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Research report 83

The UK and the European Court of Human Rights

Alice Donald, Jane Gordon and Philip Leach

Human Rights and Social Justice Research Institute

London Metropolitan University

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Research Team
Equality and Human Rights Commission
Arndale House
The Arndale Centre
Manchester
M4 3AQ

Email: research@equalityhumanrights.com
Telephone: 0161 829 8500
Website: www.equalityhumanrights.com

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Alice Donald
Philip Leach
Human Rights and Social Justice Research Institute
London Metropolitan University

Jane Gordon
Visiting Fellow
London School of Economics

Abbreviations

ATCSA	Anti-terrorism, Crime and Security Act 2001
DPA	Data Protection Act 1998
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EU	European Union
GC	Grand Chamber
HET	Historical Enquiries Team
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
IPCC	Independent Police Complaints Commission
IVF	In-vitro fertilisation
JCHR	Joint Committee on Human Rights
LGBT	Lesbian, gay, bisexual or transgender
NCCL	National Council for Civil Liberties
NIHRC	Northern Ireland Human Rights Commission
RIPA	Regulation of Investigatory Powers Act 2000
SAS	Special Air Service
SHRC	Scottish Human Rights Commission
SIAC	Special Immigration Appeals Commission
TPIM	Terrorism Prevention and Investigation Measure
UCL	University College London
UNCAT	United Nations Convention against Torture

Executive summary

Aims of the research

In November 2011, the Equality and Human Rights Commission contracted the Human Rights and Social Justice Research Institute at London Metropolitan University and Jane Gordon, human rights lawyer and Visiting Fellow at the London School of Economics, to examine the relationship between the UK and the European Court of Human Rights (ECtHR) in Strasbourg.

The aim was to provide better information to key decision-makers about the impact of the ECtHR and its judgments on the UK. The principal objectives were to:

- analyse ECtHR cases in relation to the UK to assess the circumstances in which the Court has made judgments, including both judgments which were contrary to those made by domestic courts and judgments where the Court agreed with the domestic court/UK Government position (or where applications against the UK have been found inadmissible);

- assess how ECtHR judgments relating to the UK have been received and responded to by key decision-makers in the UK; and

- evaluate the implementation of ECtHR judgments and the impact that they have had on domestic legislation and policy, as well as on domestic courts.

Methodology

The research comprised:

- a literature review and review of a selection of ECtHR judgments; and

- 17 interviews with (i) individuals in the UK, including parliamentarians; judicial figures; (former) heads of the human rights commissions in Scotland and Northern Ireland; and (ii) key figures within the Strasbourg system.

Origins and machinery of the European human rights system

The European Convention on Human Rights (ECHR) is an international treaty drawn up within the Council of Europe, which was established in Strasbourg in 1949 in the course of the first post-war attempt to unify Europe. The United Kingdom was among the first states to ratify the ECHR and played a pivotal role in its creation. The UK accepted the right of individuals to take a case to Strasbourg and the jurisdiction of

the ECtHR in 1966. In 1998, the right of individual petition and the jurisdiction of the Court were made compulsory for all states which are members of the ECHR.

Since that time, the Strasbourg system has expanded hugely due to an influx of eastern and central European states whose membership of the Convention signalled a break with their authoritarian past. Forty-seven nations - some 800 million people - are now within the European human rights system, which is widely accepted as the most effective international regime for enforcing human rights in the world. No democracy has ever withdrawn from the Convention.

The vast number of cases pending at the ECtHR - 151,600 as of 31 December 2011, of which 3,650 are applications from the UK - stems principally from systemic failures of implementation by a handful of countries and has prompted a process of reform to ensure the institutional survival of the Convention system. The reforms are centred on the fundamental role which national authorities - governments, parliaments and courts - play in protecting human rights within their own jurisdiction.

There has been criticism that the Court has become preoccupied with minor cases. However, the judgments of the ECtHR demonstrate the serious and substantive nature of the matters it considers: of all ECtHR judgments finding at least one violation in 2011, 36 per cent involved a violation of the right to life or the prohibition against torture or inhuman or degrading treatment.

Election of judges to the Court

A common misapprehension about the ECtHR is that its judges are - like judges in UK courts - unelected. This is incorrect. The Parliamentary Assembly of the Council of Europe - comprised of parliamentarians from each member state - elects judges of the Court from a list of three candidates nominated by each member state. In February 2012, the Committee of Ministers' Steering Committee for Human Rights issued guidelines on the selection of candidates for the post of judge at the ECtHR to ensure that they are of the highest possible quality.

The protection of human rights in the UK

The Human Rights Act 1998 (HRA) created a domestic scheme of human rights protection which preserves the distinct role of the judges at the same time as safeguarding parliamentary sovereignty. The HRA gives effect in domestic law to the fundamental rights and freedoms in the Convention. It makes available in UK courts a remedy for the breach of a Convention right, without the need to go to Strasbourg. It requires all public authorities to act compatibly with the ECHR, providing a basis for the development of a 'human rights culture' in public services across the UK.

Accounts of the HRA's first decade indicate that such a culture has largely failed to materialise, although there are positive examples of public authorities respecting human rights as a result of a greater understanding of their Convention obligations. There is also evidence of a stronger institutional commitment in the devolved nations to realising Convention rights in policy and practice.

The unpopularity of the HRA has been widely asserted, but the evidence should not be misconstrued and has sometimes been overstated. Polls indicate overwhelming public support for the rights guaranteed in the HRA and for the existence of legislation to protect human rights, even though there has sometimes been disquiet about the way that the HRA is applied (or is perceived to have been applied).

The Commission on a Bill of Rights is due to report in 2012 on options for creating a new UK Bill of Rights 'that incorporates and builds on' the UK's obligations under the ECHR. However, significant obstacles exist in relation to this process which may undermine it reaching an outcome which enjoys democratic legitimacy. Furthermore, any reform of human rights law will be complicated by the devolution settlements, of which the HRA and ECHR are an integral part.

Statistical overview of UK cases in Strasbourg

The UK has a very low 'rate of defeat' at Strasbourg. Of the nearly 12,000 applications brought against the UK between 1999 and 2010, the vast majority fell at the first hurdle. Only three per cent (390 applications) were declared admissible. An even smaller proportion of applications - 1.8 per cent (215) - eventually resulted in a judgment finding a violation. In other words, the UK 'lost' only one in fifty cases brought against it in Strasbourg. If adjustment is made for repetitive cases (i.e. cases where the violation has the same root cause and therefore multiple judgments are counted as a single judgment), the rate of defeat falls to 1.4 per cent (161). The latest figures for 2011 show a rate of defeat of just 0.5 per cent, or one in 200.

Of all applications lodged against the UK which (having been found admissible) result in a judgment, around 66 per cent found at least one violation and 16 per cent found no violation. These figures are not surprising given the high threshold for admissibility, which means that only cases of substantial merit make it over the initial hurdle.

Compared to a selected sample of Council of Europe states, the UK has among the lowest number of applications per year brought against it. The UK also has a lower percentage of these applications declared admissible and loses proportionately fewer of the cases brought against it.

The nature of violations in UK judgments

While judgments against the UK have been relatively few in number, they have frequently been serious in nature. Since 1966, a significant proportion of UK judgments has involved basic civil liberties. The Convention right most commonly violated in UK cases was the right to a fair trial (30 per cent of adverse judgments). In addition, violations of the right to life and the prohibition of torture and inhuman or degrading treatment each accounted for around four per cent of adverse judgments. This means that around one in every 12 judgments against the UK involved violations of Convention rights considered to be of the most fundamental importance.

The impact of Strasbourg judgments on the UK

Many ECtHR judgments have had a far-reaching impact on the rights and freedoms of individuals in the UK and elsewhere in Europe. Notable among these are cases relating to torture and inhuman or degrading treatment and those concerned with protection of life and procedural obligations for the investigation of deaths.

Other important impacts include legal reform to prevent the indiscriminate retention of the DNA profiles of innocent people and to protect people in the UK from unnecessary intrusion into their privacy through the use of secret surveillance. It is also due to a Strasbourg judgment that police can no longer stop and search people without needing any grounds for suspicion. Legislation outlawing forced labour and servitude has its origins in a Strasbourg ruling, thereby protecting some of the most vulnerable individuals in the UK from extreme exploitation. Judgments of the ECtHR have been significant milestones in the movement for equal rights for lesbian, gay, bisexual or transgender people. They have also been instrumental in bringing about the banning of corporal punishment in UK schools and restricting the physical punishment of children in the family. There have also been significant ECtHR judgments protecting the freedom of the UK media, including the protection of journalists' sources and the importance of investigative journalism, as in the exposure by the *Sunday Times* of the thalidomide case .

The evolution of the Convention and Strasbourg case law

The ECHR is considered to be a ‘living instrument’: this means that the ECtHR seeks to interpret the Convention in the light of present day conditions and social norms. Some politicians and commentators have accused the Strasbourg Court of taking an overly expansive approach. This complaint is primarily based on the propositions that the Convention is being applied in ways that would not have been foreseen by those who drafted it or that it is taking an over-activist approach which interferes unduly with decisions made by national bodies, notably parliaments.

It has always been a fundamental principle that the Convention should be interpreted and applied by taking account of changes in society, in morals, and in laws, as well as technological and scientific developments. This approach has permitted the development in recent years of positive Convention obligations, the effect of which has been to provide increased human rights protection for vulnerable groups, such as the victims of rape, domestic violence and human trafficking.

The Strasbourg Court is not alone in adopting a dynamic approach to interpretation. In the UK, judges apply a dynamic approach to the common law and in interpreting statutes.

The clarity and consistency of Strasbourg case law

ECtHR judgments have been criticised for their lack of clarity and consistency. Such criticisms in part reflect the complexity of the task of interpreting the Convention at the supranational level but have sometimes been justifiable. The ECtHR has developed mechanisms to try to ensure the consistency of its case law.

The relationship between the UK courts and Strasbourg

Section 2 of the HRA requires UK courts to 'take into account' any decision of the ECtHR or Committee of Ministers in so far as they are relevant in cases concerning a Convention right. This means that domestic courts are required to take account of **all** the jurisprudence of the ECtHR, not merely those cases brought against the UK, but are not bound by it.

As a matter of domestic law, UK courts can interpret Convention rights in a manner different to that of Strasbourg. However, because the UK elected to enact rights and freedoms contained in an international treaty (the ECHR) into domestic law, UK courts are faced with the possibility that should their judgments depart radically and without justification from established Strasbourg jurisprudence, then it is likely that the decision will be referred to Strasbourg. This may result in the decision being overturned. On this analysis, the argument advanced by some commentators that the finding of a violation by the ECtHR is a matter only for the Government under its international treaty obligations, and not something for the domestic courts to worry about, is overly simplistic. Findings of violations are a matter for **both** the Government **and** the domestic courts.

Applications against the UK resulting in a judgment can accurately be categorised into cases where:

- Strasbourg has deferred to national authorities;

- Strasbourg has adopted the reasoning and analysis of the UK courts;
- Strasbourg and the UK courts have disagreed; or
- the UK courts have consciously leapt ahead of Strasbourg.

Since the coming into force of the HRA, the ECtHR has been respectful of UK court decisions because of the high quality of their judgments. The President of the ECtHR, Sir Nicolas Bratza, surveying the most significant decisions and judgments of the ECtHR in UK cases in the past three years, notes that in the great majority of cases, the Strasbourg Court followed the conclusions reached by the UK courts. On the rare occasions that the UK courts have disagreed with ECtHR jurisprudence, the ECtHR has demonstrated a willingness to engage in a 'judicial dialogue' with the superior courts of the UK - the recent case of *Al-Khawaja* (concerning the use of hearsay evidence in criminal prosecutions) being the pre-eminent example.

The implementation of Strasbourg judgments in the UK

The UK has a generally exemplary record in implementing judgments of the ECtHR. Strasbourg judgments concerning the UK usually lead to swift changes to the law or the way that the law is applied. This view of the UK's positive record is shared within the Council of Europe. The one notable recent exception concerns the issue of prisoner voting rights, which has remained unresolved since 2005. Concern has been expressed that the UK's stance on prisoner voting, and the accompanying negative rhetoric about the ECtHR, may result in a wider refusal to implement ECtHR judgments across Europe and a weakening of the rule of law.

Parliaments play a crucial role in the implementation of ECtHR judgments. Effective parliamentary scrutiny of human rights issues raised by draft legislation and of the implementation of Strasbourg judgments may be influential in subsequent Strasbourg Court decisions. In the UK, the Joint Committee on Human Rights plays a significant role in ensuring effective parliamentary scrutiny. It has proposed ways of enhancing the process of implementation of Strasbourg judgments in the UK.

The value for the UK of the European human rights framework

The European human rights system is founded upon the principle of the collective guarantee of human rights. The ECHR sets out a list of human rights and fundamental freedoms. It establishes a regional mechanism that allows individuals to hold governments and their agents to account and creates an independent supranational court.

It is a fundamental feature of the European machinery of human rights protection established by the ECHR that it is subsidiary to the national systems safeguarding

human rights. It is first and foremost the duty of states - through their governments, legislatures and courts - to protect human rights.

The limits of the ECtHR's supervisory role are defined by the doctrine of the 'margin of appreciation', which recognises that national authorities are in the main best placed to decide how human rights should be applied. It is not the Strasbourg Court's task to take the place of national courts, but rather to review the decisions they deliver in the exercise of their domestic authority.

The ECtHR has been criticised for over-reaching its authority and interfering with established domestic laws and practices in order to impose uniform standards and laws on member states. However, the Court's jurisprudence clearly recognises that customs, policies and practices vary considerably between states and that the ECtHR will not attempt to impose uniformity or detailed and specific requirements on domestic authorities.

The conduct of public debate about the European human rights system

In recent months, the ECHR and/or the ECtHR have been the subject of concerted criticism by some British politicians and sections of the press. There have been calls from some MPs and commentators for the UK to consider withdrawal from the jurisdiction of the ECtHR, if not from the ECHR itself. These proposals have the potential to damage the UK internationally, as well as being likely to impact upon the protection of human rights in both the UK and Europe.

1. Introduction

1.1 Aims of the report

In November 2011, the Equality and Human Rights Commission (EHRC) contracted the Human Rights and Social Justice Research Institute at London Metropolitan University and Jane Gordon, human rights lawyer and Visiting Fellow at the London School of Economics, to research and write a report examining the relationship between the UK and the European Court of Human Rights (ECtHR) in Strasbourg.

The aim of the research was to provide better information to key decision-makers about the impact of the ECtHR and its judgments on the UK. The principal objectives were to:

- analyse ECtHR cases in relation to the UK to assess the circumstances in which the Court has made judgments, including both judgments which were contrary to those made by domestic courts and judgments where the Court agreed with the domestic court/UK Government position (or where complaints brought against the UK have been found inadmissible);

- assess how ECtHR judgments relating to the UK have been received and responded to by key decision-makers in the UK; and

- evaluate the implementation of ECtHR judgments and the impact that they have had on domestic legislation and policy, as well as on domestic courts.

1.2 Context of the report

The research has been conducted against a current background of contentious debate about the UK's relationship with the ECtHR. In particular, controversy has surrounded the appropriate response to the ECtHR's decisions on the right of convicted prisoners to vote, which led some MPs to call for the UK to contemplate breaking treaty obligations.[1] Some MPs have also accused the ECtHR of 'judicial activism' which, they suggest, threatens to undermine the Court's legitimacy.[2] David Cameron (2012) has suggested that the ECtHR should not undermine its own reputation by going over national decisions where it does not need to - a critique of the Court which is examined in Chapter 4. A small number of parliamentarians and commentators have made the unusual move of calling for the UK to withdraw from

[1] See, for example, David Davis MP, 'Today's vote on prisoners' rights is an historic opportunity to draw a line in the sand on European power', *Conservative Home*, 10 February 2011.

[2] Jack Straw MP, *Hansard*, HC Vol. 523, Col. 502, 10 February 2011.

the jurisdiction of the ECtHR (Pinto-Duschinsky, 2011) or from the European Convention on Human Rights (ECHR) altogether (Broadhurst, 2011) - a step which no democracy has ever taken. Still other commentaries have criticised the purported cost to the UK of complying with ECtHR judgments.[3] Media reporting about the Strasbourg system of human rights protection has at times been misleading. For example, press reports describe judges at the ECtHR as 'unelected', when in fact they are elected by parliamentarians in the Parliamentary Assembly of the Council of Europe (as discussed in section 2.3).[4] Some reports have also presented statistics which suggest that the UK loses three out of four cases brought against it at the ECtHR (Broadhurst, 2011); the true figure (as explained in section 4.2) is more like one in 50. Discussion about the UK's relationship with the Court has taken place in the context of continuing debate about the Human Rights Act (HRA) 1998.[5]

Negative perceptions about human rights, and specifically about the ECtHR and the HRA, are not universally shared. Polling data consistently suggest overwhelming public support for the existence of laws to protect human rights in the UK and for the specific rights enshrined in the HRA, even if there has at times been criticism about the way that the HRA is applied (or is perceived to have been applied) (section 3.3). Moreover, as this report shows, there has been a markedly different tenor of debate in the devolved nations about human rights and their place in public life (sections 3.4 and 9.3). The palpable impact of human rights cases in protecting the fundamental rights and freedoms of individuals in the UK also presents a counterweight to the more critical views about the ECtHR and the HRA, and is explored in Chapter 5.

This context emphasises the highly topical nature of this report and the importance of providing balanced and well-informed discussion on these contentious issues. The contemporary relevance of the research is heightened by the UK's Chairmanship of the Council of Europe (from November 2011 to May 2012), a role which places the UK centre stage in ongoing discussions about reform of the Strasbourg system.[6]

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[3] A report for the Taxpayers' Alliance estimated the total cost of complying with judgments at £17.3 billion to date and the cost of the '"compensation culture" fostered by the Court' at a further £25 billion (Rotherham, 2010: 3). The report is methodologically flawed; it extrapolates from analysis of relatively few cases and includes compensation claims that are wholly unrelated to human rights.

[4] See, for example, 'Unelected Euro judges are bringing terror to the streets of Britain', *Daily Mail*, 18 January 2012.

[5] See, for example, Stephen Pollard, political commentator of the *Daily Express*, 'Yet another farce from the hated Human Rights Act', 13 January 2012.

[6] In November 2011, the UK hosted a conference at Wilton Park on '2020 Vision for the European Court of Human Rights'. See Council of Europe (2011).

1.3 Methodology

Our methodology comprised:

- a literature review and review of a selection of ECtHR judgments; and
- 17 semi-structured interviews.

Selection of cases

Since the UK accepted the jurisdiction of the ECtHR in 1966, there have been 443 judgments relating to the UK (271 of which found at least one violation) (section 4.2). It was impracticable for the research team to review each of these judgments. Instead, we made a purposive selection of cases for detailed review under certain thematic areas[7]. These are:

- protection of life and investigations into deaths;
- anti-terrorism and the prohibition of torture and inhuman or degrading treatment or punishment;
- protection from violence;
- individual liberties;
- freedom of expression, particularly of the media; and
- immigration and deportation.

The thematic areas identified cover a range of Convention rights. They include cases where the Court has agreed with domestic courts in finding either a violation or no violation of Convention rights, as well as cases where the Court has disagreed with domestic judgments or has found UK legislation in breach of Convention rights. The themes also cover certain cases which have been especially significant in the UK in relation to their impact and public prominence. They also include both recent (post-HRA) cases and older cases. Thus, applying this thematic 'lens' to Strasbourg case law has permitted us to undertake a detailed analysis of certain cases and their

[7] Areas that have not been selected for detailed review include, for example, the right to freedom of religion or belief and the right to freedom of peaceful assembly and association. However, we have made reference to individual cases covered by these themes.

implementation and impact, in the context of broader discussion about the UK's relationship with Strasbourg.

However, the thematic lens has not constrained us from referring selectively to non-UK cases where these are pertinent to our core themes or illuminate aspects of the Strasbourg system of interest to our research questions.

Selection of interviewees

We invited for interview (i) a range of individuals in the UK, including senior judicial figures; parliamentarians; leading figures from the human rights commissions in Scotland and Northern Ireland; and commentators and (ii) key figures within the Strasbourg system. Our selection of UK-based interviewees was informed by the need to ensure a balanced range of views on the UK's relationship with Strasbourg. Accordingly, we invited for interview both individuals who have publicly criticised aspects of the ECtHR and its relationship with the UK and individuals who have been largely positive about these matters. Interviews were conducted with individuals from each of these broad perspectives. However, in the event, several of the more critical voices (including both MPs and commentators) did not agree to be interviewed. While this is regrettable, we have sought to balance this in the report by drawing on and analysing a range of published views about the UK's relationship with Strasbourg. The final list of interviewees is given in Appendix 1.

1.4 Scope of the report

This report does not examine comprehensively the continuing process of reform of the ECtHR, which is centred on measures to relieve the Court of its vast backlog of pending cases (151,600 as of 31 December 2011, of which 3,650 are applications from the UK (ECtHR, 2012a: 148)). Since February 2010, reform has been pursued through an Action Plan drawn up by Council of Europe ministers at a conference in Interlaken in Switzerland, which was later reaffirmed and developed in Izmir in Turkey.[8] The reforms emphasise the overriding importance of guaranteeing and protecting human rights at the national level. The principle that the Convention system is intended to be subsidiary to national systems for safeguarding human rights (known as 'subsidiarity') is examined in section 2.4 and in Chapter 9. However, we do not give a detailed account of the reforms that have been implemented or proposed which relate to, among other issues, the ways in which applications to the

[8] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010; High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, 27 April 2011.

Court are filtered and decisions are taken as to which are admissible and which are not.[9]

1.5 Guide to the report

Chapter 2 outlines the origins and machinery of the Convention and the ECtHR.

Chapter 3 examines how the UK gives effect to fundamental rights and freedoms in the Convention through the HRA.

Chapter 4 provides a statistical overview of cases relating to the UK at the ECtHR, over time; in comparison with a selection of other European states, and in relation to the nature of violations.

Chapter 5 discusses the impact that judgments of the ECtHR have had on protecting the rights and freedoms of people in the UK.

Chapter 6 considers how the ECtHR interprets and applies Convention rights in specific cases. It analyses criticisms of the Strasbourg Court's approach to the interpretation of Convention rights.

Chapter 7 examines in detail the relationship between domestic courts in the United Kingdom and the ECtHR. It explores the approach of the UK courts to Strasbourg case law under the HRA and analyses a variety of cases decided by the ECtHR against the UK.

Chapter 8 considers the record of the UK in implementing ECtHR judgments and the consequences when judgments are not complied with.

Chapter 9 outlines the relationship between the UK's domestic system for protecting human rights and the supervisory role played by the European regional human rights mechanism under the ECHR. The chapter considers the value of the European regional human rights system to the UK and concludes by reflecting on the status of the UK within the regional system.

Chapter 10 draws together the principal themes and findings of the report.

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[9] See ECtHR (2012c); Leach (2009); 'Council of Europe: Follow-up to the Interlaken and Izmir Declarations on the Future of the European Court of Human Rights', statement adopted by AIRE Centre, Amnesty International, European Human Rights Advocacy Centre, Helsinki Foundation for Human Rights, Interights, International Commission of Jurists, Human Rights Watch and JUSTICE, January 2012.

2. Origins and machinery of the European human rights system

2.1 Introduction

This chapter outlines the origins, machinery and content of the European Convention on Human Rights (ECHR).[10] It provides a factual account of how the Convention system works, including the role of the Council of Europe and its Parliamentary Assembly. It explains some of the key principles which permeate both the Convention and the case law of the European Court of Human Rights (ECtHR).

2.2 The European Convention on Human Rights

The ECHR is an international treaty drawn up within the Council of Europe, which was established in Strasbourg in 1949 in the course of the first post-war attempt to unify Europe. One reason for the Convention was to elaborate upon the obligations of Council membership.[11] Its fundamental purpose was to institutionalise shared democratic values and provide a bulwark against totalitarianism, in the context of both the atrocities witnessed in Europe during the Second World War and the spread of communism from the Soviet Union to European states.

The content of the Convention

The rights and freedoms enshrined in Section 1 of the ECHR are as follows:
Article 1 – obligation to respect rights
Article 2 – right to life
Article 3 – prohibition of torture and inhuman or degrading treatment or punishment
Article 4 – prohibition of slavery and forced labour
Article 5 – right to liberty and security
Article 6 – right to a fair hearing
Article 7 – no punishment without law
Article 8 – right to respect for private and family life, home and correspondence
Article 9 – freedom of thought, conscience and religion
Article 10 – freedom of expression
Article 11 – freedom of assembly and association
Article 12 – right to marry
Article 13 – right to an effective remedy
Article 14 – prohibition of discrimination

[10] Its full title is the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4 1950.

[11] Under Article 3 of the Statute of the Council of Europe 1949, a member state 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'.

Over the years, the rights in the ECHR have been supplemented by a number of Protocols to the Convention. The UK has not ratified all of these Protocols. The only Protocols conferring additional rights that the UK has ratified are Protocol 1 (protection of property and the rights to education and free elections) and Protocols abolishing the death penalty.[12]

The ECHR was inspired and influenced by the Universal Declaration of Human Rights.[13] It may be viewed as the regional counterpart of the UN International Covenant on Civil and Political Rights 1966 (ICCPR).[14] The ECHR was not designed expressly to protect economic, social or cultural rights, such as the rights to health or housing, though the ECtHR has recognised that there is no watertight division between the two sets of rights (Leach, 2011: 5). The European Social Charter, another Council of Europe treaty, came into force in 1965 and is in effect the counterpart of the ECHR in the field of economic and social rights.[15] In addition, the

[12] The UK has not ratified Protocol 4 of the ECHR, which includes prohibition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals and prohibition of collective expulsion of aliens. Nor has the UK ratified Protocol 7, which includes procedural safeguards relating to expulsion of aliens, a right of appeal in criminal matters, a right to compensation for wrongful conviction, a right not to tried or punished twice, and rights relating to equality between spouses. The UK has also not ratified Protocol 12 of the ECHR, the free-standing right to non-discrimination. Protocol 12 is designed to advance the ECHR's protection of equality beyond the relatively limited guarantee in Article 14, which provides a right to non-discrimination only in the enjoyment of other rights under the Convention. The UK Government has indicated that it will wait to see how caselaw develops in this area (Department of Constitutional Affairs, 2004: Annex 6, 41).

[13] As recognised in the Preamble of the ECHR.

[14] All parties to the ECHR are also parties to the ICCPR. Under the First Optional Protocol to the ICCPR, the Human Rights Committee, which monitors its implementation, may also receive and consider complaints from individuals in states which have accepted this optional right of individual communication. The UK has neither signed nor ratified the First Optional Protocol and therefore is it not possible to make complaints to the Human Rights Committee about the UK.

[15] The Charter was revised in 1996. The Revised Charter came into force in 1999 and is gradually replacing the 1961 treaty. The UK ratified the initial treaty in 1962 but has not ratified the Revised Charter.

UK is bound, in areas to which European Union (EU) law applies, by the EU Charter of Fundamental Rights.[16]

The drafting of the Convention[17]

British politicians and lawyers were especially influential in the creation of the Council of Europe and the Convention. In 1948, Winston Churchill convened a congress in The Hague at which he argued for a Charter of Human Rights, 'guarded by freedom and sustained by law' (Norman and Oborne, 2009: 19). Also central to this endeavour was the future Conservative Lord Chancellor, David Maxwell-Fyfe, who as a member of the independent European Movement, was a co-author of the first draft Convention. This envisaged that each signatory would bind itself 'to respect fundamental human rights within its territory and to submit itself to the jurisdiction of a European Court in respect of alleged infringements' (Bates, 2010: 53). When this draft Convention was taken to the Consultative (later Parliamentary) Assembly of the Council of Europe, Churchill was among its most enthusiastic proponents. Speaking in 1949, Churchill envisaged a Strasbourg system before which violations 'in our own body of … nations might be brought to the judgment of the civilised world' (Bates, 2010: 7).

As the Convention's preamble states, one of its founding aims was that member states should take 'the first steps' towards the 'collective enforcement' of certain rights set out in 1948 in the Universal Declaration of Human Rights. In this sense, the ECHR was revolutionary. The idea of conferring enforceable rights upon individuals against sovereign states broke with the traditional principles of international law which assumed that what a state did to its own citizens (or those without citizenship) was shielded from international scrutiny or liability.

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[16] The Charter of Fundamental Rights was proclaimed by EU institutions in December 2000 and given binding force in the Treaty of Lisbon, which entered into force on 1 December 2009. It contains the majority of rights in the ECHR, as well as a range of other rights including, in its 'Solidarity' section, economic and social rights derived from the European Social Charter. The UK and Poland obtained a protocol to the Lisbon Treaty which restricts the interpretation of the Charter of Fundamental Rights by the European Court of Justice and their respective domestic courts. The protocol was motivated by a desire to prevent the Charter from being justiciable in UK domestic courts or altering UK law. There is debate about whether this constitutes a full 'opt out' for the UK and Poland or merely a clarification of the application of the Charter, a matter which has not yet been tested in court (English, 2011).

[17] For accounts of the background of the Council of Europe and the ECHR, see Bates (2010), Part 1; Bates (2011); Christofferson and Madsen (2011); Davis (2007), Chapter 2; Harris et al. (2009), Chapter 1; Leach (2011), Chapter 1; Lester et al. (2009), Chapter 1; Moravcsik (2000); Simpson (2004); Steiner et al. (2008), Chapter 11, Section B.

Significant compromises were made so as to reduce the loss of sovereignty. Under the final text of the ECHR, no signatory was bound to accept either the right of individuals to take a case to Strasbourg (the right of 'individual petition') or the jurisdiction of the (yet to be established) Court - and the majority, including the UK, accepted neither.[18] As Bates (2010: 7) observes, the Convention was viewed by many in 1950 as a 'collective pact against totalitarianism' operating principally at a state versus state level and guarding against only the most egregious of abuses. However, some architects and early proponents of the Convention - among them, British jurists - were prophetic in their more ambitious vision of developing a 'Bill of Rights for a free Europe', as the ECHR has since become (Bates, 2010: 367). Many authors emphasise the origins of the Convention in the British common law legal tradition stretching back to encompass the Magna Carta, the Bill of Rights of 1689, Habeas Corpus and the American Declaration of Independence. For example, Norman and Oborne (2009: 7-8) note that:

> … the Convention was framed by British jurists, working within a common law legal tradition … The ECHR thus marks a vital codification of the common law, not its repudiation.

