal Justice*, Oxford, Oxford University Press, 4th edn.
Schaefer, M (2011) '*Al-Skeini* and the elusive parameters of extraterritorial jurisdiction' *European Human Rights Law Review* 566.
Schepel, H (2000) 'Reconstructing constitutionalization: law and politics in the European Court of Justice' *Oxford Journal of Legal Studies* 20: 457.
Scolnicov, A (2010) 'A question of faith' *Cambridge Law Journal* 69: 221.
Scott, C (2001) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Oxford and Portland, Hart Publishing.
Sedley, S (2001) 'The common law and the political constitution: a reply' *Law Quarterly Review* 117: 68.
Sedley, S (2005) 'The rocks or the open sea: where is the Human Rights Act heading?' *Journal of Law and Society* 32: 3.
Sedley, S (2008) 'Bringing rights home: time to start a family?' *Legal Studies* 28: 327.
Sedley, S (2012) 'Judicial politics' *London Review of Books*, 34(4): 15, 23 February.
Sen, A (2011) 'Rights, laws and language' *Oxford Journal of Legal Studies* 31: 437.
Shah, S (2005) 'The UK's anti-terror legislation and the House of Lords: the first skirmish' *Human Rights Law Review* 5: 403.
Shah, S and Poole, T (2009) 'The impact of the Human Rights Act on the House of Lords' *Public Law* 347.
Sharpe, RJ, Farbey, J, and Atrill, S (2008), *The Law of Habeas Corpus*, Oxford, Oxford University Press, 3rd edn.
Sharpe, S (1998) *Judicial Discretion and Criminal Investigation*, London, Sweet & Maxwell.
Shorts E and de Than, C (1998) *Civil Liberties: Legal Principles of Individual Freedom*, London: Sweet & Maxwell.
Silverstone, B (2010) '*R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)*' *European Human Rights Law Review* 631.
Simmonds, N (1998) 'Rights at the cutting edge' in M Kramer, N Simmonds, and H Steiner (eds), *A Debate Over Rights*, Oxford, Oxford University Press, 113–232.
Simpson, AWB (2001) *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford, Oxford University Press.
Singh, R (2008) 'Interpreting Bills of Rights' *Statute Law Review* 29: 82.
Skinner, P (2011) 'Freedom of expression, subsidiarity and "no win no fee" arrangements: *MGN Ltd v United Kingdom*' *European Human Rights Law Review* 329.
Slaughter, A-M (1994) 'A typology of transjudicial communication' *University of Richmond Law Review* 29: 99.
Smith, J (1989) *Justification and Excuse in the Criminal Law*, London, Stevens and Sons.
Smith, J (2002) 'The use of force in public or private defence and Article 2' *Criminal Law Review* 958.

Smyth, K (2008) '*R (on the application of Al-Jedda) v Secretary of State for Defence*: human rights and accountability in international military operations' *European Human Rights Law Review* 606.
Socha, M (2005) 'Double-standard: a comparison of British and American defamation law' *Penn State International Law Review* 23: 471.
Spencer, S (2005) 'Gypsies and travellers: Britain's forgotten minority' *European Human Rights Law Review* 335.
Squires, D (2006) 'The problem with entrapment' *Oxford Journal of Legal Studies* 26: 351.
Sreenivasan, G (2005) 'A hybrid theory of claim-rights' *Oxford Journal of Legal Studies* 25: 257.
Stauffer, J (2001) Review of C Douzinas, *The End of Human Rights, Journal of Law and Society* 28:459.
Steele, J (2008) 'Damages in tort and under the Human Rights Act: remedial or functional separation?' *Cambridge Law Journal* 67: 606.
Stevens, R (2002) *The English Judges: Their Role in the Changing Constitution*, Oxford and Portland, Hart Publishing.
Steyn, J (1998) 'The centrality of the right to a fair trial as a human rights norm', Lecture at judicial colloquium on the domestic application of international human rights norms, Bangalore, December; reprinted in J Steyn *Democracy Through Law*, Dartmouth, Ashgate, 2004, Ch 17.
Steyn, J (2002) 'The case for a Supreme Court' *Law Quarterly Review* 118: 382.
Steyn, J (2003) 'Guantanamo Bay: the legal black hole', FA Mann lecture at Lincoln's Inn, London, 23 November; reprinted in J Steyn *Democracy Through Law*, Dartmouth, Ashgate, 2004, Ch 18.
Steyn J (2004) 'Dynamic interpretation amidst an orgy of statutes' *European Human Rights Law Review* 245.
Steyn, J (2005a) 'Deference: a tangled story' *Public Law* 346.
Steyn, J (2005b) '2000–2005: laying the foundations of human rights law in the United Kingdom' *European Human Rights Law Review* 349.
Steyn, J (2006) 'Democracy, the rule of law and the role of judges' *European Human Rights Law Review* 243.
Steyn, J (2007) 'Our government and the international rule of law since 9/11' *European Human Rights Law Review* 1.
Stirton, L and Arvind, TT (2011) 'Estimating the impact of the Human Rights Act 1998 on decisions of the House of Lords and Supreme Court through Bayesian multi-level ideal-point modelling', noted at <http://www.law.dept.shef.ac.uk/news/?p=1313>.
Stuart, M and Baines, C (2004) *Progress on Safeguards for Children Living Away from Home*, York, Joseph Rowntree Foundation.
Sumption, J (2011) 'Judicial and political decision-making: the uncertain boundary', The FA Mann lecture, available at <http://www.scribd.com/doc/72814968/Sumption-Mann-Lecture-Final>.
Sumption, J (2012a) 'Foreign affairs in the English courts since 9/11', lecture at the Department of Government, London School of Economics and Political Science, 14 May 2012, available at <http://www.supremecourt.gov.uk/docs/speech_120514.pdf>.
Sumption, J (2012b) 'Home truths about judicial diversity', Bar Council Law Reform Lecture, 15 November, available at <http://www.supremecourt.gov.uk/docs/speech-121115-lord-sumption.pdf>.
Sweeney, J (2008) 'The human rights of failed asylum seekers in the United Kingdom' *Public Law* 277.
Tadros, V and Tierney, S (2004) 'The presumption of innocence and the Human Rights Act' *Modern Law Review* 67: 402.
Tedford, T, Herbeck, D, and Haiman, F (eds) (2009) *Freedom of Speech in the United States*, State College, Pennsylvania, Strata Publishing, 6th edn.
Tettenborn, A (2012) 'Wrongful death, human rights, and the Fatal Accidents Act' *Law Quarterly Review* 128: 327.
Thompson, M (2009) *Modern Land Law*, Oxford, Oxford University Press, 4th edn.
Tierney, S (2005) 'Determining the state of exception: what role for Parliament and the courts?' *Modern Law Review* 68: 668.