Development of the Convention system

The ECHR opened for signature in Rome in 1950 and entered into force on 3 September 1953. Originally, there were 10 members of the Council of Europe, including the United Kingdom,[19] which was among the first to ratify the Convention on 8 March 1951.

For two decades after its entry into force, the Convention remained a largely symbolic document. The ECtHR was constituted in 1959 but the UK did not accept the right of individual petition and the jurisdiction of the ECtHR until 1966 (Italy did not do so until 1973 and France waited until 1981).

These optional clauses were time limited and on successive occasions in the 1970s, 1980s, and early 1990s, therefore, the UK had the opportunity to withdraw its acceptance of these aspects of the Convention system, but chose not to do so (Bates, 2010: 316-18). In a forerunner of current critiques of the Strasbourg system, Cabinet discussions in the 1980s reveal disquiet about the implications of the ECtHR

[18] Article 1 of the ECHR spells out the primary duty on states to 'secure to everyone within their jurisdiction' the rights and freedoms defined in the Convention.

[19] The others were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway and Sweden.

for UK sovereignty. Nevertheless, from the 1970s onwards, an attempt was made to give effect to adverse judgments in every case (Bates, 2010: 317).[20] In 1989, Margaret Thatcher declared that the UK 'was committed to, and supported, the principles of human rights' in the ECHR and John Major reiterated this commitment in 1993 (Bates, 2010: 318).

Expansion of the Convention system

The early 1990s saw a major expansion of the Convention system due to the collapse of the Soviet Union and the disintegration of the former Yugoslavia. In 1989, there were 22 member states to the Convention; by 2010, this had risen to 47, with a combined population of some 800 million (Council of Europe, 2010a: 7). Russia became a significant new signatory in 1998. As Bates (2010: 22) notes:

> ... the Convention was eyed by many … new democracies as a document they should subscribe to, to demonstrate the seriousness of their break with their pasts and their commitment to a democratic future.

Excluding Belarus and the Vatican, the whole of Europe is now within the Convention system of protection.

This expansion in membership is reflected in a remarkable increase in the number of judgments by the ECtHR. In the 1960s, the Court produced just 10 judgments in total; in the 1970s, 26 and in the 1980s, 169 (Leach, 2011: 6). By the early 1990s, this had increased to an average of around 65 judgments per year. The year 2000 saw a significant leap in the Court's 'output' with 695 judgments in a single year - almost as many as for the whole of the 1990s (ECtHR, 2002: 29). Between 1998 and 2010, there were 12,860 judgments: an average of around 990 per year (ECtHR, 2011a: 155).

The current caseload of the ECtHR (151,600 as of 31 December 2011, of which 3,650 are applications from the UK (ECtHR, 2012a: 148)) is incomparable to earlier decades. The explosion of cases stems in large part from systemic failures of national implementation of Court judgments: around 70 per cent of pending cases arise from structural or systemic problems giving rise to repeat violations in just six states - Italy, Poland, Romania, Russia, Turkey, and Ukraine (Committee on Legal Affairs and Human Rights, 2011a: 7). The pressure thereby created has prompted a process of reform to ensure the institutional survival of the Convention system (see section 2.4).

[20] As explained in section 2.4 below, the right of individual petition and the jurisdiction of the Court became compulsory with the introduction of Protocol 11 in 1998.

2.3 The Council of Europe

The Council of Europe's principal decision-making bodies are the Committee of Ministers and the Parliamentary Assembly.

The Committee of Ministers

The Committee of Ministers is formed of the Ministers of Foreign Affairs of each member state.[21] In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their obligations. The Committee of Ministers is assisted in matters of policy by a Steering Committee for Human Rights composed of representatives of the 47 member states.

The Committee of Ministers supervises the enforcement of judgments of the ECtHR under Article 46 of the ECHR (Leach, 2011: Chapter 3). The Committee's essential function is to ensure that member states comply with the judgments and decisions of the Court. Compliance may require 'individual measures' - specific steps to end the unlawful situation or compensate the victim, and/or 'general measures', such as changes to law or policy, which are intended to prevent repeat violations. See Chapter 8 for discussion of implementation of judgments in the UK.

The Parliamentary Assembly

The Parliamentary Assembly is composed of groups of representatives from the national parliaments of member states (currently there are 636 members). While in the Committee of Ministers each member state has one vote, in the Parliamentary Assembly each country, depending on its population, has between two and 18 representatives, who provide a balanced reflection of the political forces represented in the national parliament.[22] It is left to each member state to decide how to appoint or elect its representatives. In the UK, they are appointed by the Prime Minister.[23]

The Parliamentary Assembly chooses its own agenda and recommends policies for adoption which are then submitted to governments for action. Its work is prepared by

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[21] See http://www.coe.int/t/cm/aboutCM_en.asp.

[22] The delegations are not exactly proportionate to population size; for example, the UK and Russia each have 18 delegates.

[23] Currently the UK members of the Committee (and their alternates) are: Christopher Chope MP (James Clappison MP), Geraint Davies MP (Ian Liddell-Grainger MP), Oliver Heald MP (Robert Walter MP) and Charles Kennedy MP (Lord John E. Tomlinson). Robert Walter MP chairs the UK delegation. See http://www.parliament.uk/mps-lords-and-offices/offices/delegations/coe2/membership/.

specialist committees, one of which is the Committee on Legal Affairs and Human Rights. The Committee has assumed a role (supplemental to that of the Committee of Ministers) in supervising the execution of ECtHR judgments.[24] The Committee primarily focuses on cases which raise important implementation issues and judgments concerning Convention violations of a particularly serious nature. Being a committee of the Parliamentary Assembly, its emphasis has been to seek dialogue with national legislators. The Committee also elects the Council of Europe Commissioner for Human Rights, whose role is non-judicial and preventive.[25]

Election of judges to the Court

A common misapprehension about the ECtHR, reflected in some UK media reporting and political debate, is that its judges are - like judges in UK courts - unelected.[26] This is not correct. Whilst judges are not elected by popular vote,[27] the Committee on Legal Affairs and Human Rights interviews and shortlists potential candidates for the position of judge at the ECtHR before they are elected by the Parliamentary Assembly. The Parliamentary Assembly elects judges of the Court from a list of three candidates nominated by each member state. In February 2012, the Committee of Ministers' Steering Committee for Human Rights issued guidelines on the selection of candidates for the post of judge at the ECtHR to ensure that they are of the highest possible quality.[28] At any one time, there is one judge from each member state. Judges are elected for a non-renewable term of nine years. In recent years, the Parliamentary Assembly has taken steps to improve the fairness, transparency and accountability of the process of nominating and electing judges, as well as to achieve a better gender balance among judges (Committee on Legal Affairs and Human Rights, 2011b: 2).

2.4 How the Convention system works

The ECHR system is widely accepted as the 'most advanced and effective' international regime for enforcing human rights in the world (Moravcsik, 2000: 218).

[24] See: http://assembly.coe.int/Main.asp?link=/Committee/JUR/role_E.htm.

[25] See http://www.coe.int/t/commissioner/Activities/mandate_en.asp.

[26] See, for example, the reference to 'unelected Euro judges' in 'Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals', *Daily Mail*, 12 January 2012.

[27] We note that judges of the Supreme Court of both the UK and the US are appointed rather than elected.

[28] See Steering Committee for Human Rights, *Draft Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights and Explanatory* Memorandum, CDDH(2012)R74 Addendum IV, 15 February 2012.

As discussed in section 2.2, the ECHR created a right of individual petition - the right of individuals and organisations, regardless of their nationality, to challenge a government through the Strasbourg process, by taking their case to the European Commission of Human Rights (established in 1954)[29] and then to the European Court (established in 1959).

Driven by the ever-increasing workload of the ECtHR, the enforcement machinery of the Convention was reformed, first in 1998 by Protocol 11 (which made the right of individual petition and jurisdiction of the Court compulsory for all member states) and later by Protocol 14. Protocol 14 came into force in 2010 and its principal aim is to simplify and speed up the processing of individual applications (Leach, 2011: 7-9). It seeks to do so in part by amending the criteria and process for deciding whether cases are admissible (Leach, 2011; Chapter 4).[30] The Protocol has had some success in this regard. The number of inadmissibility and striking-out decisions increased by 31 per cent in 2011 compared to 2010 (ECtHR, 2012a: 5).

The vast majority of applications to the Court are found to be inadmissible or struck out.[31] In 2011, 50,677 cases were declared inadmissible (or struck out) compared with 1,157 judgments published (ECtHR, 2011b: 4-5) (see Chapter 4 for UK and comparative figures).

If an application is declared admissible, the Court then decides by way of a judgment[32] whether there has been a breach of the Convention. After a Chamber[33] of

[29] From 1954 to the entry into force of Protocol 11 of the ECHR in 1998, individuals did not have direct access to the ECtHR but applied initially to the Commission, a body of independent experts which decided whether claims were admissible and which also produced reports on the merits of cases. Protocol 11 abolished the Commission and created a single, full-time, permanent Court.

[30] The admissibility criteria are set out in Article 35 of the ECHR. For example, applicants must have exhausted all domestic remedies; they must make their application within a period of six months from the date on which the final decision was taken; they must have suffered ‘significant disadvantage’ as a result of the alleged violation; and their application must not be ‘manifestly ill-founded’.

[31] Cases may be struck out, for example, where the applicant discontinues a claim or reaches what is known as a ‘friendly settlement’ with the respondent government. The Court is placing increasing emphasis on its friendly settlement procedure, particularly as a means of resolving repetitive or ‘clone’ applications which have the same root cause (Keller et al., 2010: 110-11; Leach, 2011: 63-74).

[32] Increasingly, decisions on the admissibility and merits of a case are made in the same decision.

the ECtHR has issued a judgment, the parties may, exceptionally, request referral of the case to the Grand Chamber (Leach, 2011: 80-81).[34] This is sometimes mistakenly referred to as a right of 'appeal' but is in fact a request for a re-hearing which must meet certain strict criteria.[35] Judgments of the Grand Chamber are final. All judgments of the Court are binding on state parties to the Convention.

The Convention also provides for states to bring cases against each other. Such cases are extremely rare and almost invariably politically highly charged (e.g. cases relating to the conflicts in Northern Ireland and Cyprus) (Leach, 2011: 13-14).

Interim protection

In urgent cases, where the applicant's life is at risk or where there is a substantial risk of serious ill-treatment, the ECtHR may apply 'interim measures' (Leach, 2011: 30-37).[36] Interim measures are urgent measures which need to be taken to prevent irreparable damage. A request for interim measures may be made by a party (an individual applicant or a state) or by any other person concerned, e.g. the relative of a person in detention. Interim measures may also be invoked by the Court. They have most commonly been applied where an applicant is threatened with deportation, extradition or expulsion to a third country where there is a danger of torture or death.[37]

The former President of the ECtHR, Jean-Paul Costa, states that interim measures have 'preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable' (ECtHR, 2012a: 38). One example is the case of and *D v UK*,[38] where the applicant was in the advanced stages of AIDS and was

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[33] The Court is organised into five sections, whose composition is geographically and gender balanced and reflects the different legal systems in Europe. Each section forms Committees, which make admissibility decisions, and Chambers, which may also make admissibility decisions as well as deciding upon the merits of cases.

[34] A Grand Chamber consists of 17 judges who represent the Court as a whole.

[35] Under Article 43 of the ECHR, the party seeking referral to the Grand Chamber must do so within three months of the Chamber judgment and specify its reasons. The request is considered by a panel of five judges from the Grand Chamber. The panel's role is to decide whether the case involves a serious question affecting the interpretation or application of the Convention or a serious issue of general importance. In 2011, the panel received 239 requests, but accepted only 11 cases (ECtHR, 2012a: 141).

[36] Under Rule 39 of the Rules of the Court.

[37] For example, in *Soering v UK*, No. 14038/88, 7.7.1989, where the applicant faced extradition to the United States and a death sentence for a murder charge.

[38] No. 30240/96, 2.5.1997.

threatened with removal to his country of birth, St Kitts, where, he argued, medical treatment would be totally inadequate.

However, Jean-Paul Costa notes that the volume of requests for interim measures presents 'a serious obstacle to the Court's functioning (ECtHR, 2012a: 37). The number of requests increased markedly from 2008, as did the rate of acceptance.[39] However, in 2011, the number of requests for interim measures granted fell by 75 per cent compared to 2010, after the Court revised its judicial and administrative procedures for dealing with urgent requests (ECtHR, 2012c: 3).[40]

Interim measures are binding on states. However, Leach (2011, 36) notes that there has been a worrying increase in the rate of states' non-compliance. In the case of *Al-Saadoon and Mufdhi*,[41] the UK Government was informed by the ECtHR that two Iraqi men detained by British armed forces should not be removed from its custody. The next day, they were nevertheless handed over to the Iraqi authorities. This action led the Court to find a violation of Article 3 because of the risk that the men would face the death penalty.[42]

Interpretative authority of the Court

The Interlaken Declaration on the future of the ECtHR, adopted by Council of Europe members in 2010, calls on states to take into account, not only judgments of the Court against the state itself, but also the Court's developing case law in judgments finding a violation of the Convention by other states.[43] It urges states to consider the conclusions to be drawn from judgments against other states where the same problem of principle exists within their own legal system. The UK Parliament's Joint Committee on Human Rights (JCHR) has expressed concern that the binding effect of the Court's judgments on member states is limited in practice by states taking an

[39] In 2008, 747 interim measures applications were granted, out of a total of 3,178 applications; in 2010, 1,440 were granted out of a total of 4,786 applications (Leach, 2011: 33).

[40] In 2011, approximately 350 were granted compared to 1,440 in 2010 (ECtHR, 2012a: 13; ECtHR, 2011a: 15).

[41] No. 61498/08, 30.6.2009.

[42] The Court also found a violation of Article 34, which guarantees the right of individual application to the Court.

[43] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, para. 4(c). See also *Opuz v Turkey*, No. 33401/02, 9.6.2009, para. 163.

'essentially passive approach' to compliance with the Convention, i.e. waiting until the Court has found a violation before considering whether its law, policy or practice requires changing in order to make it compatible with the Convention (JCHR, 2010: 57).

Principles used to interpret the Convention

This section introduces some of the key principles which permeate the Convention and its case law (Harris et al., 2009: 5-15; Leach, 2011: Chapter 5).

Subsidiarity

The Convention system is intended to be subsidiary to national systems for safeguarding human rights.[44] This is reflected in the requirement to exhaust domestic remedies before applying to Strasbourg. The principle of subsidiarity has been reinforced in the course of the process of institutional reform of the Court (ECtHR, 2012c). The Interlaken Declaration adopted by Council of Europe states in 2010 emphasised the:

> … subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. governments, courts and parliaments must play in guaranteeing and protecting human rights at the national level.[45]

Section 9.2 examines the principle of subsidiarity and section 9.4 considers the Court's supervisory role in more detail.

Proportionality

The principle of proportionality is at the heart of the ECtHR's investigation into the reasonableness of an interference with a Convention right. Some Convention rights are absolute and may never be interfered with. These include the right to be free from torture and inhuman or degrading treatment or punishment and the right not to be held in slavery. Other rights are qualified. They may be interfered with in certain circumstances which are set out in the text of the relevant Article; for example the protection of public safety. These include rights such as the right to freedom of thought, conscience or religion and the right to freedom of expression.

Interference with these rights must be:

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[44] Articles 1 and 13 of the ECHR. Article 19 sets out the ECtHR's supervisory role.

[45] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, PP.6.

- prescribed by law; this includes a requirement that the restriction is not arbitrary, irrational or ineffective;
- in pursuit of one or more particular legitimate aims;
- 'necessary in a democratic society' - a response to a 'pressing social need', and
- proportionate to the legitimate aim/s pursued.

Thus, an assessment of proportionality will ask whether a less restrictive approach could have been pursued in any given circumstance.

Margin of appreciation

In assessing proportionality, the state is allowed a certain discretion or 'margin of appreciation'. This concept acknowledges that national authorities are in principle in a better position than the Court to assess the necessity of a restriction '[b]y reason of their direct and continuous contact with the vital forces of their countries'.[46] The breadth of the state's margin of appreciation will vary depending upon the context. For example, states have a wide margin of appreciation in relation to contentious social issues on which there is no European consensus. UK cases where the Court has allowed a wide margin of appreciation include cases concerning cruelty to animals in the pursuit of sport;[47] the protection of public morals;[48] and fertility law.[49] The Court has also allowed states considerable discretion in cases of public emergency;[50] or where the 'economic interests' of the state are at stake.[51] By contrast, the margin of appreciation has been found to be narrow in cases which concern an important facet of an individual's identity or existence;[52] and protection of the authority and impartiality of the judiciary.[53]

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[46] *Handyside v UK*, No. 5493/72, 7.12.1976, para. 48.

[47] *Friend and Countryside Alliance and others v UK*, Nos. 16072/06 and 27809/08, 24.11.2009.

[48] *Handyside v UK*, No. 5493/72, 7.12.1976.

[49] *Evans v UK*, No. 6339/05 [GC], 10.4.2007.

[50] *Brannigan and McBride v UK*, Nos. 14553/89 and 14554/89, 26.5.1993.

[51] *Hatton and others v UK*, No. 36022/1997 [GC], 8.7.2003.

[52] *Dudgeon v UK*, No. 7525/76, 22.10.1981.

[53] *Sunday Times v UK (No. 1)*, No. 6538/74, 26.4.1979.

The Convention as a 'living instrument'

The Convention is regarded as a 'living instrument'. This means that the Court seeks to interpret the Convention in the light of present day conditions and social norms, rather than assess what was intended by the drafters of the Convention 60 years ago. For example, in a landmark decision in 1978, the ECtHR held that the birching of a school boy on the order of a juvenile court was a 'degrading punishment' contrary to Article 3 of the Convention, even though corporal punishment had previously been regarded as a normal sanction.[54] The dynamic (or 'evolutive') interpretation of the Convention in ECtHR case law (and also of the common law) is considered in detail in Chapter 6.

Rights which are practical and effective

The Convention provisions are interpreted and applied by the ECtHR so as to make them 'practical and effective' and not 'theoretical or illusory'.[55] This principle has been applied, for example, where a lawyer appointed by the state did not provide effective legal representation,[56] and where the criminal law in France failed, in practice, to prevent a 15 year old Togolese national from being held in servitude and being required to perform forced labour (see also section 5.6).[57]

Positive obligations

The Convention is to a great extent concerned with limits on interference with rights by the state (known as negative obligations). However, there are several areas where it has established that there are positive obligations on the state to take action to prevent violations, including in cases solely concerning private individuals or entities. For example, the Court found a positive obligation to take preventive operational measures to protect those whose lives were at risk from criminal attack.[58] The concept of positive obligations is discussed in detail in sections section 6.2 and 6.8, and in Chapter 5 in relation to the impact of specific cases.

Relationship with the European Union

A common misapprehension is that the ECHR is a creation of, or directly linked to, the European Union (EU) (previously the European Community). This is incorrect.

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[54] *Tyrer v UK*, No. 5856/72, 25.4.1978.

[55] *Soering v UK*, No. 14038/88, 7.7.1989, para. 87.

[56] *Artico v Italy*, No. 6694/74, 13.5.1980, para. 33.

[57] *Siliadin v France*, No. 73316/01, 26.7.2005, para. 148.

[58] *Osman v UK*, No. 23452/94, 28.10.1998.

The EU, as it now is, had its origins in the Treaty of Rome 1956. Its principal aim was to encourage European economic integration in order to eliminate future causes of war.[59]

All 27 EU member states are also parties to the ECHR and ratification of the Convention is an explicit condition of accession to the EU. However, as EU law stands at present, the Union and its institutions (such as the European Commission, the European Parliament and the Court of Justice of the EU in Luxembourg) are not directly bound by the ECHR as such. This creates an imbalance in that EU member states are subject to the Convention, but the supranational institutions to which they have transferred certain of their powers are not. To rectify this anomaly, the EU has committed itself (through the Treaty of Lisbon, which entered into force on 1 December 2009) to become a party to the ECHR.[60] Once accession is complete, any individual will be able to bring a complaint about infringement of Convention rights by the EU before the ECtHR. The EU would thus be in the same situation as any individual member state.

Withdrawing from the Convention

A member state may withdraw from the Council of Europe and the Convention system by a process of 'denunciation' (Article 58). This requires six months' notice to be given to the Council of Europe. No democracy has ever denounced the Convention. The only state to have done so is Greece in 1969. Greece denounced the Convention after an inter-state case brought against it following a military coup d'état in 1967 which led to, among other violations, mass internment and torture.[61] Greece rejoined the Council of Europe and ratified the Convention in 1974 after the end of military rule.

In the light of this history, proposals from some MPs and commentators for the UK to consider withdrawal from the jurisdiction of the ECtHR, if not from the ECHR itself, can be viewed as potentially damaging to the Convention as a pan-European system of human rights protection, as well as to the reputation of the UK. The implications of

[59] See Davis (2007: 19) for a guide to some of the institutions of the Council of Europe which are commonly confused with similar-sounding institutions of the European Union.

[60] See http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention. The European Union has the power to accede to the ECHR according to Article 59(2) of the ECHR (as amended by Protocol 14 in 2010).

[61] *Denmark, Norway, Sweden and the Netherlands v Greece,* Nos. 3321/67, 3322/67, 3323/67 and 3334/67, 5.11.1969.

UK withdrawal - and debate about withdrawal - for the Convention system are discussed further in section 9.8.

2.5 Conclusion

The United Kingdom was among the first states to ratify the ECHR and played a pivotal role in its creation: British politicians and jurists were among its principal architects and the treaty reflects the UK's common law legal tradition. The UK opted into the right of individual petition and the jurisdiction of the ECtHR in 1966. On successive occasions in the 1970s, 1980s, and early 1990s, the UK had the opportunity to withdraw its acceptance of these key aspects of the Convention system, but chose not to do so. In 1998, the right of individual petition and the jurisdiction of the Court was made compulsory for all states which are members of the ECHR.

Since that time, the Strasbourg system has expanded hugely due to an influx of eastern and central European states whose membership of the Convention signalled a break with their authoritarian past. Virtually all European nations - some 800 million people - are now within the European regional human rights system. The ECHR system is widely accepted as the most advanced and effective international regime for enforcing human rights in the world. No democracy has ever withdrawn from the Convention.

The vast current caseload of the ECtHR stems in large part from systemic failures of national implementation of its judgments by a small number of countries and has prompted a process of reform to ensure the institutional survival of the Convention system. The reform process is centred on the fundamental role which national authorities - governments, parliaments and courts - play in guaranteeing and protecting human rights at the national level. Our next chapter examines how the UK gives domestic effect to Convention rights.

3. The protection of human rights in the UK

3.1 Introduction

This chapter explains how the UK gives effect to fundamental rights and freedoms in the European Convention on Human Rights (ECHR) through the Human Rights Act (HRA) 1998. It examines the debate about human rights protection in the UK, including proposals for a new UK Bill of Rights and the implications of devolution.

3.2 Giving effect to Convention rights in the UK

This section examines how human rights were protected in the UK before and after the Human Rights Act (HRA) 1998.

Before the Human Rights Act

Under international law, the UK has been bound by the ECHR since it came into force in 1953. Despite having international obligations under the Convention, for decades UK judges and public authorities were not bound to observe these human rights as a matter of UK law.[62] Anyone claiming that the UK Government or a public authority had breached their fundamental rights could not take their complaint to the national courts, but had to go to Strasbourg to make a claim - a lengthy and sometimes expensive process.

From the 1960s onwards, influential figures across the political spectrum endorsed the creation of a UK Bill of Rights (Klug, 2007: 2; Rycroft, 2008). In 1993, Labour proposed a Human Rights Act directly incorporating the ECHR into UK law, to be followed by an entrenched, indigenous Bill of Rights. The first of these stages was completed between 1997 and 2000. The Human Rights Bill was introduced into Parliament in October 1997 and the HRA received Royal Assent in November 1998. The HRA came into force across the UK on 2 October 2000.[63]

How the Human Rights Act works

The aim of the HRA is to 'give further effect' in UK law to the fundamental rights and freedoms in the Convention. The HRA makes available in UK courts a remedy for the breach of a Convention right, without the need to go to Strasbourg.

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[62] In essence, the Courts had to do no more than 'have regard' to the Convention when interpreting ambiguous statutes, the presumption being that Parliament intended to legislate in conformity with the Convention (*R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696).

[63] The devolved administrations in Scotland, Wales and Northern Ireland were bound by the HRA from their inception in 1999.

The Act works in three main ways, which are explained below. We make reference to sections 2, 3, 4 and 6 of the HRA, which are set out in Appendix 3.

Duty on public authorities

First, section 6 of the HRA requires all public authorities - such as central government, local councils, police forces, prisons, health services and courts and tribunals - to act in a way which is compatible with the Convention rights unless primary legislation requires them to act otherwise. If a public authority is found to have breached human rights, the court has the discretion (as in other civil cases) to grant 'judicial review' relief, a process by which executive decisions are reviewed by judges to ensure that they are lawful. Courts can (but rarely do) award damages.

The duties of public authorities under the HRA provide a basis for moving beyond a purely legalistic approach to human rights and towards the 'grand ambition of the Human Rights Act to transform society through the development of a human rights culture' (Gordon, 2010: 609). Shortly after the HRA came into force, the (then) Lord Chancellor, Lord Irvine, defined such a culture as one in which:

> … our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor.[64]

Accounts of the HRA's first decade confirm that, due largely to a 'critical gap between governmental ambition and action' (Gordon, 2010: 612), such a culture has largely failed to materialise. A minimal, risk-based approach to human rights compliance has taken precedence in most public authorities over a positive culture of compliance to secure human rights in practical terms (Donald et al., 2009a: Chapter 2). However, the situation across the UK is not uniform. Human rights are a core pillar of the devolution settlements and there is evidence of stronger institutional commitment to human rights in the devolved nations (Gordon, 2010: 612-13). Individual public authorities in each part of the UK have sought to embed human rights in their policies, practices and organisational ethos, and there is evidence that benefits have accrued to people using and working in public services as a result (Donald et al., 2009a: Chapter 3; Equality and Human Rights Commission (EHRC), 2009: Chapter 3; Scottish Human Rights Commission, 2009).

[64] Evidence to the Joint Committee on Human Rights, JCHR HL 66-ii HC 332-ii, 19 March 2001.

The impact of cases brought under the HRA on the protection of rights and freedoms of individuals in the UK is examined in section 5.10.

Interpretation of legislation

Secondly, under section 3 of the HRA, UK law must be interpreted, so far as it is possible to do so, in a way that is compatible with Convention rights. If an Act of Parliament breaches these rights, higher courts (such as the High Court, Court of Appeal or Supreme Court) can declare the legislation to be incompatible with Convention rights.[65] This triggers a power that allows a minister to make a remedial order to amend the legislation to bring it into line with Convention rights.[66] A declaration of incompatibility does not affect the validity, operation or enforcement of the law. Thus, the HRA respects and maintains parliamentary sovereignty, as the ultimate decision as to whether to amend the law rests with parliament, not the courts. This is commonly referred to as the 'dialogue model' - where the courts are invited by parliament to indicate when legislation is incompatible with human rights but parliament decides if, and how, it will respond (Hickman, 2005).[67] This model contrasts with, for example, the US Bill of Rights or the German Basic Law, which entrench rights as 'supreme law' and allow courts to strike down incompatible legislation.[68]

[65] Section 4 of the HRA. In addition, any court can strike down or disapply subordinate legislation (such as regulations, statutory instruments or orders) so long as the incompatibility in the subordinate legislation does not derive from the Act of Parliament under which it is made.

[66] Section 10 and Schedule 2 of the HRA.

[67] Section 19 of the HRA requires that when legislation is introduced into either House for a second reading, the minister responsible must make a written statement that he or she considers the Bill is compatible with the Convention rights or is unable to make such a statement but wishes parliament to proceed with the Bill anyway. This is intended to encourage ministers and the civil service to consider the human rights implications of proposed legislation before it is introduced.

[68] The HRA model also contrasts with the European Communities Act 1972 which allows UK law to be overridden if it conflicts with directly enforceable EU law.

In practice, there have been relatively few declarations of incompatibility (an average of less than three per year since the HRA came into force) and most are remedied by primary legislation or remedial orders.[69]

Interpretation of Convention rights

The third key aspect of the HRA is that, while ECtHR judgments are binding upon the UK Government, UK courts are **not** obliged under the Convention to give them direct effect. Section 2 of the HRA requires that, in interpreting questions about human rights, domestic courts 'take into account' judgments of the ECtHR. This does not bind UK courts; rather, it requires them to take into account relevant judgments, much like they do under common law rules of statutory interpretation.[70] In practice, domestic courts do apply their own interpretation and have sometimes made decisions that expressly divert from Strasbourg judgments in comparable cases.[71] The requirement on courts to take account of Strasbourg decisions has been intensively debated in the UK (e.g. Klug and Wildbore, 2010; Lewis, 2007; Masterman, 2007; Wicks, 2005) and is explored in detail in Chapter 7.

The role of parliament in the implementation of ECtHR judgments

As noted in section 2.4, a fundamental premise of the Strasbourg system is that it is the shared responsibility of all branches of the state - the executive and parliament, as well as the courts - to ensure effective national implementation of the Convention, both by preventing human rights violations and ensuring that remedies for them exist at the national level. Thus, implementation is a political process as well as a legal one. The Joint Committee on Human Rights (JCHR) has proposed ways in which its role may be enhanced in relation to the implementation of ECtHR judgments. These include timelier reporting to parliament about any judgment of the ECtHR in an application against the UK and the systematic provision to parliament of Action Plans detailing the response to adverse judgments at the same time as these are submitted

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[69] According to figures published in September 2011, since the HRA came into force, courts had issued 27 declarations of incompatibility, eight of which had been overturned on appeal (Ministry of Justice, 2011a: 29). Of the remaining 19, 12 had been (or will be) remedied by later primary legislation; two had been (or will be) remedied by a remedial order; four related to provisions that had already been remedied by primary legislation at the time of the declaration; and one is under consideration as to how to remedy the incompatibility.

[70] This was restated unambiguously by Attorney General, Dominic Grieve, in a recent speech (Grieve, 2011): 'British courts are not bound to follow the jurisprudence of the Strasbourg court. They must take it into account.'

[71] For example, *R v Horncastle and others (Appellants)* [2009] UKSC 14, in which the Supreme Court expressly diverted from Strasbourg case law relating to the right to a fair trial (see also Chapter 7).

to the Committee of Ministers (JCHR, 2010: 66). See Chapter 8 for a more detailed examination of issues relating to implementation of ECtHR judgments in the UK.

3.3 Debate about human rights protection in the UK

This section examines broader issues relating to human rights protection in the UK, including public attitudes to, and understanding of, human rights laws; proposals for a new UK Bill of Rights and the context of devolution.

Attitudes towards the HRA

Much media reporting and political commentary about the HRA suggests that it is unpopular with the UK public. However, the evidence should not be misconstrued and has sometimes been overstated.. A survey commissioned by the Ministry of Justice (2008: 47) found that 84 per cent of the public 'feel we need to have a law dealing with Human Rights in Britain'.[72] In a poll commissioned from Ipsos MORI by the Equality and Human Rights Commission in 2008, an identical percentage agreed that it is 'important to have a law that protects human rights in Britain' (Kaur-Ballagan et al., 2009: 22); and 81 per cent of people polled agreed with the statement: 'Human rights are important for creating a fairer society in the UK' (Kaur-Ballagan et al., 2009: 20).

In Liberty's Human Rights Act Poll conducted by ComRes in 2010, 96 per cent of respondents supported the existence of a law 'that protects rights and freedoms in Britain'. [73] This poll also indicated that the specific rights enshrined in the HRA are almost universally popular. For example, 95 per cent of respondents believed the right to a fair trial is vital or important; and 94 per cent believed that respect for privacy, family life and the home is vital or important.

In broad terms, evidence from quantitative and qualitative surveys over the past decade suggest that hostility towards the HRA is not due to its content, but to the way in which is perceived to be implemented so as to protect 'undesirable' or 'undeserving' groups more than others (Donald et al., 2009a: 174-77). The Ministry of Justice survey (2008: 47) found that 57 per cent of the public 'feel that too many people take advantage of the HRA'. The poll commissioned by the EHRC found that 42 per cent of people consider that: 'The only people who benefit from human rights are those that don't deserve them' (Kaur-Ballagan et al., 2009: 57). The Ministry of Justice survey (2008: 22-23) suggests that negative attitudes correlate with low

[72] We are not aware of polling data specifically on public attitudes in the UK towards the ECtHR.

[73] See http://www.comres.co.uk/polls/Liberty_HRA_poll_27.09.10.pdf.

understanding about human rights and are not immutable: people tend to become more positive about human rights the more they know about them.

Proposals for a UK Bill of Rights

The UK coalition parties entered the 2010 general election with divergent positions on human rights. The Conservatives pledged to repeal the HRA and replace it with a UK Bill of Rights, without expressly committing to an alternative mechanism for incorporating the ECHR into domestic law. The Liberal Democrats were committed to the HRA, as was Labour.

The coalition agreement (HM Government, 2010: 11) states that:

> We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties.

This Commission on a Bill of Rights was established in March 2011 and is due to report by the end of 2012. It has also been suggested that the Commission could become deadlocked as its eight members (excluding the chair) are equally split between avowed supporters and detractors of the HRA.[74]

The Commission on a Bill of Rights launched its formal public consultation in August 2011, inviting responses to the question of whether the UK needs a bill of rights and, if so, what it should contain and how it should apply to the devolved nations (Commission on a Bill of Rights, 2011). The document omits any discussion of what a bill of rights might entail or how it might relate to the HRA. The consultation elicited some 900 responses.[75] Commission members have acknowledged the importance of having extensive public consultation 'to ensure that those who are not part of any organised interest also have their say'.[76] At the time of writing, the Commission has announced its intention to consult the judiciary; hold a series of seminars and

[74] *Hansard*, HC Vol.1049-ii, Q58, 16 June 2011. The Commission has also faced criticism for its lack of diversity: it is comprised of eight white men and one white woman, with one Scot and no-one based in Wales or Northern Ireland.

[75] See http://www.justice.gov.uk/about/cbr/consultation-prog.htm.

[76] *Hansard*, HC Vol.1049-ii, written evidence submitted by Dr Michael Pinto-Duschinsky, 16 June 2011.

roundtables; and carry out 'further engagement with the UK public'. It is unclear how extensive this will be given that the Commission's chair, Sir Leigh Lewis, has acknowledged that the Commission has limited resources.[77] The UK Government has not given any commitment to act upon the outcome of the Commission's recommendations. Taken as a whole, these are significant obstacles and there are concerns around the democratic legitimacy of this process, in the sense of its having been subject to inclusive and informed public deliberation and debate (Donald et al., 2010).

The Commission also has a mandate to provide interim advice to the Government on the ongoing Interlaken process to reform the ECtHR ahead of and following the UK's Chairmanship of the Council of Europe (November 2011 - May 2012). This advice was published in July 2011.[78]

3.4 The context of devolution

Convention rights are deeply embedded into the UK constitutional framework within which devolved powers are exercised in Scotland, Wales and Northern Ireland. In summary:

- Convention rights as contained in the HRA form part of the devolution statutes;[79]

- the devolved institutions have no competence to act in a manner that is contrary to the Convention rights;[80]

- the devolved Scottish Parliament and Northern Ireland Assembly have no power to amend the HRA;[81] and

- the devolution statutes contain mechanisms similar to those in the HRA, such as the requirement under section 3 HRA to interpret legislation consistently with Convention rights.[82]

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[77] *Hansard*, HC Vol.1049-i, Q17, 9 June 2011.

[78] See http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf.

[79] Section 126 Scotland Act (SA) 1998; Section 98 Northern Ireland Act (NIA) 1998; and Section 158 Government of Wales Act (GOWA) 2006.

[80] Section 29 and 54 SA; Section 6 and 24 NIA; and Section 81(6) and 94 GOWA.

[81] Section 29 and Schedule 4 SA, and Sections 6(2f) and 7(1) NIA.

[82] Section 83 NIA; Section 101 SA and Section 154 and Schedule 5 Part 2 GOWA.

There would almost certainly be a need for amendments to the devolution statutes if the HRA was amended or repealed and/or a bill of rights was enacted covering the devolved jurisdictions (Donald et al., 2010: 73-74).

Northern Ireland presents particular complexities. The 1998 Belfast (Good Friday) Agreement stated that:

> The British government will complete incorporation into Northern Ireland law of the … ECHR … with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.[83]

Thus, a decision to amend or repeal the HRA and/or enact a UK Bill of Rights covering Northern Ireland in a way which diminished existing human rights protection, would be likely to breach the Good Friday Agreement.

The position in Northern Ireland is further complicated by the continuing uncertainty over a possible Northern Ireland Bill of Rights. In December 2008, the Northern Ireland Human Rights Commission (NIHRC) presented its detailed advice on a Bill of Rights to the UK Government, fulfilling the mandate given to the Commission a decade earlier and informed by an extensive process of public consultation (Donald et al., 2010: 17-21; NIHRC, 2008). The Minister of State for Northern Ireland, Hugo Swire, has indicated that the coalition will subsume the Northern Ireland Bill of Rights within the architecture of the UK-wide Commission lest it become, as he put it, a 'stand-alone sideshow'.[84]

3.5 Conclusion

This chapter has examined the way in which the UK gives direct effect to Convention rights. Of greatest significance is the fact that, since the HRA came into force, all public authorities have been required to act compatibly with the ECHR and individuals have been provided with domestic legal remedies where they fail to do so.

We have found that the 'dialogue' between the courts and parliament that the HRA was designed to facilitate has resulted in relatively few declarations of incompatibility. On average, courts have declared legislation to be incompatible with Convention rights less than three times a year and on most occasions, the incompatibility has been remedied by primary legislation or a remedial order.

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[83] See http://www.nio.gov.uk/agreement.pdf.

[84] *Hansard,* HC Vol. 512, Col. 850, 30 June 2010.

Debate about human rights protection in the UK is far from settled. The unpopularity of the HRA has been widely asserted but should not be misconstrued. Polls indicate overwhelming public support for the rights guaranteed in the HRA and for the existence of legislation to protect human rights, even if there has at times been disquiet about the way that the HRA is applied (or is perceived to have been applied).

The Commission on a Bill of Rights is due to report by the end of 2012 on options for creating a new UK Bill of Rights ‘that incorporates and builds on’ all the UK’s obligations under the ECHR. However, significant obstacles exist in relation to this process which may undermine its ability to reach an outcome which enjoys democratic legitimacy. Any future reform of human rights law in the UK will be complicated by the devolution settlements, of which the HRA is an integral part.

4. Statistical overview of UK cases in Strasbourg

4.1 Introduction

This chapter analyses statistical data on applications and judgments relating to the UK at the European Court of Human Rights (ECtHR). It provides an analysis of UK cases over time and in comparison with a selection of comparator states. The chapter also analyses the nature of violations in both UK and non-UK cases.

4.2 Overview of UK cases over time

Table 4.1 provides an overview of applications lodged against the UK at the ECtHR from 1999-2010. Table 4.2 provides data for judgments in UK cases during the same period.

Table 4.3 shows figures for applications and judgments from 1966-2010 (the UK opted into the Court's jurisdiction in 1966 (section 2.2)).

Table 4.4 shows figures for applications and judgments in 2011.

Table 4.1 Applications to the ECtHR against the UK, 1999-2010[1]

	Lodged[2]	Allocated to a judicial formation[3]	Declared inadmissible or struck out[4]	Declared admissible
1999	1,054	429	223	32
2000	1,467	625	465	32
2001	1,176	474	529	34
2002	1,468	985	737	25
2003	1,393	686	865	134[5]
2004	1,366	745	721	20
2005	1,652	1,007	732	18
2006	1,608	844	963	7
2007	n/a	886	403	13
2008	n/a	1,253	1,240	31
2009	n/a	1,133	764	17
2010	n/a	2,766[6]	1,175	27
1999-2010	**n/a**	**11,833**	**8,817**	**390**

Notes

1. This table is based on statistics in the *Annual Reports*, which the ECtHR has published since 2001. For 1999 and 2000, figures are from the annual *Survey of Activities*, which adopts a comparable format. Data are taken from the tables in each report entitled 'Events in total, by respondent State' (or, pre-2006, 'Evolution of cases - applications'). We acknowledge with thanks the work completed by Helen Wildbore of the Human Rights Futures Project at LSE which contributed to this table.

2. For 1999-2001, described as 'provisional files opened'. The number of allocations lodged (or provisional files opened) is not provided in ECtHR reports after 2006. The Court's 2007 *Annual Report* explains that the (lower) figure for applications allocated to a judicial formation 'more accurately reflects its true judicial activity'.

3. For years 1999-2001, the figure is for applications registered, prior to their allocation to a judicial formation.

4. Note that admissibility decisions in a given year may relate to cases lodged in a previous year.

5. This relatively high figure can be explained partly by a batch of cases relating to discriminatory benefits provisions for widows.

6. This figure appears to include some of the 2,500 repetitive applications made in relation to prisoners' right to vote, as indicated in *Greens and MT v UK*.

Table 4.2 Judgments of the ECtHR in UK cases, 1999-2010[1]

	Total number[2]	Violation (s) found	Violations found (adjusted)[3]	No violations found	No violations (adjusted)[3]
1999	19	12	7[4]	0	0
2000	20	16	15[5]	3	2[6]
2001	33	19	15[7]	11	7[8]
2002	40	30	28[9]	4	4
2003	25	20	17[10]	2	2
2004	23	19	16[11]	0	0
2005	18	15	13[12]	0	0
2006	23	10	10	8	8
2007	50	19	9[13]	7	5[14]
2008	36	27	9[15]	6	6
2009	18	14	8[16]	3	3
2010	21	14[17]	14	7	7
1999-2010	**326**	**215**	**161**	**51**	**44**

Notes

1. This table is based on statistics in the *Annual Reports*, which the ECtHR published from 2001. For 1999 and 2000, figures are from the annual *Survey of Activities*, which adopts a comparable format. Data are taken from the tables entitled 'Violations by Article and by respondent State [or country]' (or, pre-2003, 'Judgments'). We acknowledge with thanks the work completed by Helen Wildbore which contributed to this table.

2. Note that the total number of judgments exceeds the sum of 'judgments finding at least one violation' and 'judgments finding no violation' because it includes other types of judgments, e.g. friendly settlements, which are not quantified separately here.

3. This column makes adjustment for repetitive or 'clone' cases where there are at least two cases where the violation stems from the same root cause.

4. The ECtHR found a breach of Article 6 due to the lack of independence and impartiality of courts-martial in four cases; as they deal with the same issue, they are counted here as one case. There were two cases where the ECtHR found a breach of Article 8 due to people being discharged from military on grounds of their sexual orientation (counted as one case) and two where the ECtHR found a breach of Articles 5 and 6 concerning the criminal trials of children (also counted as one case).

5. The ECtHR found a breach of Article 6 due to the lack of access to a lawyer in two cases (counted here as one case).

6. The ECtHR found no breach of Article 6 where the prosecution had withheld material on public interest grounds in two cases (counted here as one case).

7. The ECtHR found a breach of Article 2 for failings in the investigative procedures concerning deaths in Northern Ireland in four cases (counted as one case) and a breach of Article 6 in trials by court martial in two cases (also counted as one case).

8. The ECtHR found no breach of Articles 8 and 14 for planning and enforcement measures taken against Gypsies in five cases (counted as one case).

9. The ECtHR found a breach of Article 8 due to people being discharged from military on grounds of their sexual orientation in two cases (counted as one case) and a breach of Articles 8 and 12 due to the lack of legal status of transsexual people in two cases (also counted as one case).

10. The ECtHR found a breach of Article 5 concerning the review of the lawfulness of continued detention as a mandatory life prisoner in two cases (counted as one case) and a breach of Article 8 concerning the use of surveillance devices at home/work in three cases (also counted as one case).

11. The ECtHR found a breach of Article 6 for the length of criminal proceedings in two cases (counted as one case) and a breach of Article 6 for the lack of independence and impartiality of courts-martial in three cases (also counted as one case).

12. The ECtHR found a breach of Article 6 for the length of criminal proceedings in two cases (counted as one case) and a breach of Articles 5 and 6 for orders of detention for failure to pay local taxes or court-imposed fines in two cases (also counted as one case).

13. The ECtHR found a breach of Article 14 for discriminatory benefits provisions for widows in six cases (counted as one case); a breach of Article 2 due to the lack of independence of the Royal Ulster Constabulary during investigations into deaths in five cases (counted as one case); and a breach of Article 6 concerning adjudication proceedings before prison governors (counted as one case).

14. The ECtHR found no breach of Article 14 for discriminatory benefits provisions for widows in three cases (counted as one case).

15. The ECtHR found a breach of Article 14 for discriminatory benefits provisions for widows in 19 cases (counted as one case).

16. The ECtHR found a breach of Article 14 for discriminatory benefits provisions for widows in seven cases (counted as one case).

17. This figure needs to take into account an increase in the ECtHR's productivity by 16 per cent in 2010, something which is likely to increase further since the coming into force of Protocol 14 in 2010.

Table 4.3 Applications and judgments relating to the UK, 1966-2010[1]

Applications lodged	14,460 (est.) [2]
Applications declared inadmissible/struck out	14,029
Total number of judgments	443
Judgments where violation(s) found	271
Judgments finding no violation	86

Notes

1. The UK accepted the right of individual petition in 1966. Unless otherwise stated, data in this table is taken from: http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf.

2. No figure is available for the number of applications lodged between 1966 and 2010. This figure has been extrapolated from the fact that 97 per cent of applications (a total of 14,029) were declared inadmissible in this period, as stated here (at p. 21): http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf.

Table 4.4 Applications and judgments relating to the UK, 2011[1]	
Applications allocated to a judicial formation	1,553
Applications declared inadmissible/struck out	1,028
Applications declared admissible	26
Total number of judgments	19
Judgments where violation(s) found	8
Judgments finding no violation	9

Notes

1. Data relating to applications is taken from ECtHR (2012b) 60. Data relating to judgments is taken from: http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_EN_2011.pdf.

Interpreting data on applications and judgments

Great care is required when interpreting data relating to the number of applications brought against the UK: the number declared admissible or inadmissible; and the number that result in a judgment finding at least one violation (or finding no violation). Fluctuations in figures may be attributable to repetitive or 'clone' cases, i.e. batches of cases which have the same root cause. These include the roughly 2,500 cases relating to the right of convicted prisoners to vote and more than 30 cases relating to discriminatory benefits provisions for widows. Table 4.2 indicates (in footnotes) where repetitive cases affect the figures. It also shows what the more meaningful figure would be if each of these clusters of 'clone' cases were treated as a single case. Figures may also fluctuate according to the productivity of the Court in processing cases and producing judgments (an effect that is likely to become more pronounced from 2011 onwards as the impact of Protocol 14 is felt (section 2.4)).

The data in Tables 4.1 to 4.4, and other data referred to below, suggest the following conclusions.

Statistical trends in UK cases

- Of all the applications lodged against the UK, a very small percentage passes the initial threshold of admissibility. Between 1999 and 2010, only around three per cent of applications allocated for a decision were declared admissible. This trend has been consistent over time, as the figure is about the same for the period 1966-2010. The vast majority of cases, then, are declared inadmissible or struck out (for example, because they are found to be 'manifestly ill-founded') (section 2.4). Figures for 2011 indicate a downward trend in the proportion of applications lodged against the UK which are declared admissible. In 2011, less

than two per cent of applications allocated for a decision were declared admissible.

- The UK has a very low 'rate of defeat' at Strasbourg. Of all the applications brought against the UK and allocated for a decision (i.e. before the admissibility stage), only 1.8 per cent eventually result in a judgment finding at least one violation. Put another way, the UK 'loses' only around one in fifty cases brought against it in Strasbourg. This figure is true for both time periods examined here. If adjustment is made for repetitive cases (as shown in Table 4.2 for the period 1999-2010), the rate of defeat falls to 1.4 per cent, or about one in 70. In 2011, there were 1,553 applications against the UK allocated for a decision. In the same year, there were eight adverse judgments issued against the UK. This equates to a 'rate of defeat' of 0.5 per cent or 1 in 200.[85]

- Of the total number of judgments in UK cases between 1999 and 2010, around 66 per cent found at least one violation and 16 per cent found no violation. The figures for 1966-2010 are 61 per cent and 19 per cent respectively. The proportion of adverse judgments is higher if expressed as a percentage **only** of judgments against the UK which **either** found at least one violation **or** no violation, i.e. not including friendly settlements or other types of judgment. Expressed in this way, the percentage of adverse judgments between 1999 and 2010 was 81 per cent; between 1966 and 2010 it was 76 per cent. These figures are not surprising given the high threshold for admissibility, which means that only cases of substantial merit make it over the initial hurdle.[86] The more meaningful figure for the 'rate of defeat' is the 'one in 50' explained above, since this reflects the very high proportion of applications lodged against the UK that fall at the first hurdle and the comparatively tiny number that eventually result in an adverse judgment.

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[85] Note, however, that judgments in a given year relate to applications lodged in previous years and therefore annual figures offer only a 'snapshot' of the state of applications and judgments against a state.

[86] An example of statistics being presented with insufficient context is the report *Human Rights: Making Them Work for the People of the UK*, which was endorsed by 10 Conservative MPs (Broadhurst, 2011: 14). The report highlights the fact found that around three-quarters of judgments involving the UK have found a breach of a Convention right, without putting this figure in the context of the total number of applications lodged against the UK. This aspect of the report gained prominent media coverage. See 'Europe's war on British justice: UK loses three out of four human rights cases, damning report reveals', *Daily Mail*, 12 January 2012; and 'ECHR: Britain loses 3 in 4 cases in human rights court', *Daily Telegraph,* 12 January 2012.

- There are no discernible trends over time in relation either to (i) the number of applications lodged (or allocated for a decision) or (ii) the number of applications declared either admissible or inadmissible. Fluctuations are sometimes attributable to repetitive cases, as indicated in Tables 4.1 and 4.2.

Changes before and after the Human Rights Act 1998

The Human Rights Act (HRA) has been in force across the UK since 2000. It might be expected that - allowing for a time lag of several years as cases work through the domestic and Strasbourg systems - the Act would have resulted in fewer adverse judgments by the ECtHR against the UK.[87] This expectation reflects the fact that, as a result of the HRA, UK courts consider human rights more explicitly and intensively than before and that the Strasbourg Court would, in turn, follow their reasoning and conclusions (Bratza, 2011: 507) (see also section 7.4). The number of adverse judgments against the UK has indeed shown a slight downward trend since 2005 if allowance is made for repetitive cases (Table 4.2). However, the annual figures are so low that it is not possible to discern any pronounced trend. A more marked and consistent reduction in adverse judgments may become apparent in future years (as the figure of eight adverse UK judgments in 2011 suggests) (Table 4.4). There are no discernible trends pre- and post-HRA in relation to admissibility decisions or judgments finding no violation.

4.3 Overview of UK cases in comparison with other states

It is instructive to compare statistical trends for the UK with those of other European states. We have selected for the purposes of comparison six other countries: Italy, France, Sweden, Croatia, Turkey and Ukraine. These states, selected from each part of Europe, represent a mixture of both older and newer members of the Convention (Sweden ratified the Convention in 1952; Turkey in 1954; Italy in 1955; France in 1974; and Croatia and Ukraine in 1997). Our comparators include both settled and newer democracies and they vary in the nature and scale of human rights violations each has experienced. Italy, France, Turkey and Ukraine are broadly comparable to the UK in terms of their population size, while Sweden and Croatia are considerably smaller. This comparison is illustrative rather than scientific. The data include repetitive cases and are not adjusted (as in Table 4.2) to show what the figure would be if repetitive judgments were counted as a single judgment.

[87] Merris Amos has suggested that 2005 is the year that the effect of the HRA would be expected to have 'kicked in'; see Amos (2010).

Table 4.5 shows selected data for the UK and the six comparator countries from 1 November 1998 to 31 December 2010.[88]

Table 4.5 Cases relating to the UK and selected comparator countries, 1998-2010

	UK	Croatia	France	Italy	Sweden	Turkey	Ukraine
Applications allocated to a judicial formation	11,881	6,447	19,048	19,207	4,406	35,152	30,738
Applications declared inadmissible or struck out	8,817	4,689	16,049	8,067	3,537	18,877	19,532
Applications declared admissable	390	189	736	2431	52	3,113	982
Total no. of judgments	326	191	698	1,964	53	2,539	717
Judgments finding at least one violation	215	154	542	1,516	25	2,221	709
Judgments finding no violation	51	8	89	35	9	52	4

Notes: Data are for 1 November 1998 to 31 December 2010.

The data in Table 4.5 suggest the following conclusions.

- The UK had among the lowest number of applications per year lodged against it of our comparator states. The average number of applications against the UK allocated for a decision each year was 990. The figure for Turkey was the highest at just under 3,000 per year, while for Ukraine it was just over 2,500. Both France and Italy had an average of around 1,600 applications against them per year. Only Croatia and Sweden had lower average numbers of applications than the UK.

- The UK has among the lower rates among our comparator countries for the number of applications against it that are declared admissible (i.e. the number of cases declared admissible as a percentage of the number of applications allocated for a decision). While in the UK, the rate is around three per cent, in Italy it is almost 13 per cent and in Turkey is it almost nine per cent. France has a slightly higher rate of applications declared admissible than the UK, while Ukraine and Croatia are roughly the same. Sweden has the lowest rate of admissibility decisions at just over one per cent.

[88] Data are drawn from the *Annual Reports* of the ECtHR, which make available data for all member states: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/.

- The UK has the second lowest 'rate of defeat' of our comparators (i.e. the number of judgments finding at least one violation expressed as a percentage of the total number of applications allocated for a decision). Less than two per cent of the applications against the UK allocated for a decision result in an adverse judgment. Only Sweden loses proportionately fewer cases (just over one per cent). Italy's 'rate of defeat' is almost eight per cent, while for Turkey the figure is more than six per cent. France, Ukraine and Croatia also have a slightly higher rate of adverse judgments than the UK (between two and three per cent).

- Of all applications lodged against the UK which (having been found admissible) result in a judgment, around 66 per cent found at least one violation. This was the second lowest percentage of our comparator states. Virtually all judgments against Ukraine found at least one violation (98 per cent). For Turkey, the figure was 87 per cent and for Italy, France and Croatia, it was around 80 per cent. Less than 50 per cent of judgments relating to Sweden found at least one violation.

- The average number of adverse judgments each year relating to the UK is significantly lower than the average for most of the comparator states. While the UK had an average of 18 judgments per year finding at least one violation, for Turkey the average was 185, followed by Italy (126), Ukraine (60) and France (45). Only Croatia (13) and Sweden (2) had a lower average number of adverse judgments each year.

4.4 The nature of violations in Strasbourg cases

David Cameron (2012) has stated that the ECtHR 'should ensure that the right to individual petition counts; it should not act as a small claims court'. In this section, we address this critique, with reference to judgments concerning both the UK and other states.

Judgments of the ECtHR in 2011

Analysis of data provided by the ECtHR about judgments against all Council of Europe states demonstrates the frequently serious and substantive nature of the matters it considers. Of all ECtHR judgments finding at least one violation in 2011, 26 per cent involved a violation of the right to liberty and security (Article 5 of the ECHR); 21 per cent involved a violation of the right to a fair trial (Article 6); 20 per cent involved a violation of the prohibition of torture or inhuman or degrading

treatment or punishment (Article 3) and 16 per cent involved a violation of the right to life (Article 2).[89]

The ECtHR's latest annual report highlights significant developments in its case law in 2011 (ECtHR, 2012a: 103-40). Judgments concerning violations of Article 2 include: the bombing of residential buildings by Russian military jets during the Chechen war, with loss of civilian life;[90] the failure to hold fully independent and effective investigation into deaths of Iraqi nationals during the occupation of southern Iraq by British armed forces;[91] the excessive use of police force;[92] and the effectiveness of investigation into disappearance of applicant's husband during the war in Bosnia and Herzegovina.[93] Judgments concerning violations of Article 3 include: protracted solitary confinement in inadequate prison conditions;[94] the sterilisation of a Roma woman without her informed consent;[95] repeated, video-taped, full-body searches by masked security-force personnel;[96] and the failure to apply effectively criminal-law mechanisms to protect a child from sexual abuse.[97]

Judgments concerning violations of Article 5 include: the indefinite internment without trial of an individual by British forces in Iraq;[98] the detention of three Sri Lankan children and their mother in a closed centre;[99] and the unlawful apprehension and continued detention without justification of the Russian businessman and opposition

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89 See http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_EN_2011.pdf. Note that individual judgments may involve violations of more than one Convention right.

90 *Kerimova and others v Russia*, Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, 3.5.2011; *Khamzayev and others v Russia*, No. 1503/02, 3.5.2011.

91 *Al-Skeini and others v UK*, No. 55721/07 [GC], 7.7.2011.

92 *Soare and others v Romania*, No. 24329/02, 22.2.2011; *Alikaj and others v Italy*, No. 47357/08, 29.3.2011.

93 *Palić v Bosnia and Herzegovina*, No. 4704/04, 15.2.2011.

94 *Csullog v Hungary*, No. 30042/08, 7.6.2011.

95 *VC v Slovakia*, No. 18968/07, 8.11.2011.

96 *El Shennawy v France*, No. 51246/08, 20.1.2011.

97 *M and C v Romania*, No. 29032/04, 27.9.2011.

98 *Al-Jedda v UK*, No. 27021/08 [GC], 7.7.2011

99 *Kanagaratnam v Belgium*, No. 15297/09, 13.12.2011. The ECtHR also found that the family had been subjected to inhuman or degrading treatment, in violation of Article 3.

figure, Mikhail Khodorkovskiy.[100] Judgments concerning violations of Article 6 include: a police officer's participation on a jury in a case involving disputed police evidence;[101] insufficient reasoning in the case of a Croatian man jailed for 40 years solely on the basis of hearsay evidence;[102] and a judgment considering whether a conviction based solely on the statement of an absent witness would automatically prevent a fair trial and result in a breach of Article 6(1) (see also section 7.5).[103]

Judgments of the ECtHR in UK cases over time

Similarly, figures for violations in UK cases illustrate the serious nature of the issues before the Strasbourg Court. Table 4.6 shows the nature of the human rights violations in ECtHR judgments against the UK between 1966 and 2010.[104]

[100] *Khodorkovskiy v Russia*, No. 5829/04, 31.5.2011. The Court also found that Mr Khodorkovskiy had been held in inhuman or degrading conditions for part of his detention and in a Russian court room, where he was held in a cage despite having no history of violent behaviour.

[101] *Hanif and Khan v* UK, Nos. 52999/08 and 61779/08, 20.12.2011.

[102] *Ajdarić v Croatia*, No. 20883/09, 13.12.2011.

[103] *Al-Khawaja and Tahery v UK*, Nos. 26766/05 and 22228/06 [GC], 15.12.2011. The ECtHR found no violation of Article 6 in the case of Mr Al-Khawaja and a violation in the case of Mr Tahery.

[104] See http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf. The data are shown in the original source as being from 1959, when the ECtHR was established. The UK accepted the Court's jurisdiction in 1966. The figures in Table 4.5 are not adjusted for the effect of repetitive cases. Note that individual judgments may involve violations of more than one Convention right.

Table 4.6 Violations in ECtHR judgments against the UK by Article, 1966-2010		
Type of violation	**Article**	**Judgments**
Right to life - deprivation of life	2	2
Lack of investigation	2	12
Prohibition of torture and inhuman or degrading treatment	3	15
Prohibition of slavery and forced labour	4	0
Right to liberty and security	5	59
Right to a fair trial	6	87
Length of proceedings	6	25
No punishment without law	7	1
Right to respect for private and family life	8	63
Freedom of thought, conscience and religion	9	0
Freedom of expression	10	10
Freedom of assembly and association	11	3
Right to marry	12	4
Right to an effective remedy	13	32
Prohibition of discrimination	14	43
Protection of property	Article 1, Protocol 1	2
Right to education	Article 2, Protocol 1	2
Right to free elections	Article 3, Protocol 1	4
Other Articles of the Convention	Not specified	2

The data show that the Convention right most commonly violated in UK cases was Article 6 (the right to a fair trial and length of proceedings - 30 per cent of adverse judgments), followed by Article 8 (the right to a private and family life - 17 per cent) and the Article 5 (the right to liberty and security - 16 per cent). A sizeable minority of judgments also involved a violation of the right to an effective remedy (9 per cent).