Tomkins, A (2005) 'Readings of *A v Secretary of State for the Home Department*' *Public Law* 259.
Tomkins, A (2011) 'Parliament, human rights and counter-terrorism' in T Campbell, K Ewing, and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford, Oxford University Press, 13–39.
Tubbs, JW (2000) *The Common Law Mind: Medieval and Early Modern Conceptions, Baltimore and London, Johns Hopkins University Press.*
Tur, R (2003) 'Legislative technique and human rights: the sad case of assisted suicide' *Criminal Law Review* 3.
UCL (2011) *The UK Supreme Court: Taking Stock Two Years On*, London, University College London Judicial Institute, report for seminar held on 18 November (on file with the author).
Usher, T (2008) 'Adjudication of socio-economic rights: one size does not fit all' *UCL Human Rights Review* 1: 155.
Van de Heyning, C (2008) '"Is it still a sin to kill a mockingbird?" Remedying factual inequalities through positive action: what can be learned from the US Supreme Court and European Court of Human Rights' *European Human Rights Law Review* 376.
Van Zyl Smit, D and Ashworth, A (2004) 'Disproportionate sentences as human rights violations' *Modern Law Review* 67: 541.
Varuhas, J (2009) 'A tort-based approach to damages under the Human Rights Act 1998' *Modern Law Review* 72: 750.
Verschraegen, G (2002) 'Human rights and modern society: a sociological analysis from the perspective of systems theory' *Journal of Law and Society* 29: 258.
Wade, HWR (1998) *European Human Rights Law Review* 520.
Wade, HWR (2000) 'Horizons of horizontality' *Law Quarterly Review* 116: 217.
Wadham J, Ruebain, D, Robinson, A, and Uppal, S (2012) *Blackstone's Guide to the Equality Act 2010*, Oxford, Oxford University Press, 2nd edn.
Wadham, J, Mountfield, H, Prochaska, E, and Brown, C (2011) *Blackstone's Guide to the Human Rights Act 1998*, Oxford, Oxford University Press, 6th edn.
Waldron, J (1993) 'A right-based critique of constitutional rights' *Oxford Journal of Legal Studies* 13: 1.
Walker, C (1980) 'Shooting to kill—some of the issues in *Farrell*' *Modern Law Review* 43: 591.
Walker, C and Horne, A (2012) 'The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?' *Criminal Law Review* 421.
Walker, S (1991) 'Freedom of speech and contempt of court: the English and Australian approaches compared' *International and Comparative Law Quarterly* 40: 583.
Wallace, S (2011), 'Much ado about nothing? The pilot judgment procedure at the European Court of Human Rights' *European Human Rights Law Review* 71.
Wallbank, R (2004) '*Re Kevin* in perspective' *Deakin Law Review* 9: 461.
White, I (2012) *Prisoners' Voting Rights—In Brief*, House of Commons Library Note, SN/PC/06480, 22 November 2012.
White, R and Ovey, C (2010) *The European Convention on Human Rights*, Oxford, Oxford University Press, 5th edn.
Williams, AT (2007) 'Human rights and law: between sufferance and insufferability' *Law Quarterly Review* 123: 133.
Wintemute, R (2006) 'Same-sex couples in *Secretary of State for Work and Pensions v M*: identical to *Karner* and *Godin-Mendoza*, yet no discrimination?' *European Human Rights Law Review* 722.
Woolf, H (2005) 'Magna Carta: A precedent for recent constitutional change', lecture to the judiciary of England and Wales, 15 June 2005, available at <http://www.judiciary.gov.uk/media/speeches/2005/magna-carta-precedent-recent-constitutional-change>, reprinted in Woolf (2008), Ch 5.
Wright, J (2001) *Tort Law and Human Rights*, Oxford, Hart Publishing.
Young, A (2000) 'Fact, opinion, and the Human Rights Act 1998: does English law need to modify its definition of "statements of opinion" to ensure compliance with Article 10 of the European Convention on Human Rights?' *Oxford Journal of Legal Studies* 20: 89.

Young, A (2005) 'A peculiarly British protection of human rights?' *Modern Law Review* 68: 858.
Young, A (2009a) *Parliamentary Sovereignty and the Human Rights Act*, Oxford and Portland, Hart Publishing.
Young, A (2009b) 'In defence of due deference' *Modern Law Review* 72: 554.
Young, A (2011) 'Is dialogue working under the Human Rights Act 1998' *Public Law* 773.
Zedner, L (2005) 'Securing liberty in the face of terror: reflections from criminal justice' *Journal of Law and Society* 32: 507.
Zuckerman, A (1987) 'Illegally obtained evidence: discretion as a guardian of legitimacy' *Current Legal Problems* 55.

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