These data suggest, as Lord Bingham (2010: 568) has identified, that before the HRA, while statutory and common law rules gave a level of protection to person and property, e.g. freedom from arbitrary arrest:

> … the individual enjoyed no rights which could not be curtailed or removed by an unambiguously drafted statutory enactment or subordinate order, and in important areas, such as freedom of expression and assembly, the

> individual's right was no more than to do whatever was not prohibited: the right would shrink if the prohibition were enlarged. In times of perceived emergency, few traditional rights and liberties could be regarded as free from the risk of invasion.

The number of Strasbourg cases involving basic civil liberties bears out the observation by Bates (2010: 314) that:

> … from the late 1960s onwards, the traditional bastion of British liberty, the common law, had been increasingly exposed as an imperfect safeguard of individual rights.

In addition, violations of the right to life and the prohibition of torture and inhuman or degrading treatment each accounted for around four per cent of adverse judgments. This means that around one in every 12 judgments against the UK involved violations of Convention rights considered to be of the most fundamental importance.

Overall, then, the statistics and cases examined in this section do not bear out the suggestion that the Strasbourg Court has been preoccupied with ‘small claims’.

4.5 Conclusion

Statistical data for cases relating to the UK provide a useful context for discussion about the impact of the ECtHR on the UK. Our key finding is that the UK has a very low ‘rate of defeat’ at Strasbourg, both in absolute terms and in comparison with a selection of other states. Of all the applications brought against the UK at the ECtHR in the past decade, the vast majority fell at the first hurdle: only three per cent were declared admissible. An even smaller proportion - 1.8 per cent – eventually resulted in a judgment finding at least one violation. In other words, the UK ‘lost’ only one in fifty cases brought against it in Strasbourg. The rate of defeat falls to 1.4 per cent (around one in 70) if judgments are adjusted to show the effect of repetitive cases. The latest figures for 2011 show a rate of defeat of just 0.5 per cent, or one in 200.

Compared to a selected range of other Council of Europe states, the UK has among the lowest number of applications per year allocated for a decision. It also has a lower percentage of these applications declared admissible than most and loses proportionately fewer of the cases brought against it than most (whether expressed as a proportion of the total number of applications allocated for a decision or as a proportion of the total number of judgments). While this comparison is not scientific, it does provide a useful context for analysing the UK’s relationship with the ECtHR.

Analyses which suggest that the UK loses a significant number of cases brought against it at Strasbourg are incorrect and are not supported by the data, whether analysed for the UK alone or in comparison with other states.

Overall, the statistics and cases examined in this section do not bear out the suggestion that the Strasbourg Court has been preoccupied with ‘small claims’, as the Prime Minister has suggested. Around 36 per cent of all ECtHR judgments - and 8 per cent of judgments relating to the UK - involved a violation of either the right to life or the prohibition of torture and inhuman or degrading treatment, which are considered to be of the most fundamental importance.

Clearly, statistics do not convey the whole story in relation to the impact of ECtHR judgments on the UK - the subject of our next chapter.

5. The impact of European Court of Human Rights judgments on the UK

5.1 Introduction

This chapter examines the impact that judgments of the European Court of Human Rights (ECtHR) have had on protecting the rights and freedoms of people in the UK. The importance of promoting a better understanding of the Strasbourg system and its impact in the UK was recently underlined by the Attorney General, Dominic Grieve (2011):

> There has been a failure in the past to explain how the operation of the Convention affects the lives of all of us in a significant and positive manner.

The chapter focuses on ECtHR cases relating to the UK, but some non-UK judgments are also referred to where they have had a significant impact in the UK. We also refer to the impact of UK cases in other Council of Europe states where this is known. The selection of cases is guided by the broad themes set out in section 1.3. While the chapter is principally focused on Strasbourg judgments, the impact of cases brought under the Human Rights Act (HRA) 1998 on protecting the rights and freedoms of people in the UK is also outlined. Such impact reflects the broader effect of the European Convention on Human Rights (ECHR) on UK law and policy since it was given direct effect in the domestic legal framework.

5.2 Identifying the impact of legal cases

Impact beyond that on the individual applicant in a case can most easily be identified where a legal judgment has immediate implications for legislation, administrative action or statutory guidance, i.e. where a judgment leads directly to a change in the law or the way that the law is applied.[105] Over time, the impact of a judgment - or successive judgments - may also be reflected in changes to policy, practice and broader social attitudes (e.g. towards lesbian, gay, bisexual or transgender people). Multiple factors may combine to produce change: a judgment which highlights a particular law or policy as being inconsistent with regional human rights norms may be used by civil society actors to 'reframe' an issue or make it more prominent. In this sense, a judgment may 'tip the balance' by changing the political landscape in favour of legal or policy reform (Helfer and Voeten, 2011: 15). However, it may be hard to

[105] In the Strasbourg system, such changes are known as 'general measures' which are required to prevent the breach happening again or to put an end to breaches that still continue. These are distinct from 'individual measures' which are for the specific benefit of the applicant.

establish beyond doubt a causal link between a judgment and the subsequent changes, especially where substantial time lags are involved (Donald et al., 2009b). This chapter focuses primarily on judgments which led directly to a change in the law or the way that the law is applied. Where consequent changes to broader policy and practice have been documented, this evidence is also referred to.

5.3 Protection of life and investigations into deaths

Some of the most prominent judgments against the UK have concerned the claims of wrongful death on behalf of deceased relatives in violation of Article 2 of the ECHR (the right to life), as well as a failure adequately to investigate those deaths.

Protection of life

Handling threats or risks to life

A leading case concerned with the protection of life is that of *Osman v UK*,[106] in which the ECtHR established criteria for when authorities have failed in their obligation to uphold the Article 2 rights. The case concerned a teacher who had developed an obsession with one of his pupils, Ahmet Osman. The pupil's family experienced harassment and criminal damage, culminating in an attack by the teacher in which Ahmet Osman was injured and his father killed. While the family identified measures the police could have taken and did not, the court found no violation of Article 2 on the particular facts of the case. Nevertheless, its significance lies in the principle established in the judgment that, in order to assess whether or not there has been a violation of the positive obligations of Article 2, the relevant test is whether:

> … the 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.[107]

Research commissioned by the Equality and Human Rights Commission on the impact of *Osman* (Donald et al., 2009b: 29) found that:

> … the *Osman* principles have become part of policing policy and practice across a range of areas - indicating acceptance of the underlying

[106] No. 23452/94 [GC], 28.10.1998.

[107] Para. 116.

principles of the case and their applicability to a range of situations wider than those examined by the court.

The research found that the majority of police forces in England and Wales have in place policies on handling threats or risks to life which derive directly from the obligations of Article 2 of the ECHR and from *Osman*. Policies are put into practice using a wide variety of preventive measures. These include 'Osman warnings', which are sent by the police to individuals whose lives the police have reason to believe are at risk. The *Osman* principle is referred to in guidance for police on the management, command and deployment of armed officers (Association of Chief Police Officers and National Policing Improvement Agency, 2009: 17).

Osman has also had impact beyond the UK. For example, the *Osman* principle has been applied to cases involving domestic violence,[108] the murder of journalists,[109] and a foreseeable risk of environmental hazards such as mudslides.[110]

Investigations into deaths at the hands of the state

ECtHR judgments have had a significant impact on investigative and prosecutorial processes following deaths at the hands of the state or while in the care of the state. *Jordan v UK* and related cases[111] concerned the death of the applicants' next-of-kin during security forces operations (or in circumstances giving rise to suspicions of collusion of such forces) in Northern Ireland. *Jordan* concerned the shooting dead in Belfast of an unarmed man, Pearse Jordan, by officers of the Royal Ulster Constabulary (RUC). The RUC carried out an investigation into the death, on the basis of which the Director of Public Prosecutions directed that no prosecution should be brought. An inquest was started but was subject to four adjournments and did not reach a conclusion. The ECtHR found that the UK was in breach of its duty under Article 2 ECHR as it had failed to conduct a proper investigation into the death of Pearse Jordan.

In *Jordan* and the related cases, the Court found the following shortcomings:

[108] *Kontrova v Slovakia*, No. 7510/04, 31.5.2007.

[109] *Dink v Turkey*, No. 2668/07, 14.9.2010.

[110] *Budayeva and others v Russia*, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20.3.2008.

[111] *Jordan v UK*, No. 24746/94, 4.5.2001; *McKerr v UK*, No. 28883/95, 4.5.2001; *Kelly v UK*, No. 30054/96, 4.5.2001; *Shanaghan v UK*, No. 37715/97, 4.5.2001; *Finucane v UK*, No. 29178/95, 1.7.2003; *McShane v UK*, No. 43290/98, 28.5.2002.

- a lack of independence of the investigating police officers from security forces/police officers involved in the events;

- a lack of public scrutiny and information to the victims' families concerning the reasons for decisions not to prosecute;

- the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;

- the soldiers/police officers who shot the deceased could not be required to attend the inquest as witnesses;

- the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings; and

- the inquest proceedings did not commence promptly and were not pursued with reasonable speed.

Thus, as well as raising fact-specific issues, the cases pointed collectively to broader systemic failings in both the investigative and prosecutorial processes. In the following years, the UK Government responded to the cases with a series of changes to law, policy and practice. Dickson (2010: 271-72) summarises these changes (some specific to Northern Ireland and others UK-wide) in chronological order as follows:

- as a result of changes begun in 1996, information relevant to inquests is now disclosed to all parties in advance (except where it may affect national security);

- since 1999, it has been judges, not ministers, who decide whether the content of documents is so sensitive as to entitle them to be protected from disclosure under ‘public interest immunity certificates’;

- in 2000, the office of the Police Ombudsman for Northern Ireland was created to conduct independent investigations of complaints against the police;

- in 2002, the rules applicable to inquests in Northern Ireland were changed so that witnesses suspected of involvement in a death could be compelled to

attend the inquest (although they could not be compelled to incriminate themselves);

- in 2002, the Prosecution Service in Northern Ireland said that it would from then on give reasons for not prosecuting in cases where death is, or may have been, occasioned by the conduct of agents of the state;

- in 2003, the Police Service of Northern Ireland created the Serious Crime Review Team to review unsolved major crimes where it is thought that new evidential leads may be developed; in 2005, this became the Historical Enquiries Team (HET);

- in 2003, the Lord Chancellor established a statutory scheme to provide for legal representation for close relatives at certain exceptional inquests in Northern Ireland;

- in a case decided in 2004, the House of Lords[112] ruled that in order to provide an Article 2-compliant investigation, an inquest is required when examining 'how' someone met their death to determine not only 'by what means' but also 'in what circumstances' the death occurred; and

- in 2006, a new Coroners Service was launched in Northern Ireland, in order to expedite the holding of inquests.

The UK Government has acknowledged delays in implementing *Jordan* and related judgments, in respect of both general and individual measures.[113] In particular, it has acknowledged that the HET's focus on the review of historical cases 'means they cannot satisfy the promptness requirement of Article 2' (Ministry of Justice, 2009: 17).[114]

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[112] *R (Middleton) v Coroner for the Western District of Somerset* [2004] 2 AC 182; for examination of the impact of this case, see Donald et al. (2009), Chapter 3.

[113] The Ministry of Justice (2011a: 8) notes that 'work is progressing to bring those cases to a close; individual measures remain open in four of them'.

[114] In 2006, the Committee of Ministers noted that the HET 'will not provide a full effective investigation in conformity with Article 2 in "historical cases" but only identify if further "evidentiary opportunities" exist' (Committee of Ministers, 'Cases concerning the action of security forces in Northern Ireland - Stocktaking of progress in implementing the Court's judgments', CM/Inf/DH(2006)4, 23 June 2006). However, in 2009 it revised its assessment, stating that 'the HET has the structure and capacities to allow it to finalise its work' (Committee of Ministers, 'Action of the Security Forces in Northern Ireland' Interim Resolution CM/ResDH(2009)44, 19 March 2009).

Notwithstanding these delays in implementation, the impact of the cases has been far-reaching, both in Northern Ireland and in the rest of the UK. Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission, observed that *Jordan* and related cases exerted 'a tremendous influence' in Northern Ireland, particularly in the absence of a 'truth-recovery' process such as those that have taken place in other post-conflict settings, e.g. South Africa.[115]

In *Jordan* and other judgments,[116] the Strasbourg Court established the essential requirements that must be met in order for the state to discharge its duty to carry out an effective investigation into credible cases in which Article 2 may have been breached. The detailed procedural obligations for the investigation of deaths established in these cases are:

- effectiveness;
- independence;
- promptness;
- accessibility to the family, and
- sufficient public scrutiny to ensure accountability.

Further, the ECtHR has established that the investigation must be initiated by the state. These principles have been held by both the ECtHR and domestic courts to apply to circumstances beyond those involving deliberate killing by state agents. For example, they were applied in cases involving: the killing of Zahid Mubarek in a young offenders' institution by a cell mate with a known history of violence and racism;[117] the death after an asthma attack of Paul Wright, who had a known history of asthma and received deficient medical treatment while in prison;[118] the deaths by suicide while in custody of Colin Middleton[119] and Mark Keenan;[120] the death, by

[115] Monica McWilliams, Interview, 23 December 2011.

[116] For example, *Salman v Turkey*, No. 21986/93 [GC], 27.6.2000.

[117] *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, para. 20. See also *Paul and Audrey Edwards v UK*, No. 46477/99, 14.3.2002, which concerned the killing of Christopher Edwards while in custody on remand in 1994 by a cell-mate with a history of mental illness.

[118] *R (Wright) v Secretary of State for the Home Department* [2001] 1 Lloyd's Rep Med 478, para. 60.

[119] *R (Middleton) v Coroner for the Western District of Somerset* [2004] 2 AC 182.

[120] *Keenan v UK,* No. 27229/95, 3.4.2001.

hyperthermia, of a soldier, Jason Smith, while on active service in Iraq;[121] and the death of a patient where there was a potential failure to act upon information that a GP had been administering opiates to terminally ill patients in lethal doses.[122]

The principal means of meeting these obligations in England and Wales is the enhanced type of 'Article 2 inquest' used in, among other recent circumstances, the bombings in London in July 2005 and the fatal shooting of Jean Charles de Menezes by the police on the London Underground after he had mistakenly been identified as a terrorist suspect.[123]

The principles laid down in Strasbourg case law are also stated as being central to the Independent Police Complaints Commission (IPCC), which was established by the Police Reform Act 2002 and became operational in 2004 (covering England and Wales).[124] The independence of the former Police Complaints Authority had also been found wanting in two previous cases considered in Strasbourg.[125]

The impact of *Jordan* and the related cases has extended beyond the UK. For example, in 2009, Russian prosecutors investigating grave human rights violations in Chechnya visited Northern Ireland to meet members of the HET and learn from their investigative techniques and their approach to engagement with bereaved families (see also section 8.2).[126] The visit followed the Committee of Ministers' endorsement

[121] *R (Smith) v Secretary of State for Defence and another* [2010] UKSC 29.

[122] *R (Moss) v HM Coroner for the North and South Districts of Durham and Darlington* [2008] EWHC 2940.

[123] As of March 2012, the case of *Armani da Silva v UK*, No. 5878/08, is pending before the ECtHR. The application concerns the alleged failure to conduct an effective investigation into the fatal shooting of Jean Charles de Menezes on the London Underground.

[124] See http://www.ipcc.gov.uk/en/Pages/our_values.aspx.The ECtHR cases discussed in this section were not the only driver behind the establishment of the IPCC. The Scarman Inquiry into the Brixton riots in 1981 and the inquiry published in 1999 into the murder in 1993 of Stephen Lawrence had each called for the establishment of an independent police complaints mechanism. See http://www.ipcc.gov.uk/en/Pages/came_from.aspx.

[125] See *Khan v UK*, No. 35394/97, 12.5.2000, paras. 41-47 and Committee of Ministers Resolution ResDH(2005)68 concerning the violations of the right to private life by the police's covert surveillance in the United Kingdom and of the right to an effective remedy (Govell against the United Kingdom and 5 other cases), 18 July 2005.

[126] Committee of Ministers, 'Action of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights', CM/Inf/DH(2010)26, 27 May 2010, paras. 22-23. For an overview of ECtHR decisions concerning Chechnya, see Leach (2008).

of the HET as a 'useful model for bringing a "measure of resolution" to those affected in long-lasting conflicts'.[127]

At the end of 2007, five further cases involving alleged defective investigations into killings in Northern Ireland were decided by the ECtHR.[128] These concerned the obligation to investigate historic deaths where information purportedly casting new light on the circumstances of the death comes into the public domain; specifically, whether, and in what form, the procedural obligation to investigate is revived.

Control and planning of operations that result in deaths

A landmark case which arose from the conflict in Northern Ireland was *McCann v UK*,[129] which laid down standards for the planning and control of operations that result in deaths. The case concerned the fatal shooting in Gibraltar of three members of the IRA by British Special Air Service (SAS) officers. The deceased were not in possession or control of a bomb at the time but were on a reconnaissance mission for the planting of a bomb with the aim of killing British soldiers in Gibraltar. The relatives of the deceased argued that the deaths constituted a violation of the right to life under Article 2 of the ECHR. The ECtHR found that the SAS officers had honestly and reasonably (albeit mistakenly) believed that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing loss of life. However, by a narrow margin of 10 judges to nine, the Court held that Article 2 had been violated as a result of the failures in the conduct and planning of the operation. The Court focused on the decision not to prevent the suspects from travelling into Gibraltar; the authorities' failure to make sufficient allowances for the possibility that their intelligence assessments might, at least in part, have been wrong; and the automatic recourse to lethal force when the soldiers opened fire.

The judgment was intensely controversial at the time. The (then) Deputy Prime Minister Michael Heseltine said that the ruling would encourage a 'terrorist mentality' and that the UK Government would 'ignore it and do nothing about it' (Wilson Jackson, 1997: 57). However, over time, the standards established by the judgment for the control and planning of operations gained acceptance, and are now enshrined in guidance for police on the management, command and deployment of armed

[127] Committee of Ministers, 'Action of the Security Forces in Northern Ireland', Interim Resolution CM/ResDH(2009)44, 19 March 2009.

[128] *Brecknell v UK,* No. 32457/04; *McCartney v UK,* No. 34575/04; *McGrath v UK*, No. 34651/04; *O'Dowd v UK*, No. 34622/04; and *Reavey v UK*, No. 34640/04, all 27.11.2007.

[129] No. 18984/91 [GC], 27.09.1995.

officers (Association of Chief Police Officers and National Policing Improvement Agency, 2009: 17).

5.4 Anti-terrorism and the prohibition of torture and inhuman or degrading treatment or punishment

The absolute prohibition of torture and inhuman or degrading treatment or punishment, enshrined in Article 3 of the ECHR, is so fundamental that it has no limitations or exceptions. The Convention does not define torture or inhuman or degrading treatment or punishment. ECtHR judgments against the UK (among others) have developed such definitions.

The use of interrogation techniques

An early decision of great significance was the inter-state case of *Ireland v UK*.[130] It concerned the interrogation of 14 individuals arrested and interned in 1971 as part of a British army operation against suspected Republican paramilitaries. The ECtHR assessed five interrogation techniques which had the purpose of 'disorientation' or 'sensory deprivation':

- wall-standing for long periods in a 'stress position';
- hooding;
- subjection to a continuous loud and hissing noise;
- deprivation of sleep; and
- deprivation of food and drink.

The Strasbourg Court held that, used in combination and for hours at a time, such treatment, causing at least intense physical and mental suffering and leading to acute psychiatric disturbances, constituted inhuman treatment.[131] The techniques were also degrading since they were 'such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'. However, the Court held that they did not amount to

[130] No. 5310/71, 18.1.1978.

[131] Para. 167.

torture, which was defined as 'deliberate inhuman treatment causing very serious and cruel suffering'.[132]

The techniques had in 1972 been held to be illegal under domestic law by a committee of inquiry chaired by Lord Parker, the Lord Chief Justice of England.[133] On 2 March 1972, the (then) Prime Minister Edward Heath stated that the five techniques would not be used in future as an aid to interrogation. This commitment was reiterated before the Strasbourg Court by the UK Attorney General on 8 February 1977.

In spite of this, some of the same techniques were deployed by the British army in Iraq in 2003. In a seminal case, the Law Lords held that UK human rights laws applied to detainees held in British custody in Iraq.[134] The subsequent inquiry by Sir William Gage into the death of hotel worker Baha Mousa at a military base in Basra found that the use of hooding and stress positioning had, in combination with a violent assault by British soldiers, contributed to his death.[135] The Gage inquiry found that since the 1970s, the ban on the five techniques had become 'largely forgotten … and mainly faded from policy and training materials'. In particular, the doctrine on interrogation in wartime had not been amended to mirror the specific prohibition on the five techniques that applied to internal security operations. This was a 'corporate

[132] In *Selmouni v France*, No. 25803/94 [GC], 28.7.1999, the ECtHR revised this approach and found that acts which had previously been defined as inhuman or degrading treatment could in future be classified as torture. This was in recognition that 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'. The Court adopted a definition which could be summarised as a situation where physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel.

[133] The 1972 Parker report was not unanimous. The majority report concluded that the application of the techniques, subject to recommended safeguards against excessive use, need not be ruled out on moral grounds. On the other hand, the minority report by Lord Gardiner disagreed that such interrogation procedures were morally justifiable, even in emergency 'terrorist' conditions. Both the majority and the minority considered the methods to be illegal under domestic law, although the majority confined their view to English law and to 'some if not all the techniques' (*Ireland v UK*, paras. 100-02).

[134] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

[135] Statement by Sir William Gage at the release of 'The Report of the Baha Mousa Inquiry', 8 September 2011, p. 6. The inquiry was held after the Law Lords found that UK human rights laws applied to Baha Mousa while he was in British custody in Iraq: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

failure' on the part of the Ministry of Defence.[136] Among the inquiry's 73 recommendations was a requirement for standard orders to be issued for each operation prohibiting the use of the five techniques (Gage, 2011: 1267). In July 2010, the UK Government issued new guidance to intelligence officers and service personnel on the detention and interviewing of detainees overseas and on the passing and receipt of intelligence relating to detainees. This guidance was successfully challenged at the High Court on the grounds that it envisaged a limited use for hooding.[137] The guidance has since been revised in line with this finding.[138] Three decades on from *Ireland v UK*, the Gage inquiry and its aftermath illustrate the continuing relevance of the case and the importance of ensuring that principles established in case law are embedded in policy and procedure and do not become, as the inquiry put it, 'largely forgotten'.

Deportation of individuals who may face a risk of torture

As Greenberg and Dratel (2005: 602) observe, since *Ireland v UK*, 'neither time nor the ever expanding threat of terrorism' has diminished the ECtHR's commitment to maintaining an absolute prohibition against torture and inhuman or degrading treatment or punishment. ECtHR judgments against the UK have affirmed that the prohibition against torture prevents the return of any person to a country where they faced a real risk of torture, even if that person is deemed to pose a threat to national security (Leach, 2011: 225-29).

Soering v UK[139] concerned the decision to extradite the applicant to the United States where he faced capital murder charges. The ECtHR found that application of the death penalty did not in itself amount to a breach of Article 3 of the ECHR but that the applicant's exposure to the 'death row phenomenon', where he would be detained awaiting execution for an unknown period, did amount to such a breach. Thus, the Court found that the responsibility of the state would be engaged where there were substantial grounds for believing that, if extradited, the applicant faced a

[136] Statement by Sir William Gage, pp.13-15.

[137] The guidance stated that methods of obscuring vision or hooding could constitute cruel, inhuman or degrading treatment or punishment 'except where these do not pose a risk to the detainee's physical or mental health **and** is [sic] necessary for security reasons during arrest or transit' (HM Government, 2010: 13) (emphasis in original). The High Court found that this limited exception was 'unworkable and, in our view, officers on the ground should not be encouraged or required to make any judgment which might possibly enable them to go along with it' (*R (Alaa' Nassif Jassim al Bazzouni) v Prime Minister and others* [2011] EWHC 2401, para. 93).

[138] *Hansard*, HC Vol. 732, Col. WS26, 10 November 2011.

[139] No. 14038/88, 7.7.1989.

real risk of being subjected to torture or inhuman or degrading treatment or punishment.

This principle was also at stake in the case of *Chahal v UK*,[140] in which the applicant complained that his deportation to India would violate his rights under Article 3 because, as a Sikh separatist leader, he risked being subjected to torture. In a Grand Chamber judgment, the ECtHR affirmed (by 12 votes to seven) the principle established in *Soering*, even though the applicant was deemed to pose a threat to national security.[141] The Court held that:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[142]

The judgment in *Chahal* has been intensely controversial. At issue is the question of whether the Government should be able to balance the risk that a deportee might suffer torture or inhuman or degrading treatment against the risk they are deemed to pose to national security. The parliamentary Joint Committee on Human Rights (JCHR, 2006: 12-13) has asserted (in common with numerous human rights organisations) that:

> ... the absolute nature of the prohibition on torture precludes any balancing exercise between considerations of national security and the risk of torture. In our view, the principle established in *Chahal v UK* is essential to effective protection against torture, and accordingly should be maintained and respected.

The *Chahal* principle was reaffirmed in 2008 by the Grand Chamber in *Saadi v Italy*,[143] which expressly rejected an intervention by the UK Government which

[140] No. 22414/93 [GC], 15.11.1996.

[141] The dissenting judges indicated that, in their view, the prohibition of torture was not absolute in 'extra-territorial' cases: where there was a 'substantial doubt' as to whether the person would be subjected to torture or inhuman or degrading treatment on return, the threat to security could be sufficient to justify deportation.

[142] Para. 79.

[143] No. 37201/06 [GC], 28.2.2008, paras. 138-41.

sought to dilute the absolute protection provided by Article 3. The Court held that it was misconceived to talk of 'balancing' the risk of harm if the person were deported against the danger posed to the community if they were not: the two concepts had to be assessed independently.

Diplomatic assurances

Another response of the UK Government has been to obtain 'diplomatic assurances' or 'memoranda of understanding' from receiving states that an individual will not be subjected to ill-treatment. The JCHR (2006: 41) has argued that memoranda of understanding agreed between the UK Government and the Governments of Libya, Lebanon and Jordan:

> … have left us with grave concerns that the Government's policy of reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of redress.

The Strasbourg Court has been consistently clear that such assurances, even if made in good-faith, cannot be relied upon per se. In each case, the Court will assess whether such assurances provide a sufficient guarantee that the applicant will in practice be protected against the risk of treatment prohibited by the ECHR.[144] In *Othman (Abu Qatada) v UK*,[145] the ECtHR decided that the diplomatic assurances obtained by the UK from the Jordanian government were sufficient to protect the applicant: they were specific, comprehensive, given in good faith and subject to independent monitoring by a Jordanian human rights organisation. The case is summarised in this section but discussed in detail in section 7.5 below.

The *Chahal* judgment had other far-reaching consequences. The judgment upheld the applicant's complaint that the procedures governing his appeal against deportation on national security grounds were unfair: in particular, he had no opportunity to view or challenge the evidence against him. Instead, his only avenue for appeal against deportation was to an internal Home Office review panel. The ECtHR found that the lack of procedures allowing the applicant to challenge the evidence breached his right to liberty under Article 5(4) of the ECHR (because he had been detained pending his deportation) and his right to an effective remedy under Article 13 of the ECHR. This ruling led Parliament to pass legislation in 1997 replacing the internal Home Office review panel with an appeal in national security

[144] *Saadi v Italy*, para. 148.

[145] No. 8139/09, 17.1.2012. The applicant is known variously as Omar Mohammed Othman and Abu Qatada.

cases to an independent judicial tribunal, the Special Immigration Appeals Commission (SIAC).[146] Controversially, however, the 1997 Act also introduced the use of 'special advocates' (security-cleared lawyers) appointed to represent an appellant in closed hearings involving intelligence material which the Home Secretary is unwilling to disclose to the appellant. The JCHR (2007: 55) ventures that the Special Advocate system:

> … does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law.

In 2011-12, the UK Government is consulting on proposals to extend 'closed material procedures' using special advocates by making them available in all civil proceedings, not just those involving national security (Secretary of State for Justice, 2011). In a collective response, lawyers appointed to be special advocates have described the proposal as 'unsupportable' and propose an alternative system which would provide a substantially greater measure of fairness without compromising national security.[147]

Prohibition against the use of evidence obtained by torture

Another issue that has been considered by the ECtHR is the following: under what circumstances may a state that is bound by the ECHR be required not to deport an individual to a country where the individual faces the risk of torture or the risk of a trial that would involve the use of evidence obtained by torture, thereby falling short of the standards set by Article 3 (prohibition against torture) and Article 6 (the right to a fair trial)? The recent case of *Othman (Abu Qatada) v UK*[148] considered both these questions (see section 7.5 for a more detailed discussion of this case).

The ECtHR noted that Othman could not be deported to Jordan if there were a real risk that he would be tortured or subjected to inhuman or degrading treatment. However, as noted above, the Court decided that the diplomatic assurances obtained by the UK Government from the Jordanian Government were sufficient to protect him. There would therefore be no risk of ill-treatment, and no violation of Article 3, if Othman were deported to Jordan.

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[146] Special Immigration Appeals Commission Act 1997.

[147] Justice and Security Green Paper, Response from Special Advocates, 16 December 2011.

[148] No. 8139/09, 17.1.2012.

However, the Strasbourg Court ruled unanimously that there was a real risk that, if Othman was deported to Jordan, he would face a trial at which evidence obtained by torture would be used. This would be a 'flagrant denial of justice' and therefore it would be contrary to Article 6 for the UK to deport him. The ECtHR ruled that allowing a criminal court to rely on torture evidence would legitimise the torture of witnesses and suspects pre-trial. Moreover, torture evidence was unreliable, because a person being tortured would say anything to make it stop.[149]

5.5 Anti-terrorism and other human rights violations

Article 5 (right to liberty and security) issues

Indefinite detention of terror suspects without charge or trial

The Strasbourg Court has considered other contentious issues arising from perceived threats to UK national security. The case of *A and others v UK*[150] concerned the detention without charge or trial of individuals in the UK under the Anti-terrorism, Crime and Security Act (ATCSA) 2001. Part 4 of ATCSA provided for extended powers to arrest or detain foreign nationals who were considered to be a risk to national security, pending deportation or removal. The individuals could not be immediately deported as there was a risk that they would be subjected to torture or ill treatment in their home country. However, it was also forbidden to hold them unless 'action was being taken with a view to deportation' i.e., the individual could not be detained indefinitely whilst alternative destinations were sought. To be able, therefore, to bring in this legislation, the UK had declared a state of emergency which paved the way for it to derogate from the relevant requirements.[151] The Grand Chamber of the ECtHR accepted the UK's assessment that a state of emergency existed but found that the measures taken as a consequence of that declaration were disproportionate as they discriminated unjustifiably between nationals and non-nationals. This was a violation of Article 5 (the right to liberty). The Grand Chamber also concluded that there had been a violation of Article 5 because some of the applicants were not in a position effectively to challenge the principal allegations against them as these were closed material which was not disclosed either to the individuals or their lawyers (special advocates) - the same concern that had arisen in *Chahal*.[152]

[149] Paras. 263-67.

[150] No. 3455/05 [GC], 19.2.2009.

[151] Article 15 of the ECHR contains a derogation clause which allows states to 'opt out' of limited aspects of the Convention in particular, prescribed circumstances such as war or public emergency.

[152] Paras. 223 and 224.

Parliament had already repealed Part 4 of ATCSA, following the earlier judgment of the House of Lords which had also found the indefinite detention without charge or trial of foreign nationals suspected of terrorism to be incompatible with Article 5 of the ECHR (as well as Article 14 of the ECHR (the prohibition of discrimination)) - commonly referred to as the 'Belmarsh case'.[153] The offending provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of 'control orders'. This regime also involved secret evidence and special advocates, along with numerous other possible restrictions. A subsequent judgment by the House of Lords found that control orders imposed on a group of Iraqi and Iranian asylum seekers under the Prevention of Terrorism Act 2005, which, among other things, imposed an 18-hour curfew and prohibited social contact with anybody who was not authorised by the Home Office, amounted to a deprivation of liberty contrary to Article 5.[154] Relying on *A v UK,* the Lords ruled that sufficient detail of the allegations must be disclosed to suspects to enable them to give effective instructions to the special advocates representing them.

The UK Government included control orders in its 2010 Review of Counter Terror and Security Powers. As a result of that review, the Government scrapped control orders, but replaced them in January 2012 with Terrorism Prevention and Investigation Measures (TPIMs). Certain features of TPIMs have been condemned by human rights organisations[155] and the JCHR[156] as replicating features of the control order regime which they considered incompatible with Convention rights.

Pre-charge detention periods

Until January 2011, individuals suspected of terrorism in the UK could be held in pre-charge detention for a maximum of 28 days - the longest period of pre-charge detention of any comparable democracy.[157] The Government had in 2006 attempted to increase the period to 90 days and in 2008 to 42 days, but these plans were defeated in parliament. Since January 2011, the relevant section of the Terrorism Act

[153] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[154] *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.

[155] See http://www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php.

[156] The JCHR (2011b: 3) has highlighted, among other aspects, the lack of a requirement for prior judicial authorisation of TPIMs; the need to assure the right to a fair hearing in terms of those subject to a TPIMs notice being given sufficient information about the allegations made against them; and the lack of a requirement for the new system to be debated or agreed annually by Parliament.

[157] See http://www.liberty-human-rights.org.uk/human-rights/terrorism/extended-pre-charge-detention/index.php.

2006 has been allowed to expire and the pre-charge detention limit has reverted to 14 days.

The issue of pre-charge detention in terrorism cases had been examined by the ECtHR as far back as 1988. This case of *Brogan and others v UK*[158] concerned the detention of suspected terrorists in Northern Ireland under the Prevention of Terrorism (Temporary Provisions) Act 1984.[159] None of the applicants was brought before a judge or other officer during his time in custody, nor were any charged after their release. The four applicants were held for between four days and six days. The Strasbourg Court ruled that even the shortest of the four periods of detention without judicial supervision, namely four days and six hours, breached Article 5(3). The fact that the actions of the police had the legitimate aim of protecting the community as a whole from terrorism was not on its own sufficient to ensure compliance with Article 5(3). The assessment of 'promptness' had to be made in the light of the object and purpose of Article 5 and the fundamental importance of protecting the individual against arbitrary interferences by the state with his or her right to liberty. *Brogan* has been applied in many Strasbourg cases since.[160]

Rather than comply with *Brogan* by introducing a form of judicial supervision, the UK Government chose to derogate with respect to Article 5(3). The validity of this derogation was challenged unsuccessfully in *Brannigan and McBride v UK*,[161] where the Court accepted that there was a public emergency threatening the life of the nation.

Reasonable suspicion for arrest

In *Fox, Campbell and Hartley v UK*,[162] the applicants had been arrested as terrorist suspects but later released without charge. They alleged - and the ECtHR agreed - that their rights under Article 5 had been violated because the evidence provided was insufficient to establish that there had been an objectively determined ‘reasonable suspicion’ for the arrests. Dickson (2010: 114) notes that by the time the ECtHR heard this case, the UK Government had already accepted the need to introduce a

[158] No. 11209/84, 29.11.1988.

[159] The Act at that time allowed a period of up to seven days’ detention (detention in excess of 48 hours requiring the authorisation of the Secretary of State).

[160] For example, *Sakik and others v Turkey*, Nos. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94 and 23883/94, 10.7.1996.

[161] Nos.14553/89 and 14554/89, 26.5.1993.

[162] Nos. 12244/86, 12245/86 and 12383/86, 30.8.1990.

'reasonableness requirement' into the Northern Ireland (Emergency Provisions) Act. In two other cases, the Court held that the applicants' arrests on suspicion of terrorism had met the standard of honest suspicion on reasonable grounds.[163] Thus, the Court exercised a relatively 'light touch' control over army and police arrest powers under the emergency legislation in force during the Northern Ireland troubles (Dickson, 2010: 117).

Anti-terrorism and other Article 6 (right to a fair trial) issues

The ECtHR has repeatedly held that the right of any person charged with a criminal offence to be effectively defended by a lawyer is a fundamental element of a fair trial. In *John Murray v UK,*[164] the Strasbourg Court found there had been a breach of John Murray's right to a fair trial because he had not access to a lawyer for the first 48 hours of his interrogation. This was incompatible with the concept of fairness as it had placed the accused in a situation where his rights might be irretrievably prejudiced. See also section 6.4 for discussion of cases concerning the right of access to a solicitor prior to being interviewed by the police.

5.6 Protection from violence and coercion

This section examines a range of cases that have had an impact in the UK in protecting individuals - and in particular, women and children - from various types of violence or coercion. A particular focus of this section is the positive obligation on states to secure Convention rights to everyone in their jurisdiction - that is, not only to refrain from breaching Convention rights, but also to take positive measures to prevent private parties from interfering with them and to carry out effective investigations into such cases.

Slavery, servitude and forced and compulsory labour

In 2010, the UK introduced legislation which criminalised forced labour and slavery.[165] The law was designed to address the extreme exploitation experienced by migrant workers and other vulnerable groups in the sex industry, as well as sectors such as construction, agriculture/horticulture, contract cleaning and residential care (Anderson and Rogaly, 2005). Specifically, it aimed to plug a gap in protection for workers who were not covered by the Asylum and Immigration Act 2004, which criminalises forced labour connected to trafficking, and the Gangmasters Licensing

[163] *Murray v UK*, No. 14310/88 [GC], 28.10.1994*; O'Hara v UK*, No. 37555/97, 16.10.2001.

[164] No. 18731/91 [GC], 8.2.1996.

[165] Section 71 of the Coroners and Justice Act 2009 entitled 'Slavery, Servitude and Forced or Compulsory Labour'.

Act 2004, which requires those who employ or supply workers in certain industries to be licensed (Mantouvalou, 2010: 427-28).

As Mantouvalou (2010) notes, the new law was substantially shaped and inspired by the ECtHR ruling in *Siliadin v France* in 2005.[166] This was the first case in which the Court had found a breach of Article 4 of the ECHR, which prohibits slavery, servitude and forced and compulsory labour. Siwa-Akofa Siliadin, aged 15, was brought to France from Togo to work and be educated. She was in reality kept by her employers (a couple) in appalling conditions and forced to work for 90 hours a week for no payment. She escaped and sought redress in the French courts. However, neither slavery nor servitude, as such, constituted a criminal offence in French law.

At the ECtHR, Siliadin claimed that the lack of criminal legislation banning slavery, servitude and forced and compulsory labour violated Article 4 of the Convention. The Court agreed and held that, although the employers were private individuals, the state had a positive duty to regulate private conduct that is in breach of the Convention. The judgment established that because Siliadin worked against her will, was unpaid and, as a result of threats by her employers, feared arrest, she had been subjected to 'forced and compulsory labour'. Further, her position could be classified as 'servitude', because she had to work in slavery-like conditions (but which were not 'slavery', because her employers did not have a legal title of ownership of her). The key considerations were the fact that she worked very long hours, was vulnerable and isolated and had no income, private space, free time, freedom of movement or legal documents.

Siliadin is a compelling example of a case which was not brought against the UK and yet which has directly influenced UK legislation. The definitions of coercion (in relation to forced labour) and servitude established in *Siliadin* were expressly referred to in parliamentary debate about the new law (Mantouvalou, 2010: 429).[167] Referring to the civil society campaigning which harnessed the *Siliadin* case to push for legal reform in the UK, Mantouvalou (2010: 430-31) argues that:

> … judgments in individual cases, like *Siliadin,* do not only do justice to the particular applicant. They also raise awareness, inspire action and lead to

[166] No. 73316/01, 26.7.2005.

[167] The approach to coercion as encompassing either physical or mental restraint was re-iterated in *Rantsev v Cyprus and Russia*, No. 25965/04, 7.1.2010, concerning human trafficking and positive obligations to investigate alleged breaches of Article 4 and other ECHR provisions. See also McCrudden (2011) for a discussion of judicial evolution of the legal concept of slavery.

> systematic reform. For all these reasons, the introduction of the new offence [in the UK] is a significant development, satisfying the standards set out in the case law of the ECtHR in a paradigmatic way.

In August 2011, one of the first convictions under the new law was secured, when an employer was imprisoned for six months and forced to compensate a Tanzanian employee whom she had kept in servitude.[168] Another case, *Kawogo v UK*,[169] which is pending at the ECtHR as of March 2012, provides the Court with an opportunity to consider the nature and extent of states' positive obligations to provide equal and effective protection to migrant domestic workers from abuse and exploitation. Interights has intervened in this case to argue for the need for the UK Government to introduce appropriate and effective safeguards in order to monitor and regulate the employment of migrant domestic workers.[170]

Corporal punishment

A succession of ECtHR judgments has been instrumental in bringing about a ban on corporal punishment in all UK schools. In 1982, in a case brought by two Scottish mothers (*Campbell and Cosans v UK*),[171] the ECtHR found that the UK was in breach of Article 2 of Protocol 1 of the ECHR (the right to education) by not respecting parents' objections to school corporal punishment. It also held that the right to education of one of the applicant's children was breached when he was suspended for refusing to accept corporal punishment. This judgment and other European Commission of Human Rights decisions on applications made by UK schoolchildren and their parents effectively led to the abolition of corporal punishment in all state-supported schools in the UK in 1987.[172]

An early case against the UK, *Tyrer v UK*,[173] concerned a 15-year-old boy in the Isle of Man, Anthony Tyrer, who in 1972 had been subjected to judicial corporal punishment for assaulting a senior pupil at his school. He was required to take off his trousers and underpants and bend over a table. He was then held down by two

[168] See 'HIV expert jailed for keeping woman as slave in London flat', *The Guardian*, 11 August 2011.

[169] No. 56921/09. This case was communicated to the UK Government on 22 June 2010.

[170] See http://www.interights.org/kawogo/index.html.

[171] Nos. 7511/76; 7743/76, 25.2.1982.

[172] However, it remained legal for pupils in private schools not receiving state support until September 1999.

[173] No. 5856/72, 25.4.1978.

police officers while a third police officer struck him three times with a birch. The ECtHR considered such punishment to be 'institutionalised violence', in violation of Article 3 of the ECHR, which prohibits inhuman or degrading treatment or punishment. The UK Government's response was to inform the Isle of Man authorities that birching was in breach of the Convention; however, birching was not formally outlawed in the Isle of Man until 1993.[174]

The first case concerning parental corporal punishment came in 1998. In *A v UK*,[175] a nine-year-old boy was repeatedly caned with considerable force by his step-father, causing bruising. His step-father was tried for assault causing actual bodily harm, but acquitted, as the domestic law allowed for a defence of 'reasonable chastisement' which had been elaborated in the Victorian era. The ECtHR considered that children and other vulnerable individuals were entitled to protection, in the form of effective deterrence, from such forms of ill-treatment. It found a violation of Article 3, as domestic law did not adequately protect the boy. In response, in England and Wales, section 58 of the Children Act 2004 removed the defence of 'reasonable chastisement' for those with parental responsibility and replaced it with one of 'reasonable punishment'. The Act limited the use of the defence of reasonable punishment so that it could no longer be used when people are charged with offences against a child such as causing actual bodily harm or cruelty to a child. However, it may be used in relation to charges of common assault, where the injury suffered is transient or trifling. The UK Government considers that this change, combined with numerous awareness-raising measures, ensures that the UK is now fully compliant with the judgment in *A v UK* (Ministry of Justice, 2009: 22).[176] The UK's Children's Commissioners and numerous human rights bodies have called for a prohibition of all physical punishment in the family.[177]

[174] See http://www.corpun.com/manx.htm.

[175] No. 25599/94, 23.9.1998.

[176] In October 2011, the Welsh Assembly voted in favour of removing the defence of reasonable punishment for smacking children. In Scotland, the law was changes with section 51 of the Criminal Justice (Scotland) Act 2003 which bans shaking, hitting on the head and the use of implements to punish children. In Northern Ireland, the law on physical punishment of children in the home was changed in 2006 to bring it into line with the law in England and Wales.

[177] See information provided by the 'Children are Unbeatable' alliance at: http://www.childrenareunbeatable.org.uk/pages/info.html.

The rights of victims and witnesses

The ECHR does not contain explicit rights for victims of crime in the way that it contains rights explicitly directed at defendants in criminal proceedings (Cape, 2004: 15). However, successive ECtHR judgments have established the nature and extent of the state's positive obligations in relation to the rights of victims, even where the perpetrators are private individuals (Klug, 2004).[178] In *Whiteside v UK*, [179] the European Commission of Human Rights reaffirmed that the state had a positive obligation to provide adequate protection for a woman facing persistent harassment by her ex-partner. In *Stubbings v UK*, [180] the Court established that sexual abuse is 'unquestionably an abhorrent type of wrongdoing' and that children and other vulnerable individuals are 'entitled to State protection, in the form of effective deterrents from such grave types of interference with essential aspects of their private lives'.

The ECtHR has extended the state's positive obligation to include the protection of victims and vulnerable witnesses in the court room. In a landmark case against the Netherlands in 1996,[181] concerning the anonymity of witnesses testifying against an alleged drug dealer, the ECtHR extended its interpretation of Article 6 of the ECHR (the right to a fair trial), which is primarily concerned with the rights of defendants, to take account of the rights of witnesses and defendants. It established that 'the principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.[182] However, it added that a conviction 'should not be based either solely or to a decisive

[178] *X & Y v Netherlands*, No. 8978/80, 26.3.1985 concerned the failure of Dutch law to provide for the prosecution of a man who had committed a sexual assault on a teenage girl with learning difficulties due to the fact that she was incapable of making the complaint herself. The ECtHR established (at paras. 22 and 33) that 'the obligation to secure the effective exercise of Convention rights … may involve positive obligations on a State and that these obligations may involve the adoption of measures even in the sphere of relations between individuals'.

[179] No. 20357/92, 7.3.1994.

[180] No. 22083/93, 22.2.1995.

[181] *Doorson v Netherlands*, No. 20524/92, 26.3.1996.

[182] *Doorson v Netherlands,* para. 70.

extent on anonymous statements'.[183] Later decisions established that, where necessary, screens and other equipment can be used in court to protect vulnerable witnesses.[184] Strasbourg case law on the treatment of victims and witnesses informed the later adoption of the Criminal Evidence (Witness Anonymity) Act 2008, which permitted the use of anonymous witnesses in criminal trials in special circumstances. The Act was later replaced by sections 86 to 97 of the Coroners and Justice Act 2009.

5.7 The protection of individual liberties

As discussed in section 2.2, the ECHR was borne out of the imperative, laid bare by the atrocities of the Second World War, to protect individuals and minorities from abuse by the power of the state and its agents. This section examines selected ECtHR judgments that have resulted in enhanced protection of the liberties of individuals in the UK from disproportionate interference by the state.

Retention of DNA profiles, cellular samples and fingerprints

The National DNA Database contains around five million profiles, making it the largest in the world, both per capita and in absolute terms (Metcalfe, 2011: 9). Around one million of these profiles belong to people who have never been charged with or convicted of a criminal offence. The applicants in *S and Marper v UK*,[185] a child and an adult, fell into this category. The case concerned the UK's policy (in place since 2003) of retaining indefinitely DNA profiles and samples of everyone arrested for a recordable offence.[186] In a unanimous judgment of the Grand Chamber in 2008, the Court held that the 'blanket and indiscriminate nature' of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, failed to strike a fair balance between competing public

[183] *Doorson v Netherlands,* para. 76. The Grand Chamber referred to the 'sole and decisive' rule in its judgment in *Al-Khawaja and Tahery v UK*, Nos. 26766/05 and 22228/06 [GC], 15.12.2011, which concerned the use of hearsay evidence. It stated at para. 147 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 … 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 significance of the *Al-Khawaja and Tahery* Grand Chamber judgment is examined in section 7.5.

[184] *AM v UK*, No.20657/92, 21.9.1992.

[185] *S and Marper v UK*, Nos. 30562/04 and 30566/04 [GC], 4.12.2008.

[186] Recordable offences include any offence punishable by imprisonment, plus a number of non-imprisonable offences such as those relating to prostitution, drunkenness, and firearms and knives.

and private interests.[187] The retention of such information was held to constitute a disproportionate interference with the applicants' right to respect for private life under Article 8 of the ECHR.

In response to the judgment, the Crime and Security Act 2010 was passed (but not enacted) to restrict the retention of innocent people's DNA to six years for adults and three years, in most cases, for children. This response was considered belated and inadequate by the Committee of Ministers of the Council of Europe, as well as by the JCHR and human rights organisations (JCHR, 2010: 19-21; Liberty, 2010: 20-22). In particular, it was noted that the revised proposals did not take sufficient account of the seriousness of the offence concerned and made no provision for independent oversight. The Government committed itself to change the law by adopting the less restrictive Scottish model of DNA retention, cited approvingly in *S and Marper*.[188] This model seeks to achieve a more proportionate balance between public protection and respect for a person's private life.[189] These changes are contained in the Protection of Freedoms Bill, which is expected to become law in early 2012.

Surveillance

Until the mid-1980s, there was no statutory regulation of interceptions of communications in the UK; effectively, the state was able to 'tap' telephones or intercept mail without needing to account for its actions. A succession of ECtHR judgments has produced changes to the law to protect UK citizens against arbitrary or disproportionate intrusion into their privacy through the use of various forms of surveillance (Metcalfe, 2011: 31-32).

The first was *Malone v UK*,[190] which concerned interception of communications and phone tapping by or on behalf of the police. James Malone learnt that a telephone

[187] Para. 125.

[188] Paras. 109 and 110.

[189] This provides that the DNA of a person who is arrested but not charged, or charged but not convicted, should be destroyed as soon as possible, and in the case of a sexual or serious violent offence be retained for three years following conclusion of the proceedings. The model also provides for the retention of DNA beyond this three year period for a further two years on application to a Court, with no limit on the number of such applications. Liberty objects to this aspect of the Scottish model since it means that some DNA could conceivably be retained indefinitely. See *Liberty's response to the Home Office's 'Your Freedom' consultation* (October 2010), available at: http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-theyour-freedom-consultation-october-2010.pdf.

[190] No. 8691/79, 26.4.1985.

conversation had been intercepted by police when he was wrongly suspected of handling stolen goods. He believed that his correspondence had also been intercepted. He challenged the legality of these measures in domestic courts and then in Strasbourg. The European Commission of Human Rights (section 2.4) found that the interception of the telephone call was a breach of Malone's right to respect of his private life and correspondence guaranteed by Article 8. The Commission also found that because the law did not provide adequate regulation of the content, duration, and circumstances in which warrants for surveillance could be issued, there were insufficient safeguards against their arbitrary use by the state. This constituted a further breach of Article 8.

The judgment led directly to the Interception of Communications Act 1985, which for the first time placed under a statutory regime the interception of communications by law enforcement and intelligence services on **public** communications networks. However, this did not cover non-public networks, voicemail, e-mail or even cordless telephones. In 1997, *Halford v UK*[191] raised the issue of surveillance in the workplace. Alison Halford, an Assistant Chief Constable in Merseyside, had had her calls intercepted by senior police officers (at a time when she had instigated proceedings against the police for sex discrimination). The ECtHR found that the lack of regulation of interceptions of calls on internal communications systems operated by public authorities constituted a violation of Article 8.

This judgment was among the factors that led to the enactment of the Regulation of Investigatory Powers Act 2000 (RIPA), which regulated interception of communications on all public and private networks, including mobile 'phones. (Metcalfe, 2011: 28).[192] In the consultation preceding RIPA, the (then) Home Secretary Jack Straw (Secretary of State for the Home Department, 1999), noted that:

> [The] revolution in communications technology is one of the imperatives for change in the law. But so too is the need to protect human rights - this has been uppermost in our minds in devising these proposals.

[191] No. 20605/92, 25.6.1997.

[192] The inadequacy of the 1985 Act had been further confirmed in *Liberty and others v UK,* No. 58243/00, 1.7.2008. See also the earlier case of *Khan v UK*, No. 35394/97, 12.5.2000, where the ECtHR held that the lack of any domestic law regulating the use of covert listening devices meant that the consequent interference with privacy was a breach of Article 8. By the time of the Court's decision in *Khan*, the Police Act 1997 had already been passed in anticipation of its decision (Metcalfe, 2011: 32). See also *Copland v UK*, No. 62617/00, 3.4.2007*,* which held that the monitoring of the applicant's e-mails in the workplace was in breach of Article 8, not being in accordance with the law.

> Disproportionate, or unfettered, use of interception can have consequences for the rights of individuals.

Aspects of the regime governing surveillance under RIPA have in turn been challenged - unsuccessfully - at the ECtHR. In *Kennedy v UK*,[193] the applicant challenged, among other things, the procedural fairness of the tribunal established to check abuse of surveillance powers by public authorities. The Court held that there was 'no evidence of any significant shortcomings in the application and operation of the surveillance regime': it was necessary and proportionate and was compliant with both Article 8 and Article 6.[194] The coalition has proposed to amend RIPA by means of various provisions in the Protection of Freedoms Bill. These would require public authorities to seek approval from magistrates in order to access communications data, use covert sources or carry out directed surveillance. JUSTICE has proposed more thoroughgoing reform of RIPA - and suggests that aspects of the regime are vulnerable to further challenge at Strasbourg (Metcalfe, 2011: 145).

The longer-term impact of *Malone* and *Halford* has been rendered starkly visible by the 'phone hacking scandal which erupted in 2011. By raising the alarm about unregulated surveillance by both public authorities and private entities, these cases led directly to a law on interception - RIPA - which for the first time created a right of redress for the general public against intrusive surveillance (Wagner, 2011a).

Strasbourg decisions have also addressed the issue of the legal basis for surveillance by the security services. In 1985, it emerged that two former employees of the National Council for Civil Liberties (NCCL, now known as Liberty), Harriet Harman and Patricia Hewitt, had been under MI5 surveillance while working at the NCCL. They had been classified as 'subversive' and as 'communist sympathisers'. Their files recorded details of passport applications, data from surveillance by local police, as well as Special Branch and special agents, and references to them or by them on telephone intercepts picked up under warrants issued in relation to other people. Surveillance continued after they left the NCCL and ran for elected office (both became Labour MPs). In 1989, the European Commission of Human Rights ruled that the framework - a Directive issued by the Home Secretary which did not have the force of law or constitute legally enforceable rules - governing the activities

[193] No. 26830/05, 3.6.2010.

[194] Para. 169. See Metcalfe (2011: 143-51) for a critique of the *Kennedy* judgment. See also *Knaggs and Khachik v UK*, Nos. 46559/06 and 22921/06, 30.8.2011 (concerning the use of intercept evidence in domestic courts) where the ECtHR, in declaring the application inadmissible, gave due deference to the application of RIPA as a piece of legislation that it considered to be human rights-compliant.

of the security service lacked the necessary degree of certainty on the scope and manner of carrying out secret surveillance activities.[195] Accordingly, the Commission found that there had been a breach of the right to respect for the applicants' private lives protected by Article 8 of the ECHR. There had also been a breach of Article 13 (the right to an effective remedy). In response, the UK Government enacted the Security Service Act 1989, 'in order to place the Security Service on a statutory basis, define the purposes for which its activities might be carried out and establish a Security Service Commissioner and an independent Tribunal for the investigation of complaints about the Service'.[196]

Summarising the impact of the decisions discussed above, Jack Straw MP comments that looking back from our vantage point today, it is remarkable that in 1984 there was no statutory base whatsoever for the security and intelligence services and no statutory authority for their activities: ECtHR cases had - directly and indirectly - brought about changes to address this situation.[197]

Stop and search powers

The case of *Gillan and Quinton v UK*[198] concerned the stop and search of Kevin Gillan and Pennie Quinton at a demonstration in the vicinity of an armaments fair in London in September 2003. Gillan was on his way to take part in the protest and Quinton, a journalist, intended to film it. They were both stopped and searched by the police under an authorisation made under section 44 of the Terrorism Act 2000, which allowed individuals to be stopped and searched for articles that could be used in connection with terrorism, even where the police officer did not suspect the presence of such articles. Nothing incriminating was found in either case. The ECtHR found that the law under which the stop and search powers were used contained insufficient safeguards to act as a curb on the wide powers afforded to the executive, amounting to a violation of Article 8. For instance, an officer was authorised to stop and search a pedestrian if he considered it 'expedient' to do so, as opposed to 'necessary'. The authorisations covered extensive regions with concentrated populations (in this case, most of Greater London) and, although they lasted only 28 days, they were renewable.

[195] *Hewitt and Harman v UK*, No. 12175/86, 9.5.1989.

[196] Committee of Ministers Resolution DH (90) 36, Hewitt and Harman and N v UK, Nos. 12175/86 and 12327/86, 13.12.1990.

[197] Jack Straw MP, Interview, 10 January 2012.

[198] No. 4158/05, 12.1.2010.

The Government's response was to an issue an urgent remedial order to repeal and replace section 44 of the Terrorism Act 2000 with new, circumscribed powers (Ministry of Justice, 2011a: 15-17). Both the Independent Reviewer of Terrorism Legislation and the JCHR have criticised the remedial order and the accompanying Code of Practice, since the discretion conferred on individual officers remains too broad and therefore continues to carry the risk of arbitrariness which concerned the ECtHR in *Gillan and Quinton* (Anderson, 2011; JCHR, 2011c). Provisions to repeal and replace sections 44-47 of the Terrorism Act are included in the Protection of Freedoms Bill which is shortly due to become law.

Protection of the rights of lesbian, gay, bisexual or transgender people[199]

Several landmark judgments against the UK have concerned the rights of LGBT people. The first, *Dudgeon v UK* in 1981,[200] concerned the decriminalisation of adult homosexual acts in private (see also section 6.5).[201] Decriminalisation had taken place in England and Wales in 1967 and in Scotland in 1980, but nineteenth century laws were still in force in Northern Ireland which criminalised homosexual behaviour between consenting adult males. The ECtHR held that the very existence of this legislation constituted a continuing interference with Jeffrey Dudgeon's Article 8 right to respect for a private life, even though no proceedings had been brought in recent years. In 1982, in a direct response to the judgment, the law in Northern Ireland was changed, leading to the decriminalisation of private homosexual acts between two consenting adults.[202] By 1981, most Council of Europe states had already decriminalised homosexual acts. At the time, then, the Court was following rather than leading in respect of creating a European consensus on this issue.[203] However, *Dudgeon* was the basis for the decriminalisation of consensual homosexual activity in Ireland[204] and Cyprus.[205] It has also had a wider impact, in that the principle it established has been referred to expressly in the conditions that states must accept

[199] See Helfer and Voeten (2011) on the Europe-wide impact of ECtHR cases concerning LGBT rights.

[200] No. 7525/76, 22.10.1981.

[201] For an overview of Strasbourg case law on the (de)criminalisation of homosexuality, see http://www.echr.coe.int/NR/rdonlyres/75A23017-F212-4F75-B9C8-1DE063663734/0/FICHES_Homosexualit%C3%A9_aspects_p%C3%A9naux_EN.pdf.

[202] Homosexual Offences (Northern Ireland) Order 1982.

[203] *Dudgeon v UK*, para. 60.

[204] *Norris v Ireland*, No. 10581/83, 26.10.1988.

[205] *Modinos v Cyprus*, No. 15070/89, 22.4.1993.

before they accede to the Council of Europe. Most candidate states from Eastern Europe and the former Soviet bloc decriminalised prior to their accession (Helfer and Voeten, 2011: 12). The case was also relied upon in *Toonen v Australia*, brought before the UN Human Rights Committee, which resulted in the repeal of Australia's last sodomy laws (Goldhaber, 2009: 41).

Other successful cases in Strasbourg have highlighted differences in the age of consent in the criminal law which discriminated unjustifiably against homosexuals. A leading case was *Sutherland v UK*.[206] At the time of the application in 1994, the age of consent for heterosexuals in the UK was 16 and for homosexual men it was 18. The European Commission of Human Rights held that the difference in ages of consent violated Article 8 and Article 14 (non-discrimination) on the ground that there was no objective and reasonable justification for maintaining a higher minimum age for male homosexual conduct. Attempts to legislate to equalise the age of consent to 16 were twice defeated in the Lords in 1998 and 1999, but (having passed in the Commons in two successive parliamentary sessions), the new law was passed in 2000.[207] By the mid-1990s, only about half of the Council of Europe member states had adopted an equal age of consent. This gap closed rapidly after the *Sutherland* decision. This suggests that the judgment 'spurred the adoption of equal age of consent laws' not only in the UK but elsewhere in Europe (Helfer and Voeten, 2011: 20).

Later cases at the ECtHR concerned the prohibition on gay men and lesbians joining the armed forces (Goldhaber, 2009: Chapter 4). In the two pre-HRA cases of *Lustig-Prean and Beckett v UK*[208] and *Smith and Grady v UK,*[209] the applicants had been subject to investigation by military police about their sexual orientation and had been discharged from (respectively) the Royal Navy and Royal Air Force solely on that ground. The UK Parliament had previously accepted the argument that the ban was necessary to maintain morale, discipline and combat effectiveness and prevent the risk of serving gays or lesbians being blackmailed and thereby compromising national security. These arguments did not find favour with the ECtHR. In *Lustig-Prean and Beckett v UK*, the Court considered that the absolute nature of the ban, the intrusiveness of the investigation into the applicants' private lives, and the

[206] No. 25186/94, 27.3.2011. See also *L and V v Austria,* Nos. 39392/98 and 39829/98, 9.1.2003.

[207] Sexual Offences (Amendment) Act 2000.

[208] Nos. 31417/96 and 32377/96, 27.9.1999.

[209] Nos. 33985/96 and 33986/96, 27.9.1999.

consequent blighting of their careers, constituted an 'especially grave' violation of their Article 8 rights and one that was not 'necessary in a democratic society'. In *Smith and Grady*, the Court additionally found a violation of Article 13 (the right to an effective remedy). The UK Government responded rapidly to the judgments. In January 2000, the Defence Secretary announced that with immediate effect, sexual orientation would not be a bar to service in the armed forces. Again, there is evidence that these judgments had some impact outside the UK: between 1991 and 1998, not a single Council of Europe state had abandoned its discriminatory policies or practices regarding gays or lesbians in the armed forces; between 1999 and 2008, 16 countries did so (Helfer and Voeten, 2011: 21).

Recognition of the rights of transsexuals has also been at stake in key ECtHR cases.[210] *Christine Goodwin v UK*[211] in 2002 concerned the right of post-operative transsexuals to receive official documents identifying their new gender. Christine Goodwin argued that various aspects of UK law violated her right to respect for her private life, especially in relation to employment, social security, pensions and marriage. The Court agreed, holding that there were no public interest factors to weigh against her interests. This case led directly to the Gender Recognition Act 2004, which affords transsexuals full recognition of their acquired sex in law for all purposes, including marriage. The *Christine Goodwin* case did not appear to have a dramatic effect outside the UK as many countries had already adopted policies to recognise gender reassignment (Helfer and Voeten, 2011: 23).[212]

In summary, since the early 1980s, ECtHR judgments against the UK have been significant milestones in the movement towards securing respect for the human rights of LGBT people both in the UK and in other European states (Helfer and Voeten, 2011: 34). These judgments have also shaped the conditions that countries must meet in order to qualify for admission to the Council of Europe. A subsequent Strasbourg judgment highlighted the discriminatory nature of legislation which prevented the surviving partner in a same-sex couple from inheriting the deceased

[210] For an overview of Strasbourg case law on gender identity issues, see http://www.echr.coe.int/NR/rdonlyres/6E6BB0DC-A41D-4ADB-94B3-37407490C629/0/FICHES_Identite_genre_EN.pdf.

[211] No. 28957/95 [GC], 11.7.2002.

[212] In 2007, the Irish High Court relied on the ECtHR's decision in *Christine Goodwin* in deciding that national laws which prohibited changing a birth certificate following gender reassignment surgery were incompatible with the Convention (*Foy v An t-Ard Chlaraitheoir and others (No. 2)* [2007] IEHC 470). The Irish Government initially objected to this judgment, but in July 2011 announced its intention to legislate for the recognition of the acquired gender of transgender people.

partner's tenancy (see also section 7.6).[213] In 2010, the ECtHR confirmed that the relationship of a same-sex couple was included within the notion of 'family life' under Article 8 of the Convention.[214]

Access to care records

Since the coming into force of the Data Protection Act (DPA) 1998, people who were placed in public care as children have had a statutory right of access to records relating to their time in care. Previously, it had been common practice to keep such files confidential. A 'powerful catalyst' for this change - though only after considerable delay - was the 1989 case of *Gaskin v UK* (Kirton et al., 2011: 914).[215] Graham Gaskin had been placed into care (with Liverpool City Council) at the age of six months and remained there until he turned 18. He had experienced abuse during his years in care. He sought access to the file maintained on him during this period, arguing that failure to provide access was contrary to his right to respect for his private and family life and his right to receive information. Given that he had not established a bond with any of his foster families, the file represented his only way of understanding his identity and childhood experiences. The European Commission of Human Rights found that there was an interference with his right to respect for his private life. This interference was disproportionate to the aim pursued - namely, to ensure that those contributing to the file were encouraged to be as frank as possible - and was not necessary in a democratic society. The DPA contains special provisions whereby social services records are accessible by people formerly in public care irrespective of whether the records are kept electronically or on paper. The Information Commission now also provides the independent appeal mechanism which was absent at the time when Graham Gaskin sought access to his case file. The DPA also requires that care records are kept for 75 years; previously they could be destroyed soon after care had ended.

Protection of the rights of people who lack mental capacity

The human rights of people who lack mental capacity - who are unable to make decisions for themselves - are particularly vulnerable to being breached. The case of *HL v UK*[216] concerned an autistic man who was admitted to a psychiatric hospital for four months against the wishes of his carers in circumstances where he lacked capacity to give consent himself. Contrary to an earlier judgment in the House of

[213] *Karner v Austria*, No. 40016/98, 24.7.2003.

[214] *Schalk and Kopf v Austria*, No. 30141/04, 24.6.2010.

[215] No. 10454/83, 7.7.1989.

[216] No. 45508/99, 5.10.2004.

Lords,[217] the ECtHR held that HL had been deprived of his liberty and that the detention was unlawful under Article 5(1) because the common law doctrine of necessity[218] contained insufficient safeguards to protect him from arbitrary or mistaken detention. Moreover, It also held that the remedies that had been available to HL's carers to secure his release, habeas corpus and judicial review, did not provide the kind of rigorous challenge that was required by Article 5(4) of the ECHR.

This case led directly to the Deprivation of Liberty Safeguards which have been operative since 2009 and protect the rights of thousands of people who lack capacity and find themselves deprived of their liberty.[219] In 2011, the Care Quality Commission (2011: 6) found that, during the first year of the Safeguards, more than 7,000 applications had been made to obtain authorisation to deprive someone of their liberty, the majority relating to people with dementia in care homes.

5.8 Freedom of expression of the media

This section examines the impact of selected ECtHR judgments on the media and journalistic freedom in the UK. Article 10 of the ECHR gives everyone the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without state interference. The ECtHR has consistently underlined the importance of the right to freedom of expression as an essential foundation of a democratic society. It has acknowledged, in particular, the vital function which the media plays as a 'public watchdog', and its duty to impart information and ideas of public interest. Under Article 10(2), the right to freedom of expression is subject to a number of restrictions 'prescribed by law' and 'necessary in a democratic society', including protection of the reputation or rights of others and maintaining the authority and impartiality of the judiciary. These restrictions must be narrowly interpreted and the reason for the restriction must be compelling.[220]
The UK has been found to have breached Article 10 in several cases relating to journalistic freedom.

[217] *R (L) v Bournewood Community and Mental Health NHS Trust* (1998) UKHL 24.

[218] This doctrine provides that mentally incapacitated adults may be restrained using reasonable force and given treatment without consent which is necessary in their best interests.

[219] The safeguards were introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007.

[220] *Observer & Guardian v UK,* No. 13585/88 26.11.1991, para. 59.

The issue of prior restraint

In *Sunday Times v UK* (*No. 1)*,[221] the newspaper had published information related to pending civil proceedings in a settlement between the manufacturer of the drug thalidomide (which caused severe birth defects) and the affected families. The Attorney General had obtained an injunction against publication of the article on the grounds that it would constitute a contempt of court, which had been upheld by the House of Lords. The ECtHR held that:

> The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy.[222]

Article 10 guaranteed not only the freedom of the press to inform the public, but also the right of the public to be properly informed.[223] By a narrow margin of 11 votes to 9, the Court held that the ban on publishing the articles did not correspond to a social need so pressing that it outweighed the public interest in freedom of expression. The *Sunday Times* campaign on the thalidomide case, made possible by the ECtHR ruling, is widely recognised as having helped secure compensation for families affected by thalidomide (in combination with the efforts of MPs).[224]

The issue of prior restraint of the media was at issue in two other cases involving newspapers[225] that were banned from publishing excerpts from *Spycatcher,* the controversial memoir of a former senior intelligence officer, Peter Wright, which revealed undemocratic and unlawful activities by MI5 agents. The UK courts had issued and upheld various injunctions banning publication of extracts of the book. The injunctions against the *Observer* and the *Guardian* were dropped in October 1988 once the book had been published in other countries including, in July 1987, the United States. However, the newspapers challenged in Strasbourg the injunctions which had prevented publication prior to October 1988. The ECtHR argued that prior restrictions placed on media outlets present grave risks to freedom

[221] No. 6538/74, 26.4.1979.

[222] Para. 66.

[223] Para. 67.

[224] 'The long road to a settlement', *BBC News*, 8 July 2005.

[225] *Observer & Guardian v UK,* No. 13585/88, 26.11.1991; *Sunday Times v UK (No. 2)*, No. 13166/87, 26.11.1991.

of expression and therefore require 'the most careful scrutiny'.[226] In particular, news is a perishable commodity, which loses its value or interest if publication is delayed, even by a short period. The Court established that, once the information had been published elsewhere, the interest of the press and public in imparting and receiving information outweighed the government's interest in protecting the reputation of its security services.[227]

Protection of journalists' sources

High-profile Strasbourg judgments against the UK have established that protection of journalistic sources is one of the basic conditions for press freedom. The case of *Goodwin v UK*,[228] concerned an order served on a journalist, William Goodwin, to disclose the identity of his source of information on a company's confidential corporate plan. The company obtained orders preventing Mr Goodwin from disclosing the confidential information and compelling him to divulge the identity of his source. He appealed unsuccessfully to the Court of Appeal and House of Lords and was fined for contempt. He took his case to the ECtHR, which ruled that the order for disclosure of the source was not necessary and therefore in breach of Article 10. The company's legitimate reasons for wishing disclosure - among them, to identify the source of the leak - were outweighed by the interest of a free press in a democratic society.[229] The ECtHR established that if journalists are forced to reveal their sources, the role of the media as public watchdog could be seriously undermined because of the chilling effect that such disclosure would have on the free

[226] *Observer & Guardian v UK*, para. 60.

[227] In the first *Spycatcher case, Observer & Guardian v UK,* the Court distinguished between two time periods - before and after the book's publication in the US in July 1987. For the first period, it ruled by a narrow margin (14 votes to 10) that the injunctions against the newspapers were justified because of a risk that the material was prejudicial to the British secret service. For the second period, however, the Court ruled unanimously that Article 10 had been violated since the government's aim of protecting confidentiality was no longer relevant as the information had entered the public domain. Eleven judges issued partly dissenting opinions concerning the majority finding that the injunctions were acceptable during the first period. Judge De Meyer, joined by four others, stated that prior restraints, whether temporary or permanent, should be upheld only when a state can demonstrate concerns so serious that they 'threaten the life of the nation', and even then, only to 'the extent strictly required'. Judge Martens said that prior restraint was undoubtedly 'after censorship, the most serious form of interference' with freedom of expression, and the 'age of information' meant that 'information and ideas cannot be stopped at frontiers any longer'.

[228] No.17488/90 [GC], 27.3.1996.

[229] Para. 39.

flow of information.[230] This principle was subsequently affirmed in *Financial Times and others v UK*,[231] in which the *Financial Times* had been ordered by the UK Court of Appeal to disclose the source of a leaked document about a possible company takeover. Again, the ECtHR held that in the balance between protecting confidential information from being leaked and promoting freedom of the press, society has a greater interest in defending freedom of expression.[232]

Balancing the rights to respect for privacy and freedom of expression

Some situations involving media publications require a fair balancing of competing rights, notably Article 8 of the ECHR (the right to respect for private and family life) and Article 10. In a recent high-profile case, the former president of the Formula One Association, Max Mosley, claimed that the UK had breached his rights under Article 8 by failing to impose a legal duty on the media to notify him in advance of a story that violated his privacy.[233] Mr Mosley's application followed his successful case against the *News of the World*,[234] which had published material about his alleged participation in a Nazi-themed orgy. The Strasbourg Court unanimously rejected the proposition that Article 8 requires member states to legislate to prevent newspapers printing stories about individuals' private lives without first warning the individuals concerned in order that an injunction might be obtained banning publication. 'Pre-notification' requirements would have a chilling effect and would be ineffective, and it fell within each state's margin of appreciation to determine whether to legislate on this matter.[235] The judgment finding no violation of Article 8 was welcomed by several organisations that promote media freedom, which had intervened in the case to argue that a pre-notification requirement would be a 'serious incursion' into freedom

[230] See also *Sanoma Uitgevers BV v Netherlands*, No. 38224/03 [GC], 14.9.2010, where the Grand Chamber emphasised that orders requiring journalists to disclose their sources must be subject to the guarantee of review by a judge or other independent and impartial decision-making body and established (in para. 92) detailed requirements for such reviews.

[231] No. 821/03, 15.12.2009.

[232] *Financial Times and others v UK*, paras. 64-73.

[233] *Mosley v UK,* No. 48009/08, 10.5.2011.

[234] *Mosley v News Group Newspapers* [2008] EWHC 1777. The High Court had held that there were no Nazi connotations in Mr Mosley's sexual activities and therefore no public interest or justification in the publication of the material.

[235] *Mosley v UK*, para. 132.

of expression and would, among other impacts, seriously impair the publication of investigative and campaigning reports by civil society groups.[236]

Another prominent UK case concerning (among other issues) the right to respect for privacy, was *MGN Limited v UK*.[237] In this case, Mirror Group Newspapers contested - unsuccessfully - the decision of the House of Lords[238] that it had breached the privacy of a model, Naomi Campbell, by publishing in 2001 articles and images which divulged details about her drug addiction therapy. The ECtHR found no reason to substitute its view for that of the House of Lords - an example of the deference paid by the Strasbourg Court in cases where national courts have balanced competing rights (see also section 7.3).

This case also raised an important issue as to the chilling effect of high costs in defamation proceedings. Mirror Group Newspapers complained that its liability to pay Ms Campbell's legal costs which, under domestic law, included success fees agreed between her and her lawyers as part of a conditional fee arrangement and calculated at almost twice the base costs of the two appeals to the House of Lords, was disproportionate and breached its right to freedom of expression under Article 10 of the Convention.

The ECtHR reiterated that 'the most careful scrutiny' is called for when measures taken by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[239] The Court noted that the domestic success fee regime and its objectives had themselves been the subject of detailed and lengthy public consultation since 2003. This judgment culminated in

[236] A Submission to the European Court of Human Rights on behalf of the Media Legal Defence Initiative, Index on Censorship, The Media International Lawyers' Association, European Publishers' Council, The Mass Media Defence Centre, Romanian Helsinki Committee, the Bulgarian Access to Information Programme (AIP) Foundation, Media Law Resource Centre and Global Witness, 23 March 2010.

[237] No. 39401/04, 18.1.2011.

[238] C*ampbell v MGN* [2004] UKHL 22.

[239] *MGN Limited v UK*, para. 201.

the Jackson Review 2010,[240] which had highlighted significant flaws inherent in the recoverability of success fees in civil litigation.[241] The Court also recorded that the Ministry of Justice had acknowledged that, as a result of recoverable success fees, the costs burden in civil litigation was excessive and, in particular, that the balance had swung too far in favour of claimants and against the interests of defendants. This was particularly so in defamation and privacy cases.

The Court concluded that the requirement that Mirror Group Newspapers pay Ms Campbell's success fees was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters.[242] Accordingly, the Court found there had been a violation of Article 10 of the Convention.

In March 2011, the UK Government set out its plans to reform civil litigation funding and costs in England and Wales, in line with the recommendations of the Jackson Review. The Justice Secretary, Ken Clarke, stated that: 'We aim to restore greater proportionality to the costs of civil cases, as demanded in the recent European Court of Human Rights case of MGN v UK' (Ministry of Justice, 2011b: 3).

5.9 Immigration

This section analyses the impact of selected judgments against the UK that have examined human rights issues arising in relation to immigration. ECtHR cases concerning deportation of individuals from the UK - which have frequently been controversial - are examined in detail elsewhere in the report: section 5.4 discusses judgments against the UK which have prevented the deportation of individuals to a country where they face a real risk of torture or of facing a trial at which evidence obtained by torture might be used; and section 6.3 analyses criticism of the way in which the right to respect for family life (Article 8 of the ECHR) has been interpreted and applied by the ECtHR in cases relating to deportation.

[240] In late 2008, Lord Justice Jackson was appointed to conduct a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. The Jackson Review was published in January 2010. Lord Justice Jackson stated that the current system was not benefiting the public, with fees to lawyers sometimes amounting to more than 1,000 per cent of damages. His report (Jackson, 2010) suggested a 25 per cent limit on the share of damages paid to lawyers in a successful claim.

[241] *MGN Limited v UK*, paras. 203-15.

[242] *MGN Limited v UK*, para. 219.

The ECtHR has established a number of principles with respect to immigration. In particular, it has recognised that - subject to treaty obligations - a state is entitled to control the entry of non-citizens into its territory and their residence there;[243] and that the ECHR does not guarantee the right of an alien to enter or to reside in a particular country.[244]

Cases concerning discrimination on grounds of race or sex

An early UK case of considerable importance was *East African Asians v UK*.[245] The case concerned section 1 of the Commonwealth Immigrants Act 1968, which prevented British passport holders in East Africa - mainly of Asian descent - from entering or settling in the UK. In the aftermath of attaining independence, Kenya, Uganda, and Tanzania had introduced policies of 'Africanisation', which deprived many Asians of their livelihoods. As a result, from the mid-1960s, increasing numbers of East African Asians - who had earlier taken UK citizenship and thereby renounced their right to local African citizenship - had exercised their right to come to the UK, fearful that the UK might decide to deprive them of their rights of entry and of residence.[246] The Commonwealth Immigrants Act was driven through all its parliamentary stages in just three days after a 'brief but effective populist campaign' led by Enoch Powell MP and Duncan Sandys MP to deprive the British Asians of their right to enter or settle in the UK (Lester, 2002: 54). As Lord Lester (who acted as co-counsel for the applicants at Strasbourg) (2002: 55) notes, the extent of the suffering which ensued for those affected was considerable:

> … stripped of their livelihood and possessions in East Africa; divided from members of their families in the United Kingdom; detained for weeks or months in prison if they sought to enter the United Kingdom without Home Office vouchers; or shuttled here and there, across Europe, Africa and Asia, desperately seeking a new world …

[243] *Abdulaziz, Cabales and Balkandali v UK*, Nos. 9214/80, 9473/81 and 9474/81, 28.5.1985, para. 67.

[244] *Uner v Netherlands*, No. 46410/99 [GC], 18.10.2006, para. 54. In addition, in pursuance of their task of maintaining public order, states have the power to expel an alien convicted of criminal offences (see section 6.3).

[245] Nos. 4403/70-4419/70, 4422/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70, all 14.12.1973.

[246] Between 1965 and 1967, the annual number of such entrants increased from 6,150 to 13,600. In the first two months of 1968, the number of people exercising the right was 12,800 (Lester, 2002: 54).

The European Commission of Human Rights (see section 2.4) concluded that publicly to single out a group for differential treatment on racial grounds constituted a special affront to human dignity and that each of the applicants, as British citizens, had been subjected to such degrading treatment in breach of Article 3 of the ECHR.[247] In response, the UK Government created a special voucher scheme to allow entry into the UK for an annual quota of British Asians from East Africa, as refugees rather than as British subjects exercising their right of residence. Thus, although the applicants and the other British Asians were not restored to full citizenship rights, their rate of entry into the UK was greatly accelerated (Lester, 2002: 55).[248]

Another case of note was *Abdulaziz, Cabales and Balkandali v UK*,[249] which concerned the 1971 Immigration Act and Rules. The rules allowed men who had entered the UK before 1973 the right to bring their spouses and children aged under 16 into the UK without constraint - but applied stricter conditions for the granting of permission for husbands to join their wives (for example, requiring that they would be able to support themselves without recourse to public funds). The case was brought by three women who were lawfully and permanently settled in the UK. The UK Government argued that the measures taken were proportionate to a legitimate aim, in this case the need to protect the domestic labour market at a time of high domestic unemployment and to advance 'public tranquillity' through effective immigration control which benefited settled immigrants as well as the indigenous population.[250]

The ECtHR held that the UK's reasons for disparate treatment were not justified, particularly when taking into account the attempts to achieve gender equality under way at the time. It found a violation of Article 14 taken together with Article 8, on the

[247] Paras. 207-09.

[248] The case was never referred to the ECtHR and in 1977 the Committee of Ministers was unable to reach a two-thirds majority decision on the application and therefore resolved that no further action was required (Lester, 2002: 55). The Committee of Ministers noted with satisfaction that all 31 applicants were by then settled in the UK; that the annual quota had been increased from 1,500 to 5,000 heads of household, and that the Immigration Rules had permitted husbands to join wives settled in the UK. Mowbray (2007: 218) notes that the failure of the Committee of Ministers to reach a conclusive determination of the case 'illustrates the problematic role played by that institution under the former Strasbourg supervisory system'.

[249] Nos. 9214/80, 9473/81 and 9474/81, 28.5.1985.

[250] Paras. 75-76.

grounds that the wives were victims of sex discrimination.[251] It also found a violation of Article 13 (the right to an effective remedy). The UK Government responded with a rule change in 1985 and legislation in 1988 that removed the privileges enjoyed by pre-1973 male migrants - effectively, making the entry rules as difficult for women as they were for men. Thus, the UK Government reflected the letter of the law 'but certainly not the spirit of it' (Hansen, 2000: 231). Stephen Sedley QC (quoted in Platt, 1991: 5) has argued in relation to the *Abdulaziz* case that 'levelling down is a fundamentally inappropriate way of securing equality of treatment in the field of human rights'.

Nevertheless, both *East African Asians* and *Abdulaziz* are considered seminal cases in the development of anti-discrimination norms.

Case concerning the right to marry

The recent case of *O'Donoghue and others v UK*[252] concerned an indiscriminate scheme requiring immigrants without settled status to pay large fees to obtain permission from the Home Office to marry anywhere other than in an Anglican church. The Home Office scheme purported to prevent sham marriages but did not, in fact, address the question of whether the proposed marriages were genuine or not. The ECtHR found a violation of Article 12 of the ECHR (the right to marry) and of Article 14 read together with Article 12 and Article 9 (the right to freedom of thought, conscience and religion). The UK Government has now abolished the scheme.[253]

5.10 Impact of cases brought under the Human Rights Act

This section outlines the impact of selected cases brought under the HRA on individuals in the UK (in addition to HRA cases referred to elsewhere in this chapter). It is a small sample since this chapter is principally concerned with ECtHR judgments.[254]

The HRA is constitutionally significant. It gives individuals a set of positive rights and freedoms in domestic law, which the state is not only under a duty to respect (the negative duty of non-interference) but also to protect (the positive duty of securing the practical and effective realisation of the rights of individuals). Several HRA cases

[251] The ECtHR held that the rules did not discriminate on the grounds of race or birth, or did so with legitimate aims, and that they did not constitute degrading treatment.

[252] No. 34848/07, 14.12.2010.

[253] See http://jcwi.wordpress.com/2011/01/05/european-court-upholds-marriage-rights-in-uk/.

[254] See Chakrabarti et al. (2010); Donald et al. (2009b).

have concerned the rights of individuals or groups whose circumstances make them especially vulnerable: for example, a young man with autism successfully challenged his removal from his family's care against his and the family's will;[255] an older couple won the right to be placed in the same residential care home rather than being separated;[256] children have won procedural rights to take part in decisions affecting their family life;[257] babies are no longer compulsorily removed from imprisoned mothers at the age of 18 months, but are only removed if it is in the child's best interest;[258] and rules permitting unnecessary physical restraint and seclusion of teenagers in custody were quashed.[259]

The HRA been used to uphold the human rights of disabled people. For example, the family of two profoundly disabled young women challenged a local authority ban on care workers lifting them manually, which had prevented the sisters from taking part in their favourite activities such as swimming (Donald et al., 2009b: Chapter 6).[260] In that case, the High Court found a violation of Article 8 of the ECHR and provided a framework for public authorities to balance the interests of the dignity of the individual with the health and safety of employees by means of individualised risk assessments.

Another significant HRA case had a direct impact on reducing destitution within the asylum system.[261] The case concerned the denial of support to late asylum applicants and established the principle that where the fate of individuals is in the hands of the state - because it denies them support and bars them from working or claiming benefits - consequent severe destitution constitutes inhuman or degrading treatment under Article 3 of the ECHR. The case changed the way that the relevant statute was applied and, as a result, the annual number of asylum applicants reduced to destitution fell by around 8,000 (Donald et al., 2009b: 68).

The HRA has also been used to allow same-sex partners to be given 'nearest relative' status. The courts used their powers under the HRA to eliminate the

[255] *Hillingdon London Borough Council v Neary* [2011] EWHC 1377.

[256] *Cowl et al v Plymouth City Council* [2001] EWCA Civ 1935 and *R (Madden) v Bury MBC* [2002] EWHC 1882.

[257] *Mabon v Mabon* [2005] EWCA Civ 634.

[258] *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151.

[259] *R (C) v Secretary of State for Justice* [2008] EWCA 882.

[260] *R (A, B, X and Y) v East Sussex County Council* [2003] EWHC 167.

[261] *R (Limbuela and others) v Secretary of State for the Home Department* [2005] UKHL 66.

discriminatory effect of a provision which meant that the survivor of a homosexual couple could not become a statutory tenant by succession whilst the survivor of a heterosexual couple could.[262]

Freedom of expression has also been at stake in HRA cases. For example, post-HRA, responsibly written media articles on matters of public interest enjoy greater protection against defamation claims.[263] Journalists have been granted access to a hearing in the Court of Protection, when such hearings had previously been closed.[264]

Taken as a whole, these cases illustrate the way in which the HRA has been used to protect the rights of those who are vulnerable or marginalised in society, as well as the interests of a free media. Impact is greatest where the principles established in human rights cases are put into operation in everyday policy and practice, thus promoting both the transformative and remedial roles the HRA was anticipated as playing at its inception (see also section 3.2).

5.11 Conclusion

ECtHR judgments have, as Dominic Grieve notes, had a 'significant and positive' impact on people in the UK. Judgments against the UK have been relatively few in number (section 4.2) but have frequently been substantive and serious in nature. Strasbourg judgments have been concerned with the most fundamental of human rights, such as the right to life and the prohibition of torture or inhuman and degrading treatment or punishment. Judgments have also gone to the heart of individual liberties.

Cases which arose from the conflict in Northern Ireland have had far-reaching impact, not only in Northern Ireland but also in the rest of the UK and in other Council of Europe states which have experienced grave human rights violations and conflict. Notable among these are cases relating to torture and inhuman or degrading treatment and those concerned with protection of life and investigation into deaths. Judgments of the ECtHR have also been significant milestones in the movement for equal rights for lesbian, gay, bisexual or transgender people, in the UK and beyond.

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[262] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[263] *Jameel v Wall Street Journal Europe* [2006] UKHL 44. This judgment restated and strengthened the principle established in an earlier case - *Reynolds v Times Newspaper* [1999] UKHL 45 – that the common law defence of qualified privilege in libel cases can protect media articles which are of public importance.

[264] *A v Independent News and Media and others* [2010] EWCA Civ 343.

Notable impacts include legal reform to prevent the indiscriminate retention of the DNA profiles of innocent people and to protect people in the UK from unnecessary intrusion into their privacy through the use of secret surveillance. It is also due to a Strasbourg judgment that the police can no longer stop and search people without needing any grounds for suspicion. Legislation outlawing forced labour and servitude has its origins in a ECtHR ruling, thereby protecting some of the most vulnerable individuals in the UK from extreme forms of abuse and exploitation. Strasbourg decisions have also been instrumental in bringing about the prohibition of corporal punishment in UK schools and restricting the physical punishment of children in the family. Especially important are cases have that have concerned the positive obligation on states to secure Convention rights to everyone in their jurisdiction - that is, not only to refrain from breaching Convention rights, but also to take positive measures to prevent private parties from interfering with them and to carry out effective investigations into such cases.

ECtHR judgments which were controversial or provoked resistance at the time - such as *McCann* - have, over time, been recognised as having established important principles which have come to inform operational policies and procedures as well as having influenced legal changes.

6. The evolution of the Convention and Strasbourg case law

6.1 Introduction

This chapter considers how the provisions of the European Convention on Human Rights (ECHR) are interpreted. It discusses a number of the most important principles which are applied by the European Court of Human Rights (ECtHR) when it considers the meaning of the Convention rights in order to interpret and apply them in specific cases.[265] It also analyses recent criticisms of the ECtHR's approach to the interpretation of Convention rights. The final section discusses the impact of the development of implied positive obligations on the protection of some of the most vulnerable people in society.

6.2 Principles of interpretation of the Convention

The Convention as a 'living instrument'

As noted in section 2.2, the ECHR is an international treaty that was drafted by representatives of twelve European states (including the UK) in the late 1940s, and was adopted in 1950. It requires each state party to ensure that 'everyone within their jurisdiction' enjoys the rights and freedoms set out in the Convention, and the ECtHR was established to ensure that Convention obligations are met.[266]

Being an international treaty, the rights in the Convention were broadly framed, so that they could be applied to the particular circumstances of each country which ratified it. For example, Article 3 states simply that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 8 encompasses the right to 'respect for … private and family life, … home and … correspondence'. A number of the Convention rights may be restricted provided that any limitation is 'prescribed by law' and that it is 'necessary in a democratic society' (section 2.4). Terms such as 'torture', 'private life' and 'necessary in a democratic society' are not defined in the Convention. However, they have of course been defined and

[265] As Bates (2010: 356-57) has shown, these are principles which have been applied by the Court since the 1970s: 'It is the mid to late 1970s…that we look back to for the key cases on the teleological approach to interpretation, evolutive interpretation, on the application of the principle of effectiveness for Convention rights, on the notion that the Convention might establish positive obligations for the States, and for the modern approach to the margin of appreciation doctrine…'.

[266] See, in particular, Articles 1 and 19 of the Convention.

interpreted by the ECtHR in the thousands of admissibility decisions and judgments which it has issued since its establishment in 1959.[267]

When interpreting the meaning of particular terms in the Convention, does the Court consider what those who drafted the Convention (in 1949-1950) would have meant by it, or does it try to interpret the meaning in the light of present day circumstances? The answer is that the Court considers the Convention to be a 'living instrument' which is to be interpreted in the present. It therefore takes primarily a dynamic approach, not a historical one. This accordingly enables the ECtHR to take account of relevant developments and commonly accepted standards within Council of Europe states,[268] and to apply Convention rights in circumstances which could not have been envisaged by its drafters, but which builds upon the principles they articulated.

This enables the ECtHR to take account of changing conditions within states (both within the state which is a respondent in a particular case and in other Council of Europe states) and developments in legal and other standards. The ECtHR has emphasised that not to take an evolutive approach might hinder reforms or improvements in standards.[269] Applying such an approach has enabled the ECtHR to take account, for example, of changing societal attitudes towards the status of children born to unmarried parents,[270] the criminalisation of homosexuality,[271] the legal status of transsexuals[272] and of scientific developments in the field of in-vitro fertilisation (IVF) treatment.[273]

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[267] As well as decisions of the former European Commission of Human Rights (which was abolished by Protocol 11 to the Convention in 1998).

[268] See, for example, *Tyrer v UK*, No. 5856/72, 25.4.1978, para. 31. For a detailed discussion and critique of the notion of 'consensus' within Europe, see ECtHR (2008).

[269] See, for example, *Christine Goodwin v UK*, No. 28957/95 [GC], 11.7.2002, para. 74.

[270] *Marckx v Belgium*, No. 6833/74, 13.6.1979.

[271] See, for example, *Dudgeon v UK*, No. 7525/76, 22.10.1981.

[272] *Christine Goodwin v UK*, No. 28957/95 [GC], 11.7.2002.

[273] See *SH and others v Austria*, No. 57813/00 [GC], 3.11.2011, concerning two Austrian couples wishing to conceive a child through IVF. One couple needed the use of sperm from a donor and the other donated ova. Austrian law prohibits the use of sperm for IVF and ova donation in general. The Grand Chamber concluded that there had been no violation of Article 8 of the ECHR. However, it underlined (at para. 97) the importance of keeping legal and fast-moving scientific developments in the field of artificial procreation under review.

Taking account of the object and purpose of the Convention

Another important principle applied by the ECtHR in interpreting Convention rights is to take account of the object and purpose of the Convention - which the Court has described as being the effective protection of human rights and the promotion of the ideals and values of a democratic society.[274] This is known as a 'teleological approach'.

This principle of interpretation was applied by the ECtHR, for example, in its 1975 judgment in the *Golder v UK* case in which it concluded that although Article 6 of the Convention (the right to a fair trial) did not explicitly refer to a right of *access* to a court, such a right was inherent in the Article.[275]

Legal certainty and other principles of interpretation

The ECtHR is not strictly bound by its previous decisions, but the Grand Chamber has emphasised that 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases'.[276] This is subject, however, to its assessment of changing conditions and evolving standards, as discussed above.

In applying the Convention, the ECtHR will also take account of other relevant provisions of international law.[277] The Vienna Convention on the Law of Treaties requires that the ECtHR should assess the 'ordinary meaning' of the provisions of the

[274] See, for example, *Wemhoff v Germany,* No. 2122/64, 27.6.1968*,* para. 8*; Kjeldsen, Busk Madsen and Pedersen v Denmark*, Nos. 5095/71, 5920/72 and 5926/72, 7.12.1976, para. 53; *Soering v UK*, No. 14038/88, 7.7.1989, para. 87; *Saadi v UK*, No. 13229/03 [GC], 29.1.2008, para. 62.

[275] *Golder v UK*, No. 4451/70, 21.2.1975 ('This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1…read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty…' - para. 36). In his extensive recent study, Bates has demonstrated that the UK Government unsuccessfully sought through the *Golder* case to argue in favour of a restrictive approach to the interpretation of the Convention: 'Above all, the significance of *Golder* lies in what the British government tried to do, and failed to achieve…it was unsuccessful in its attempt to establish a very conservative approach to the Convention's interpretation. It was established that the Strasbourg institutions did not have to stick rigidly to the Convention text in complete deference to what the sovereign States had explicitly agreed to in 1950'. The Government did, nevertheless, accept the *Golder* decision and amended the relevant Prison Rules (Bates, 2010: 304, 310).

[276] *Christine Goodwin v UK*, No. 28957/95 [GC], 11.7.2002*,* para. 74.

[277] See, for example, *Al-Adsani v UK*, No. 35763/97 [GC], 21.11.2001.

Convention, and in the light of its object and purpose.[278] As a supplementary means of interpreting the Convention, the Court may also consider the preparatory documents relating to the drafting of the Convention (known as the '*travaux préparatoires*').[279] The ECtHR has also emphasised that the Convention should be read 'as a whole', and interpreted so as to promote consistency and harmony between its provisions.[280]

Implied positive obligations

The Convention was drafted in a way that focuses predominantly on limits on interferences with civil and political rights by public authorities. For that reason, many of its provisions are expressed as 'negative obligations' - that the state must not interfere with particular rights. For example, Article 5 requires that 'no one shall be deprived of his liberty' (except for the circumstances set out in the Article). Some of the standards are also expressed in the Convention as 'positive obligations' - where the state is obliged to take action in order to secure human rights (see also section 2.4). One example is the stipulation in Article 2 that 'everyone's right to life shall be protected by law'.

In addition to what is explicit in the Convention, the ECtHR has also read into the Convention other 'positive obligations', in order to make the Convention rights real and effective.[281] This is a consequence of the fact that the Convention is an international treaty with broadly-framed standards, and it has been necessary for the ECtHR to elucidate what those standards mean. For example, the right to life and the prohibition of torture (Articles 2 and 3 of the Convention) do not explicitly refer to an obligation to investigate. However, the Court has read into those provisions a duty on public authorities to carry out an effective investigation of fatalities[282] and of allegations of torture or ill-treatment (see also sections 5.3 and 5.4).[283] The ECtHR

[278] Article 31(1) of the Vienna Convention on the Law of Treaties, 23 May 1969. See, for example, *Saadi v UK*, No. 13229/03, 29.1.2008, para. 62.

[279] Council of Europe (1975-1985). See, for example, *Young, James and Webster* v *UK*, Nos. 7601/76 and 7807/77, 26.6.1981, paras. 51-53.

[280] See, for example, *Stec and others v UK*, Nos. 65731/01 and 65900/01 [GC], 6.7.2005, para. 48.

[281] Article 1 of the Convention provides that states 'shall secure' its rights 'to everyone within their jurisdiction'.

[282] See, for example, *Paul and Audrey Edwards v UK*, No. 46477/99, 14.3.2002, paras. 69-73.

[283] See, for example, *Assenov and others v Bulgaria*, No. 24760/94, 28.10.1998, para. 102.

has also found that positive obligations are inherent, for example, in the right to respect for family life (Article 8).[284]

6.3 Criticisms of the Strasbourg Court

This section discusses a number of criticisms which have recently been made about the ECtHR or its case law, notably within the UK context, and considers specifically the interpretation of right to respect for private and family life in the context of deportation cases. We then analyse these criticisms in section 6.4.

Various commentators, from a variety of perspectives, have suggested that the ECtHR has gone too far in interpreting the ECHR. For some, this criticism is based on the argument that the ECtHR has applied particular provisions of the Convention in ways that would not have been foreseen by those who originally drafted it (Howard, 2011; Pinto-Duschinsky, 2011: 12; Raab, 2011: 5-6). Jack Straw asserts that:

> The Court has been setting itself up as a supreme court for its member states and is moving into areas on which there is no agreement or never has been any agreement or consent by the state parties to the treaty.[285]

It has also been argued that some of the Court's decisions do not take sufficient account of the historical, cultural and other differences between the 47 Council of Europe states (Sumption, 2011: 13; Pinto-Duschinsky, 2011: 11, 58). Anthony Speaight QC (a member of the Commission on a Bill of Rights) argues that the ECtHR has 'departed from normal principles of interpretation of international treaties' and that its 'over activist jurisprudence' is a 'systemic problem'.[286]

Allied to these critiques is the notion that the ECtHR has got its priorities wrong. Jack Straw suggests that:

[284] See, for example, *Marckx v Belgium*, No. 6833/74, 13.6.1979, para. 31; *Christine Goodwin v UK*, No. 28957/95 [GC], 11.7.2002, para. 72 (see also section 5.6).

[285] Jack Straw, Interview, 10 January 2012. These are not, of course, novel arguments. Writing in 2000, Francesca Klug commented that 'virtually every time the European Court of Human Rights delivers a judgment which goes against the United Kingdom…an MP or political commentator is guaranteed to respond with the retort that the issue in question is not what the framers of the [Convention] had in mind when they drafted it' (Klug, 2000: 5). See also Nicol (2005).

[286] Anthony Speaight QC, Interview, 4 January 2012.

> … what it needs to concentrate on are egregious breaches of human rights, and not go in for this competence-creep.[287]

Jonathan Sumption QC (2011: 14) has argued that there is a lack of legitimacy for this perceived extension of the ECtHR's remit:

> … the Strasbourg Court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life. These include many matters which are governed by no compelling moral considerations one way or the other. The problem about this is that the application of a common legal standard … breaks down when it is sought to apply it to all collective activity or political and administrative decision-making. The consensus necessary to support it at this level of detail simply does not exist.

For some commentators, one notable example of the ECtHR's perceived overly expansive approach is the situation regarding prisoners' voting rights (see also section 7.5), on the basis that the relevant provision in the Convention[288] is said not to refer specifically to a right to universal suffrage (Howard, 2011).[289] The Attorney General, Dominic Grieve (2011), has argued that this is a question on which parliament should be left to decide:

> …on issues of social policy such as prisoner voting, where strong, opposing reasonable views may be held and where Parliament has fully debated the issue, the judgement as to the appropriate system of disenfranchisement of prisoners is for Parliament and the Court should not interfere with that judgement unless it is manifestly without reasonable foundation.

Lord Hoffmann (the former Law Lord) has been critical of the ECtHR's reading of environmental rights into the right to respect for private and family life (Article 8), which he described as introducing 'wholly new concepts' (Hoffmann, 2009: 22). Baroness Hale, a Justice of the Supreme Court, has described as controversial the development of particular substantive positive obligations. For example, in the field of

[287] Jack Straw, Interview, 10 January 2012.

[288] Article 3 of Protocol 1 to the Convention states: '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'.

[289] Jack Straw, Interview, 10 January 2012.

housing, she has been critical that Strasbourg 'is developing a duty not to deprive a person of the home he already has, even in circumstances where there is no duty in domestic law to continue to supply him with it' (Hale, 2011: 541-42). This might mean, she argues, depriving someone with a more deserving case.[290]

Below, we consider a particularly high profile issue (the ECtHR's interpretation of the right to family life under Article 8 of the ECHR), before we analyse these critiques in section 6.4.

The right to family life and deportation cases

One subject on which where there has been an intense level of criticism is the way in which the right to family life (Article 8 of the ECHR) has been interpreted and applied by the ECtHR in cases relating to deportation, so as, it is argued, unjustifiably to prevent deportation.[291]

Jack Straw MP argues that the Court has 'over-egged the idea of the right to family life'.[292] Anthony Speaight QC ventures that:

> … there is nothing in Article 8(2) of the Convention which justifies decisions of the absurd kind which have become quite common, where fairly modest ties to this country are used as a basis for holding that there would be an infringement of the Convention if someone were deported.[293]

An example of a case which has provoked criticism is the 2011 judgment in *AA v UK*,[294] in which the Strasbourg Court ruled unlawful the deportation of a Nigerian who

[290] Lord Walker has also made a similar point: 'The developing jurisprudence on social housing is a further demonstration of the indefinite Article 8's tendency to expand its scope' (Walker, 2011: 21).

[291] See, for example, 'Stop foreign criminal using "family rights" to dodge justice', *Daily Telegraph*, 23 April 2011.

[292] Jack Straw, Interview, 10 January 2012.

[293] Anthony Speaight QC, Interview, 4 January 2012.

[294] No. 8000/08, 20.9.2011. Other recent cases in which the ECtHR has found a violation of Article 8 in relation to UK deportation decisions include *Omojudi v UK*, No. 1820/09, 24.11.2009 (in view of the strength of the applicant's family ties to the UK, his length of residence, and the difficulty that his youngest children would face if they were to relocate to Nigeria) and *AW Khan v UK*, No. 47486/06, 12.1.2010 (due in particular to the length of time that the applicant had been in the UK and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the UK, and the fact that he had not reoffended since he was released from prison).

had settled in the UK when aged 13 and who was convicted of rape of a 13 year old girl when he was aged 15. He was sentenced to four years in a Young Offenders' Institution, but was released on licence for good behaviour after serving one year and 10 months. A deportation order was issued, under the Immigration Act 1971, which permits the Secretary of State to order the deportation of a person who is not a British citizen if it is considered to be 'conducive to the public good'.[295] The applicant appealed successfully against the deportation order to the Asylum and Immigration Tribunal, but the deportation order was confirmed by a Tribunal decision two years later.

The ECtHR accepted in *AA* that the proposed deportation was both legally prescribed and was legitimately aimed at preventing disorder or crime. The Court gave significant weight to the seriousness of the offence, but also took account of the fact that he was a minor when he committed it. It noted that he had spent almost half his life in the UK. Seven years had passed since he had been released and although he had exhausted his appeal rights in January 2008, no steps had been taken in respect of his deportation until September 2010. Since committing the offence in 2002, the applicant had not committed any further offences. He had subsequently obtained several qualifications, including an undergraduate and postgraduate degree, and had worked for a local authority since 2010. His probation officer and the Asylum and Immigration Tribunal had considered the risk of his reoffending to be low. The Government did not raise any concern about the applicant's conduct in the seven years since his release from prison. He continued to live with his mother and had other close family ties in the UK. For these reasons, the Strasbourg Court unanimously found that deportation would be disproportionate and therefore in violation of Article 8 of the Convention.

The Attorney General, Dominic Grieve (2011), agrees with the criticisms about the interpretation of Article 8, arguing that 'the domestic courts have placed too much weight on the family rights of foreign criminals'. As a result the UK Government proposes to amend the Immigration Rules:

> Parliament … is best placed to decide on difficult policy questions such as where the balance should be struck in relation to the deportation of foreign criminals.

[295] Section 5(3)(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999). The UK Borders Act 2007 (sections 32-39) requires the Secretary of State to deport a non-British citizen over the age of 17 who is sentenced to at least twelve months in prison, except (amongst other conditions) where removal would breach the ECHR or the Refugee Convention.

As is reflected in Grieve's comment, a number of commentators have noted that the case law relating to the right to family life which has been the subject of criticism has been developed as much by the courts in this country, as by the ECtHR (Irvine, 2011, 13).[296] Lord Phillips, the President of the Supreme Court, acknowledges an expansion of the scope of Article 8 in recent years, but also underlines the dilemmas which arise in interpreting the provision, as 'it is so very difficult to pin down what is meant by the Article 8 rights' (JCHR, 2011a: 15).

Research carried out by the London School of Economics (Klug and Wildbore, 2011: 30) suggests that much of the press coverage in this area is misreported:

> Whilst not intending to defend every court decision in this area … the cases are highly fact sensitive and … even in the most controversial cases reported in the press, there is generally ample justification for the decisions of the courts within the ambit of Article 8.

Lord Walker has recently noted that this is a subject of 'acute political controversy' (Walker, 2011: 17), and we would observe that there has also been misreporting and exaggeration of family life cases by senior politicians.[297]

The ECtHR's approach to immigration cases is discussed in section 5.9 above. The Court has constantly reiterated that the Convention does not provide rights of entry or residence as such. Nevertheless, a decision to deport a person may raise questions about the extent of the interference with a person's right to respect for their private and family life under Article 8 - a principle that the Court has recognised for several decades.[298]

In considering whether a deportation decision is proportionate, the Strasbourg Court weighs up an extensive series of factors, including:

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[296] Referring to the case of *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1198.

[297] See, for example, Wagner (2011b). Adam Wagner comments on a speech by the Home Secretary, Theresa May, to the Conservative Party on 4 October 2011 in which she said: 'We all know the stories about the Human Rights Act……the illegal immigrant who cannot be deported because - and I am not making this up - he had a pet cat'. Wagner points out that May's comment referred to a decision of the Asylum and Immigration Tribunal by Senior Immigration Judge Gleeson (IA/14578/2008), of 1 December 2008, and he concludes that 'not only did the decision have nothing to do with a cat, it also had nothing to do with human rights either' (as it was based on European law on freedom of movement).

[298] See, for example, *Moustaquim v Belgium,* No. 12313/86, 18.2.1991.

- the nature and seriousness of the offence;
- the length of the person's stay in the country from which he or she is to be expelled;
- the time which has elapsed since the offence was committed and the person's conduct during that period;
- the nationalities of the persons concerned;
- the person's family situation, such as the length of any marriage and other factors relating to a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the person is to be expelled;
- the best interests and well-being of any children, in particular the seriousness of the difficulties which the person's children are likely to encounter in the country to which the person is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.[299]

Applying such a series of complex factors means that the outcome of these cases is highly fact-dependent. Accordingly, as well as the cases referred to above where the ECtHR has found violations of Article 8, there are also many judgments in which the Court has found that the authorities have struck a fair balance and that deportation was justified. One example is the case of *Joseph Grant v UK*[300] which concerned the deportation of the applicant to Jamaica on the basis that he had committed a considerable number of criminal offences over an extended period of time. The ECtHR made a similar decision in *Onur v UK*,[301] which concerned the applicant's deportation to Turkey after he was convicted of a series of offences, including

[299] See, for example, *AA v UK,* No. 8000/08, 20.9.2011, para. 56.

[300] No. 10606/07, 8.1.2009.

[301] No. 27319/07, 17.2.2009.

burglary and robbery. A further example is the case of *AH Khan v UK*[302] where the Court found that Article 8 was not violated by the applicant's deportation to Pakistan, given his substantial history of offending (including offences of violence) and his recidivism.

Klug and Wildbore (2011: 30) argue that in the vast majority of the cases where deportation is challenged successfully, it is because of the claimants' relationships with family members (usually their children), or because they have been present in the UK since they were children. They also emphasise that, in a number of cases, the courts have found no violation of the right to family life arising from a proposed deportation, which shows that 'public interest considerations are already part of the balance generally applied by the courts in Article 8 cases' (see also Klug, 2011). Lord Walker (2011: 17) has noted that 'proportionality (based on "a careful and informed evaluation of the facts of the particular case") is of the essence'.[303]

The 'fourth instance' doctrine

One criticism often made of the ECtHR, which has arisen particularly in the context of deportation cases, is that it should not act simply as a further court of appeal from the decisions of national courts (often referred to as the 'fourth instance' doctrine). For example, in his speech delivered in Strasbourg in January 2012, the Prime Minister warned against 'the risk of [the ECtHR] turning into a court of '"fourth instance"' (Cameron, 2012):

> … because there has already been a first hearing in a court, a second one in an appeal court, and a third in a supreme or constitutional court.
> In effect that gives an extra bite of the cherry to anyone who is dissatisfied with a domestic ruling, even where that judgment is reasonable, well-founded, and in line with the Convention.

The Strasbourg Court itself has repeatedly made it clear in its decisions and judgments that it does not act as a further court of appeal from the decisions of national courts, noting that:

[302] No. 6222/10, 20.12.2011.

[303] Lord Walker was quoting here from *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159: 12.

> … it is not its function to deal with errors of fact or law allegedly committed by [national] courts unless and in so far as they may have infringed rights and freedoms protected by the Convention.[304]

As Harris et al. (2009: 14-15) note, an application to Strasbourg that simply claims that a national court has made an error of fact or law will be declared inadmissible. A claim that there has been a violation of Article 6 (the right to a fair hearing) will not succeed as Article 6 provides a procedural guarantee only - it does not guarantee a particular outcome in a case.

Faced with a steep rise in the number of requests for interim measures in recent years (section 2.4), the President of the ECtHR issued a statement in 2011 which emphasised that the Court does not act as a court of fourth instance in the immigration context:

> … the Court is **not** an appeal tribunal from the asylum and immigration tribunals of Europe, any more than it is a court of criminal appeal in respect of criminal convictions. Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases (emphasis in original).[305]

6.4 Responses to the criticisms

This section analyses and responds to the criticisms that have been made of the way in which Convention rights have been interpreted by the ECtHR.

The basis for the ECtHR's developing interpretation of the Convention

Andenas and Bjorge (2011: 8) note that a developing (also described as a 'dynamic' or 'evolutive') interpretation of the law is a common feature of international treaties:

> ... first and foremost ... treaty makers wanted them to be capable of application to new situations, and therefore articulated the treaties' object and purpose in 'generic terms'.

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[304] See, for example*, Hoare v UK*, No. 16261/08, 12.4.2011, para. 62. This case was declared inadmissible, the ECtHR concluding that the complaint of a violation of the right to a fair hearing (Article 6) was 'essentially of a "fourth instance" nature relating to the House of Lords' interpretation and application of law to the facts of the case'.

[305] Statement issued by the President of the European Court of Human Rights concerning requests for interim measures, 11 February 2011, p. 2. Available at: http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf.

For example, Lady Justice Arden has described the evolving nature of European Union law, which ‘can expand and improve, to accommodate developments’ (Arden, 2009: 14).

The gradual development of the standards in the ECHR is a fundamental feature of the Strasbourg mechanism. White and Ovey (2010: 81) have described the ECtHR’s technique in this way:

> ... an evolutive approach based upon [its] understanding of the object and purpose of the Convention, but also reflective of its own role as an international human rights court conscious of its subsidiary role in the protection of human rights.

The former President of the ECtHR, Jean-Paul Costa, (ECtHR, 2011b: 5), has emphasised that the Court has followed such an approach for decades:

> The fact is that, more or less since the beginning, the Convention organs…have taken the view that the text should be interpreted, and applied, by adapting it to the changes that have taken place over time - to changes in society, in morals, in mentalities, in laws, but also to technological innovations and scientific progress. The Convention is sixty years old: history has moved inexorably onward during that period and this contextual evolution has been highly significant. The Convention’s interpreters expressly rejected a static or finite analysis.

As Françoise Tulkens, the Vice-President of the ECtHR, (ECtHR, 2011b: 6), has explained, the very way in which the Convention was drafted dictates the need for such an approach:

> … it is in the nature of fundamental rights that they can be applied only through a process of interpretation, as such rights are not circumscribed. They are also abstract in nature and acquire a concrete meaning in the particular context in which they are invoked.

Sir John Laws, the Court of Appeal judge, agrees with this approach:

> I don’t think you can take a literalist view…of an international instrument that applies over time to different situations. I don’t think the ‘founding fathers’ approach is terribly helpful. It has to last over time. It also has to

> operate and prevail in relation to many different state jurisdictions. What may seem over-intrusive in one state may not in another.[306]

For Judge Tulkens, the basis for this dynamic approach to interpretation is the preamble to the Convention, which not only refers to the 'maintenance' of human rights, but also their 'further realisation', thus allowing for a 'degree of innovation and creativity' (ECtHR, 2011b: 7). Jan Erik Helgesen, First Vice-President of the Venice Commission (ECtHR, 2011b: 22), points out that the ECtHR is in quite a different position to national courts There would be no development of Convention standards, he argues, if the Court did not do so through its case law, as it does not have the possibility of leaving such questions to a legislator.

Baroness Hale has acknowledged that the meaning of particular terms in the European Convention, such as 'family life' will necessarily develop over time (Hale, 2011: 538). She refers (Hale, 2011: 538) to a number of cases in which the ECtHR has latterly confirmed that the 'right to family life' exists, including unmarried fathers with their children[307] and same sex couples:[308]

> These are all examples of applying the language of the Convention to situations which may not have been contemplated by the original framers, but which are entirely capable of being covered by the language used and are consistent with its underlying principles and purpose.

Lord Hoffmann, too, acknowledges that 'the practical expression of concepts employed in a treaty or constitutional document may change' and gives the example of the evolving definition of a 'cruel punishment' (Hoffmann, 2009: 21-22). Legal commentator Joshua Rozenberg suggests that it is inevitable that the ECtHR should 'interpret the Convention to comply with modern needs', citing as a positive example the application of the investigative obligation (under Article 2 of the Convention – the right to life) to abuses by the British armed forces in Iraq (notably the Baha Mousa case) (see also section 5.4).[309]

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[306] Sir John Laws, Interview, 16 January 2012.

[307] *Keegan v Ireland*, No. 16969/90, 26.5.1994, paras. 48-51.

[308] *Schalk and Kopf v Austria*, No. 30141/04, 24.6.2010, paras. 94-95 (the Court recognised the right of same sex couples to respect for their family life under Article 8, but found that under Article 12 there was no right for same sex couples to marry). See also Case Study Two (section 6.5) on *Dudgeon v UK.*

[309] Joshua Rozenberg, Interview, 20 December 2011.

It is inevitable that there will be differences of views about how the European Convention is applied in particular cases (and it is of course essential that the decisions of the ECtHR, and of any court, are actively subject to rigorous public scrutiny). Indeed, there is a very healthy tradition of ECtHR judges themselves producing dissenting opinions where they disagree with the majority of the Court.[310] It is to be expected that the ECtHR's decisions may be subject to criticism in particular where the law is evolving. For example, responding to criticism of the *Salduz v Turkey* judgment as it was applied by the Supreme Court in the Scottish case of *Cadder* (concerning the right of access to a solicitor prior to being interviewed by the police),[311] Sir Nicolas Bratza, the President of the ECtHR, has argued that the decision 'was a foreseeable development of the Court's more recent case law' and was 'consistent with contemporary standards in the procedural protection of those suspected of a criminal offence…' (Bratza, 2011: 510). Indeed, in the *Cadder* judgment, Lord Hope described Strasbourg's approach as providing 'principled solutions that are universally applicable in all the contracting states ... there is no room in its jurisprudence for...one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other'.[312]

Prior to the enactment of the Human Rights Act (which gave direct effect to the Convention rights in the domestic law), the White Paper, *Rights Brought Home: the Human Rights Bill* (Home Office, 1997: para. 2.5) acknowledged that the Convention standards evolve, and anticipated that national judges would be involved in the process of development:

> The Convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.

[310] See, for example, *McCann and others v UK*, No. 18984/91 [GC], 27.9.1995 (the case concerning the fatal shooting of members of an IRA unit in Gibraltar by the SAS - the Grand Chamber of the ECtHR found, by ten votes to nine, that the right to life (Article 2) of the applicants' relatives had been violated because of failures in the conduct and planning of the operation) (see also section 5.3).

[311] *Salduz v Turkey*, No. 36391/02 [GC], 27.11.2008; *Cadder v HM Advocate* [2010] UKSC 43. As to criticism of these cases, see, for example, McCluskey (2011). See also *Ambrose v Harris* [2011] UKSC 43.

[312] *Cadder v HM Advocate* [2010] UKSC 43, 40.

The role of national judges and the extent of 'judicial dialogue' with the Strasbourg Court are discussed in Chapter 7.

The evolution of common law and statutory interpretation

It needs to be underlined that a developing interpretation of the law is far from unique to Strasbourg - national judges, including those in the UK, are used to applying an evolutive approach, as the case studies in section 6.5 illustrate.[313] Baroness Hale has recently emphasised that the common law has always been adapted 'to meet new problems and new factual situations' (Hale, 2011: 535):

> … the common law is no stranger to what Strasbourg calls the evolutive interpretation of the law, especially in the field of fundamental rights.

Accordingly, 'judge-made law' develops over time. Masterman (forthcoming 2012: 22) has described the 'incrementally progressive approach of the common law'. Indeed, Lord Phillips has said he considers the dynamic interpretation applied in Strasbourg and applied as part of the common law to be very similar (JCHR, 2011a: 13).

There are also developments in how judges interpret legislation. Baroness Hale has described how judges do this (Hale, 2011: 535):

> … the court is seeking to further the purpose of the legislation in the social world as it now is rather than as it was when the statute was passed, but to do so in a principled and predictable way which will not offend against either the intention of Parliament or the principle of legal certainty.

By way of example, in the *Yemshaw* judgment of the Supreme Court in 2011, Baroness Hale recognised that the meaning of a word like 'violence' could develop and change over the years.[314]

6.5 Case studies on developing interpretation of the law

This section presents two case studies which illustrate the way in which both the common law and the Convention case law develops. The first case study provides an example of the evolution of the common law (concerning the law of rape) by the UK

[313] See also Andenas and Bjorge (2011), which discusses the implementation of the ECHR in the national law in Belgium, the Czech Republic, France, Germany, Norway, Russia and the United Kingdom.

[314] *Yemshaw (Appellant) v London Borough of Hounslow (respondent)* [2011] UKSC 3, at 25 and 27 (concerning the interpretation of the meaning of 'violence' or 'domestic violence' in homelessness legislation).

courts, and the ECtHR's affirmation of such a development (Hale, 2011: 535). The second case study demonstrates the dynamic approach of the ECtHR as regards national laws which criminalised homosexuality.

Case study one: the evolutive approach of the common law - marital rape

The case of R v R

Until the case of *R v R*[315] the English courts had always recognised at least some form of immunity attaching to a husband from any charge of marital rape or attempted rape, because of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage.

In October 1989, as a result of matrimonial difficulties, R's wife left the matrimonial home with their son and returned to live with her parents. She left a letter informing R that she intended to petition for divorce. Three weeks later, R forced his way into her parents' house and attempted to have sexual intercourse with her against her will. R assaulted her, squeezing her neck with both hands. R was charged with attempted rape and assault occasioning actual bodily harm. At his trial before the Crown Court in July 1990, it was argued that the charge of rape was one which was not known to the law because the defendant was the husband of the alleged victim. R relied on a statement by Sir Matthew Hale CJ in his 'History of the Pleas of the Crown' published in 1736:

> But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

However, R was found guilty and sentenced to three years' imprisonment for attempted rape and assault occasioning actual bodily harm against his wife.

An appeal to the Court of Appeal was dismissed in March 1991. In *R v R*, Lord Lane noted that a series of cases had departed from the general proposition that a man could not commit rape upon his wife by making increasingly important exceptions to the marital immunity. Lord Lane made the following observations:

> Ever since the decision of Byrne J in *R v Clarke* in 1949, courts have been paying lip-service to Hale CJ's proposition, whilst at the same time increasing ... the number of situations to which it does not apply. This is a

[315] [1991] 2 All England Law Reports 257 CA.

> legitimate use of the flexibility of the common law, which can and should adapt itself to changing social attitudes.
>
> There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms... accord with what is ... regarded today as acceptable behaviour…
>
> It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment ... That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act.

Lord Lane concluded:

> We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

On 23 October 1991, the House of Lords upheld the Court of Appeal's judgment, declaring that the general principle that a husband cannot rape his wife no longer formed part of the law of England and Wales. It stressed that the common law was capable of evolving in the light of changing social, economic and cultural developments.

The case of *CR v UK*[316]

R complained to the ECtHR that his conviction and sentence for attempted rape of his wife constituted retrospective punishment in breach of Article 7 of the Convention.

In its judgment, the ECtHR found no violation of Article 7. The Court stated that it is in the first place for the national authorities, notably the courts, to interpret and apply national law. The ECtHR saw no reason to disagree with the Court of Appeal's conclusion, which had been upheld by the House of Lords. The ECtHR stated that the decisions of the UK appeal courts did no more than continue a perceptible line of case law development dismantling the immunity of a husband from prosecution for rape of his wife. This evolution of the criminal law had reached a stage where judicial

[316] No. 20190/92, 22.11.1995.

recognition of the absence of immunity had become a reasonably foreseeable development of the law.

Case study two: the evolutive approach of the Strasbourg Court – the criminalisation of homosexuality

Dudgeon v UK[317]

In 1976, a shipping clerk from Belfast, Jeffrey Dudgeon, took a case to the European Commission and Court of Human Rights to challenge the continuing criminalisation of private, consensual, adult homosexuality in Northern Ireland (see also section 5.7).

In practice, there had been very few prosecutions in Northern Ireland, and those that there were primarily involved people under 18. Mr Dudgeon's house had been searched by the police executing a warrant under the Misuse of Drugs Act 1971. During the raid personal papers of his were seized, which led to his being questioned by the police about his sex life. The Director of Prosecutions, and the Attorney General, later decided it was not in the public interest to bring proceedings for gross indecency against him.

Developments in the law in the UK

The law then in force in Northern Ireland dated back to the 1860s and 1880s.[318] At that time, in England and Wales the law on male homosexual acts was set out in the Sexual Offences Act 1956, as amended by the Sexual Offences Act 1967. The 1967 Act had been introduced following the Wolfenden report (1957) which had noted the function of the criminal law as being 'to preserve public order and decency…', but not 'to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour…'. In 1977, the Standing Advisory Commission on Human Rights recommended that the law in Northern Ireland should be brought into line with the 1967 Act, but the recommendation had not been acted upon.

The case in Strasbourg

Jeffrey Dudgeon argued that there had been a violation of the right to respect for his private life (Article 8), and that he had been the subject of discrimination (Article 14, together with Article 8). The ECtHR found that the very existence of the laws in question 'continuously and directly' affected his private life. The key issue which arose in the case was whether it was 'necessary in a democratic society' to maintain the domestic legislation in question. The Court stated that it was for the national

[317] No. 7525/76, 22.10.1981.

[318] The Offences against the Person Act 1861 and the Criminal Law Amendment Act 1885 (as well as the common law).

authorities to make the initial assessment of the 'pressing social need' - they were given a margin of appreciation. However, their decision was subject to review by the Court. The ECtHR also noted that where there were 'disparate cultural communities' within the same state, the authorities could be faced with different moral and social requirements.

Nevertheless, for the Court, the changes detected in attitudes towards homosexuality were critical:

> As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[319]

The Court concluded that the restrictions imposed on Jeffrey Dudgeon by the domestic law were disproportionate and in violation of Article 8.[320] The impact of *Dudgeon* is examined in section 5.7.

6.6 The limits to an evolutive approach

Baroness Hale (2011: 543) accepts the necessity of Convention case law evolving, but argues that 'there must be some limits':

> ... the development should be a predictable one. It should not contradict the express language of the Convention. It should be consistent with the established principles of Convention jurisprudence. It should also be consistent with the standards set in other international instruments....It should reflect the common European understanding, however that may be deduced. And it should seek to strike a fair balance, between the universal values of freedom and equality embodied in the Convention, and the particular choices made by the democratically elected Parliaments of the member states'.

[319] *Dudgeon v UK*, No. 7525/76, 22.10.1981, para. 60.

[320] The Court did not consider it necessary also to examine Article 14.

Baroness Hale prefers the analogy of a 'living tree' to a 'living instrument', on the basis that 'a tree has a life of its own, but it can only grow and develop within its natural limits' (Hale, 2011: 535).

The need for limits is also acknowledged by the Strasbourg judges. For example, in the 2009 Grand Chamber judgment in *Scoppola v Italy (No. 2)* (in which the majority found, for the first time, that Article 7 of the Convention incorporates a principle of retroactivity of the more lenient criminal law) six judges dissented, arguing that the majority had strayed beyond reasonable bounds:

> … no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions … This is a matter on which the Court should be particularly sensitive.[321]

Is it possible to define the limits to the interpretation of the Convention? Judge Françoise Tulkens has suggested that this would depend upon a sufficient European consensus, often as indicated by European and other international instruments. Tulkens also emphasises, for the sake of legal certainty and foreseeability, the need for the ECtHR not to change its case law without good reason, and temporal limitations[322] (ECtHR, 2011b: 7).

Like Baroness Hale, to resolve this question Judge Tulkens calls for a balance - between legal certainty and flexibility. Sir Nicolas Bratza (2011: 510) has sought to highlight that, where the ECtHR has found Convention violations arising from particular national practices, 'the Court has been careful not only to explain the nature of the incompatibility but, in general, to leave the national authorities to devise a more Convention-compliant system without itself imposing specific requirements on the State'.

6.7 The clarity and consistency of Strasbourg judgments

This section considers criticisms about the lack of clarity and consistency of the ECtHR case law, before discussing how Strasbourg seeks to address this issue.

[321] No. 10249/03 [GC], 17.9.2009: partly dissenting opinion of Judge Nicolaou, joined by Judges, Bratza, Lorenzen, Jočiené, Villiger and Sajó.

[322] Judge Tulkens gives the example of the Court in *Marckx v Belgium*, No. 6833/74, 13.6.1979, deciding not to require the Belgian authorities to re-open domestic acts which pre-dated the delivery of the judgment.

Some national judges and other commentators have been critical of the lack of clarity and consistency in some of the ECtHR's decisions.[323] Baroness Hale, for example, has been critical of the lack of clarity of the definition of what are 'civil rights' for the purposes of assessing the right to a fair trial (Hale, 2011: 538).[324] She has also been critical of the Court for developing its case law by finding that the investigative duty arising under the right to life (Article 2) could be detached from the main duty not to take life, and therefore that the investigative duty could apply to deaths which occurred **before** the Convention came into force in respect of the country in question (Hale, 2011: 539).[325] In her view, the Court's reasoning on this issue is too vague and lacking in legal certainty.[326]

Lady Justice Arden has criticised the ambiguity in the ECtHR's case law in the application of the prohibition of inhuman and degrading treatment (Article 3) to the use of handcuffs for prisoners receiving medical treatment (Arden, 2009: 24).[327] Richard Clayton QC (2001: 510-12) has been critical of the ECtHR's failure to formulate consistent principles when applying the doctrine of proportionality (see section 2.4).

Other commentators, however, have suggested that this perceived problem has been exaggerated.[328] Certainly, judicial views about the sufficiency of the clarity of the ECtHR case law may depend upon the judge's opinion of the nature of their task in interpreting the ECtHR's case law (see also Chapter 6).

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[323] This has been reflected in some national court judgments. See, for example, *N v Secretary of State for the Home Department* [2005] UKHL 316; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

[324] In the civil law field (as opposed to the criminal law), the Convention provides that there is a right to a fair hearing when national courts adjudicate on 'civil rights' (Article 6). Therefore, there must be something that is recognised as being a 'civil right' for the right to a fair hearing to come into play.

[325] Baroness Hale referred to the European Court's judgment in *Šilih v Slovenia*, No, 71463/01, 9.4.2009.

[326] See also the comments about the *Šilih* case made by Lord Phillips in: *Re McCaughey's Application for Judicial Review* [2011] UKSC 20; [2011] 2 W.L.R. 1279, at paras. 72-73. Lord Phillips did, however, say that despite the shortcomings of *Šilih*, 'I do not think that it is difficult to identify the point that matters for our purposes' (at para. 73).

[327] Commenting on the Court of Appeal judgment in *R (Faisovas) v Secretary of State for Justice* [2009] EWCA Civ 37 and the ECtHR decision in *Filiz Uyan v Turkey*, No. 7496/03, 8.1.2009.

[328] Murray Hunt, Interview, 19 December 2011.

Baroness Hale discusses the complexity of the task of interpretation, citing the case of *Osman v UK*.[329] This case established criteria for when the state has failed in its obligation to uphold the right to life under Article 2 of the Convention, while finding that there had not been such a violation on the particular facts of the case (section 5.3). Baroness Hale ventures that in *Osman*:

> Strasbourg produced quite a substantial extension of Article 2 into an operational duty to protect individuals in certain circumstances while finding no violation in that case ... Getting to grips with what [that duty] means in an actual case is very hard. Are there defined categories of case or is it a general principle? That's not easy to deduce from the case law but I wouldn't regard that as a criticism. I think what [the Strasbourg judges] are doing is finding certain principles, keeping their options open and then subjecting the individual case before them to quite intense analysis.[330]

Sir Nicolas Bratza acknowledges that criticisms about the clarity of the ECtHR's case law have some justification, but emphasises how the Strasbourg judges strive to achieve consistency:

> We cannot exclude the possibility of some inconsistency given our operating system. Every effort is made to ensure consistency. It is however inevitable that some cases will get under the net.[331]

Within the ECtHR itself, various means are used in order to ensure the clarity and consistency of the case law (see ECtHR, 2010; ECtHR, 2012c: 3). The Convention allows for the relinquishment of a case by a Chamber of the Court to the Grand Chamber in order to avoid inconsistencies with previous judgments (Article 30 of the ECHR).[332] Similarly, a Chamber judgment can be referred to the Grand Chamber (under Article 43), and this procedure can be used to avoid risks of discrepancy in the case law (ECtHR, 2010: 2) (see also section 2.4). Furthermore, one of the functions of the Bureau of the Court (comprising the President, Vice-Presidents and Section Presidents) is to facilitate co-ordination between the Court sections. In 2001, the ECtHR established the post of Juriconsult, whose role is to monitor the case law

[329] No. 23452/94 [GC], 28.10.1998.

[330] Baroness Hale, Interview, 11 January 2012.

[331] Sir Nicolas Bratza, Interview, 29 November 2011.

[332] The ECtHR is considering an amendment to Rule 72 of the Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case law (ECtHR, 2012c: para 16).

and accordingly promote its consistency. The Court's Conflict Resolutions Board (established in 2005) meets on an ad hoc basis, at the instigation of the President, in order to facilitate the resolution of case law conflicts (which may lead to an invitation to a Chamber to relinquish a case, or a proposal that a request for referral to the Grand Chamber be accepted). The five Section Registrars are also required to ensure consistency of the case law between Sections.[333]

The President of the ECtHR, Sir Nicolas Bratza (2011: 511) has emphasised how essential it is that the ECtHR's decisions should be clear and consistent:

> … while it is important that the Court's case law should evolve to deal with new factual and legal situations, it is equally important that the Court should show respect for precedent and recognise the vital need for consistency. It is difficult to overstate the importance of legal certainty if we as a Court expect, as we do, national courts to follow and apply our established case law and to do so without the fear that it may be overturned, departed from or simply ignored.

Bratza (2011: 511) considers that differences of views about matters such as clarity and consistency are part and parcel of the essential and ongoing dialogue between the Strasbourg Court and national courts:

> I believe that it is right and healthy that national courts should continue to feel free to criticise Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent…

6.8 The value of a dynamic approach: protection of the vulnerable

There has been a noticeable development in the extent of the application of positive obligations within the case law of the Court in recent years, the effect of which has been to provide increased human rights protection for some of the most vulnerable people in society. This section considers the value of taking a dynamic, evolutive approach to interpreting the Convention.

For example, victims of domestic violence have benefitted from more demanding requirements of authorities to protect the right to life (Article 2) and to protect a

[333] In 2008 the Court also established an 'Article 41 Sub-group' which led to the adoption in 2009 of (confidential) guidelines about the award of 'just satisfaction' under Article 41 of the Convention (ECtHR, 2010: 5-6).

person's physical integrity (Article 8).[334] The ECtHR has also applied the positive obligations inherent in Articles 3 and 8 of the Convention to require the enactment of criminal law provisions effectively punishing rape and their application in practice through effective investigation and prosecution.[335] The Court has strengthened the obligations that arise in investigating racist violence.[336] Furthermore, in the case of *Siliadin v France*, the Court acknowledged that domestic slavery persists in Europe and concerns thousands of people, the majority of whom are women (section 5.6).[337] Another recent example of the dynamic application of positive obligations is the judgment in *Rantsev v Cyprus and Russia*[338] which highlighted the serious problems in Cyprus (since the 1970s) involving young women, frequently from the former Soviet countries, being forced to work in the sex industry. The applicant's daughter, Oxana Rantseva, had died a few days after arriving in Cyprus on a 'cabaret-artiste' visa. The Court held that national laws must be adequate to ensure the practical and effective protection of the rights of victims, or potential victims, of trafficking. As well as criminal law provisions punishing traffickers, Article 4 (the prohibition of slavery and forced labour) also requires measures of control over businesses which are often used as a cover for human trafficking, and that immigration rules should address the encouragement, facilitation or tolerance of trafficking. In cross-border trafficking cases, states will be required to co-operate effectively with other states. Although the broad legislative framework in Cyprus was found to be acceptable, Article 4 was violated in *Rantsev* because of inadequacies in the immigration system which failed to provide practical and effective protection against trafficking and exploitation.

These sorts of developments have been warmly welcomed by Professor Christopher McCrudden (2011):

> What adopting a teleological approach to interpretation means in practice is that the Siliadins, [other victims]…obtain a legal remedy. The evolution of the concept of slavery shows the importance of judicial evolution of

[334] See, for example, *Kontrová v Slovakia,* No. 7510/04, 31.5.2007; *Bevacqua and S v Bulgaria*, No. 71127/01, 12.6.2008; *Branko Tomašic and others v Croatia*, No. 46598/06, 15.1.2009; *Opuz v Turkey,* No. 33401/02, 9.6.2009; *A v Croatia,* No. 55164/08, 14.10.2010 and *Hajduová v Slovakia,* No. 2660/03, 30.11.2010. See, also*, ES and others v Slovakia*, No. 8227/04, 15.9.2009 (Article 3).

[335] *MC v Bulgaria,* No. 39272/98, 4.12.2003.

[336] *Nachova and others v Bulgaria*, Nos. 43577/98 and 43579/98 [GC], 6.7.2005.

[337] *Siliadin v France*, No. 73316/01, 26.7.2005, para. 111 (applying Article 4 of the Convention - the prohibition of slavery and forced labour).

[338] No. 25965/04, 7.1.2010.

> legal concepts. It shows the importance of a teleological interpretation in practice. It is something we should be proud of.

A recent study by University College London (UCL) (Çali et al., 2011: 16) about the perceived legitimacy of the ECtHR found that amongst judges, politicians and lawyers (in five countries) who were interviewed, the most uniformly positive assessment concerned the Court's dynamic quality:

> The value of its transformative potential indicates that boldness and determination in judgments may add [to] rather than detract from the Court's overall legitimacy.

Murray Hunt, legal adviser to the Joint Committee on Human Rights, refers to the development of positive obligations - including procedural investigative obligations – as having had one of the biggest impacts. The Article 2 (right to life) case law is a 'good example of how decisions of the Court have reached down into the minutiae of how states conduct important functions like investigations…' (see also section 5.3).[339] For Baroness Hale (2011: 542), a particular concern is that:

> … the positive obligation to protect the vulnerable against rape and other attacks upon their right to respect for their bodily integrity should not be hindered or hampered by an unduly restrictive approach.

Professor Alan Miller, Chair of the Scottish Human Rights Commission (SHRC), comments that the evolving interpretation of Article 8 in terms of physical and psychological integrity, self-determination and personal autonomy, has been central to the SHRC's work to ensure the proper protection and treatment of vulnerable persons within the Scottish care system.[340]

Ben Emmerson QC (2011) argues that:

> The very reason we need human rights laws, and courts to enforce them, is precisely because society's most vulnerable, including unpopular minorities, are often unprotected by the ordinary democratic process.

The UCL study (Çali et al., 2011: 16) found a consensus amongst all its respondents that one aspect of the legitimacy of the Court is based on:

[339] Murray Hunt, Interview, 19 December 2011.

[340] Alan Miller, Interview, 10 January 2012.

> … a delicate balance between preserving the transformative quality of the Court and respecting the decisions with 'relevant and sufficient reasons' taken at the domestic level.

6.9 Conclusion

This chapter examined how the case law of the ECHR develops over time. It discussed a number of the most important principles which are applied in interpreting the Convention: that it is considered to be a 'living instrument'; that a dynamic and evolutive approach is adopted; that account is taken of the Convention's object and purpose; that there is a need for legal certainty; and that additional positive obligations may be implied into the Convention.

Some UK politicians and commentators have repeatedly criticised the ECtHR for taking what they regard as an overly expansive approach. This complaint is primarily based on the propositions that the Convention is being applied in ways that would not have been foreseen by those who drafted it, that the ECtHR has got its priorities wrong or that it is taking an over-activist approach which interferes unduly with decisions made by national bodies (notably parliaments).

This chapter demonstrates, however, that it has always been a fundamental principle that the Convention should be interpreted and applied by taking account of changes in society, in morals, and in laws, as well as technological innovations and scientific developments. As a consequence, the meaning of particular terms in the Convention will necessarily develop over time. This approach enables the ECtHR to take account of relevant developments and commonly accepted standards within Council of Europe states. It should also be noted that some of the criticism has been the result of misreporting and exaggeration of certain cases by some politicians, commentators and journalists.

Criticism has also focused on the perception that the Strasbourg Court risks becoming an appellate court of 'fourth instance'. However, the Court has made clear in its decisions and judgments that it is not its function to deal with errors of fact or law allegedly committed by national courts unless they may have violated rights guaranteed in the Convention.

In the UK, judges are used to applying an evolutive approach to the common law and in interpreting statutes. The President of the Supreme Court, Lord Phillips, sees the dynamic interpretation applied in Strasbourg and applied as part of the common law as being very similar.

Many experts acknowledge the necessity of the Convention case law evolving, but they also consider that there are limits to the ECtHR's dynamic approach. To define such limits requires a balance of approaches between legal certainty and flexibility.

There has been some criticism about the lack of clarity and consistency in some decisions of the ECtHR. The Court acknowledges these criticisms, whilst noting that they reflect in part the complexity of the task of interpreting the Convention at the supra-national level. The ECtHR has put in place a number of mechanisms to try to ensure the consistency of its case law.

Finally, there has been a development in recent years of positive Convention obligations, the effect of which has been to provide increased human rights protection for some of the most vulnerable people in society, including the victims of rape, domestic violence and human trafficking.

7. The relationship between the UK courts and Strasbourg

7.1 Introduction

This chapter examines in detail the relationship between the domestic courts in the United Kingdom and the European Court of Human Rights (ECtHR).

In the 1980s and 1990s, the ECtHR examined high profile and highly sensitive cases against the UK dealing with issues which included telephone-tapping,[341] marital rape,[342] freedom from self-incrimination[343] and blasphemy.[344] As explained in section 3.2, at this time, the rights and freedoms contained in the European Convention on Human Rights (ECHR) were not part of domestic law. Individuals claiming a violation of their rights under the ECHR had to take their complaint to the ECtHR in Strasbourg. In 1998, the Human Rights Act 1998 (HRA) gave direct effect to the rights and freedoms contained in the ECHR[345] (the Convention rights) in domestic law. Since October 2000, when the HRA came into force, individuals in the UK claiming violations of their human rights have been able to bring proceedings in the domestic courts.

This chapter first examines the approach of the UK courts to Strasbourg case law under the HRA and in particular the requirement (under section 2 of the HRA) that UK courts must 'take into account' any decision of the ECtHR or the Committee of Ministers.

It then analyses a variety of cases decided by the ECtHR against the UK. The impression is often given that the ECtHR interferes with domestic judicial decision-making and that in the great majority of cases it considers, it finds a violation of ECHR rights where the domestic courts have found none. This is simply incorrect. As explained in section 4.2, between 1966 and 2010, only three per cent of cases lodged against the UK were declared admissible. This chapter considers the three

[341] *Malone v UK,* No. 8691/79, 26.4.1985 (see also section 5.7).

[342] *CR v UK,* No. 20190/92, 22.11.1995 (see also section 6.5).

[343] *Saunders v UK*, No. 19187/91 [GC], 17.12.1996.

[344] *Wingrove v UK*, No. 17419/90, 25.11.1996.

[345] The HRA gives direct effect in domestic law to the rights set out in Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of the First Protocol, and Article 1 of Protocol 13, as read with ECHR Articles 16 to 18.

per cent of applications against the UK which result in a judgment of the ECtHR. It examines a selection of these judgments under the following categories:

- cases where Strasbourg has deferred to national authorities;
- cases where Strasbourg has adopted the reasoning and analysis of the UK courts;
- cases where Strasbourg and the UK courts have disagreed; and
- cases where the UK courts have consciously leapt ahead of Strasbourg.

The chapter concludes with a discussion of the development of 'judicial dialogue' between Strasbourg and the UK.

7.2 The approach of the UK courts to Strasbourg case law

To make the HRA an effective vehicle for giving effect to Convention rights in the UK, it was 'clearly necessary' that our domestic courts should, in general, be guided by relevant decisions of the ECtHR (Bingham, 2010: 573). But, unlike decisions of the Court of Justice of the European Union in Luxembourg which are binding on UK courts, the rule laid down in section 2 of the HRA is that UK courts must 'take into account' any decision of the ECtHR[346] or the Committee of Ministers[347] in so far as they are relevant in any case concerning a Convention right. This means that domestic courts are required to take account of **all** the jurisprudence of the ECtHR, not merely those cases brought against the United Kingdom, but are not bound by it.[348] Appendix 3 sets out sections 2, 3, 4 and 6 of the HRA.

During the parliamentary debate on section 2 of the HRA, the then Labour Government expressly rejected an amendment by the Conservative peer, Lord Kingsland, in the House of Lords to make the domestic courts 'bound by' the jurisprudence of the Strasbourg court. The then Lord Chancellor, Lord Irvine of Lairg, argued that it would be 'strange' to require domestic courts to be bound by all the decisions of the ECtHR when the UK is not bound in international law to follow the

[346] HRA, s.2(a), (b) and (c).

[347] HRA, s.2(d).

[348] This accords with the interpretative authority of the Strasbourg case law discussed further in section 9.7.

Court's judgments in non-UK cases. The intention was to allow the courts what Lord Irvine described as 'flexibility and discretion' (Klug and Wildbore, 2010: 623).

The interpretation of section 2 of the HRA by the domestic courts

Jack Straw MP, Home Secretary when the HRA was introduced, emphasises that the phraseology of section 2 was crafted with very great care:

> 'Take into account' is there for a reason. There is a requirement to explain but not to follow and that was Parliament's intention.[349]

The requirement on courts to take account of Strasbourg decisions has been intensively debated in the UK (e.g. Klug and Wildbore, 2010, 2011; Lewis, 2007; Masterman, 2007; Wicks, 2005). Klug and Wildbore have completed detailed analyses of the interpretation of HRA section 2 by domestic courts.[350]

Lord Bingham articulated the following proposition on the meaning of section 2 in a House of Lords case in 2004:

> The House [of Lords] is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow clear and constant jurisprudence of the Strasbourg court… This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court.

[349] Jack Straw MP, Interview, 10 January 2012.

[350] We acknowledge with thanks the detailed work completed by Professor Francesca Klug and Helen Wildbore of the Human Rights Futures Project, on the relationship between domestic case law under the HRA and the jurisprudence of the ECtHR for the purposes of this research project. Klug and Wildbore (2010) identify three broad approaches to the interpretation of HRA section 2 by the domestic courts, with recent developments suggesting the evolution of a fourth approach, as follows: (i) the mirror approach: domestic courts act as if they are bound by Strasbourg jurisprudence. This approach is adopted where there is clear, established Strasbourg case law or when domestic courts think there is or should be consensus or uniformity on the meaning of the ECHR across Europe; (ii) the dynamic approach: the domestic courts exceed Strasbourg either where the margin of appreciation applies or where there is no established Strasbourg jurisprudence in a particular issue beyond broad principles; (iii) the municipal approach: domestic courts consider Strasbourg jurisprudence but largely decline to follow it in a particular case, seeking instead to develop the domestic interpretation of Convention rights in specific circumstances; (iv) the hybrid approach: a new evolving approach involving a synthesis of (i) and (iii), which establishes clearer criteria for instances where Strasbourg jurisprudence will not be followed.

> From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law…[351]

This statement of principle has subsequently been affirmed,[352] and more carefully nuanced by Lord Neuberger who suggests:

> This court [the Supreme Court] is not bound to follow every decision of the European court… Of course, we should usually follow a clear and constant line of decisions by the European Court … But we are not actually bound to do so.[353]

In spite of this, sections of the media and some politicians have continued to suggest that domestic courts are bound by Strasbourg jurisprudence under HRA section 2. For example, Conservative MP Dominic Raab said that there was a 'serious flaw' in the HRA since it was 'importing the Strasbourg case law wholesale'.[354] In practice, domestic courts do apply their own interpretation and have sometimes made decisions that expressly divert from Strasbourg judgments in comparable cases.[355]

Lord Phillips, President of the Supreme Court, in evidence to the JCHR (JCHR, 2011a: 2), has brought some clarity to the debate:

> What Lord Bingham was talking about expressly was a settled line of Strasbourg jurisprudence; he was not suggesting that one would take an individual decision of one of the Chambers of Strasbourg and regard that as binding precedent in a way that an English court would regard a single decision of the Court of Appeal or the Supreme Court as binding precedent. If the wording 'take account' gives a message at all, it is that we are not bound by decisions of the Strasbourg court as binding precedent.

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[351] *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26, para. 20.

[352] For example, by Lord Hope in *HM Treasury v Ahmed* [2010] UKSC 2.

[353] *Pinnock v Manchester City Council* [2010] 3 WLR 1441, para. 48.

[354] Quoted in 'Britain can ignore Europe on human rights: top judge', *The Times,* 20 October 2011.

[355] For example, *R v Horncastle and others (Appellants)* [2009] UKSC 14, in which the Supreme Court expressly diverted from Strasbourg case law relating to the right to a fair trial, discussed in detail in 7.6.

In a speech in December 2011 directly responding to the vocal debate around the proper interpretation of section 2 of the HRA, Lord Irvine of Lairg (the Labour Lord Chancellor at the time the HRA was introduced) said (Irvine, 2011):

> 'Take account of' is not the same as 'follow', 'give effect to' or 'be bound by'. Parliament, if it had wished, could have used any of these formulations.
>
> It did not. The meaning of the provision is clear. The Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves.

As one of the architects of the HRA, Lord Irvine's speech is significant. Introducing the Human Rights Bill to Parliament, Lord Irvine (Irvine, 2011) stated that the HRA 'will allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe.' This was understood by the judges, as evidenced by the statement at the time of the late Lord Bingham:

> ... it seems to me highly desirable that we in the United Kingdom should help to mould the law by which we are governed in this area … British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make.[356]

Lord Irvine is clear that it is the constitutional duty of our judges to decide cases for themselves and to explain clearly to litigants, Parliament and the wider public why they are doing so. Within this framework, the role of Strasbourg case law is as follows (Irvine, 2011):

> … a recent and closely analogous decision of the Grand Chamber [of the ECtHR] should always be afforded great respect by our Courts. Such a judgment would inevitably be regarded as highly persuasive in interpreting the content of the Convention rights as a matter of domestic law. However, the existence of such a decision can never absolve the domestic Judge from the high constitutional responsibility incumbent upon him under [HRA] section 2. He must decide the case for himself and it is not open to him simply to acquiesce to Strasbourg.

[356] *Hansard*, HL Vol. 582, Col. 1245, 3 November 1997.

The remainder of this chapter considers the applications lodged against the UK which resulted in a judgment of the ECtHR under the categories set out in section 7.1.

7.3 Cases where Strasbourg has deferred to national authorities

This section examines cases where the Strasbourg Court has agreed with the conclusions of the UK domestic courts and/or has deferred to the domestic courts or Parliament.

Cases where Strasbourg has agreed with the UK courts

According to the President of the ECtHR, Sir Nicolas Bratza (2011: 507):

> … a survey of the most significant decisions and judgments of the Court in cases against the United Kingdom in the past three years reveals … [that] in the great majority of cases our Court followed the conclusions reached by the appeal courts in the three United Kingdom jurisdictions [England and Wales, Scotland and Northern Ireland].

A number of recent examples illustrate the point:

- The case of *Abu Hamza*,[357] where the ECtHR rejected radical preacher Abu Hamza's claim that his trial, at which he was convicted of soliciting to murder, inciting racial hatred and terrorism charges, was unfair. He claimed that a virulent media campaign against him and the events of 9/11 made it impossible for the jury to be impartial. The Strasbourg Court endorsed the conclusions of the Court of Appeal and rejected the case as inadmissible on the ground that it was manifestly ill founded.[358]

- The *Donaldson* case,[359] concerning the ban in Northern Irish prisoners wearing Easter lilies outside their cells.[360] The ECtHR endorsed the conclusions of the

[357] *Mustafa (Abu Hamza) v UK (No.1),* No. 31411/07, 18.1.2011.

[358] A case will be declared manifestly ill founded under Article 35 of the ECHR where the Court is unable to envisage a violation of a Convention right.

[359] *Donaldson v UK*, No.56975/09, 25.1.2011.

> Court of Appeal and found the reasons adduced by the state to justify the interference with Mr Donaldson's Article 10 rights relevant and sufficient and that the interference complained of was proportionate to the legitimate aims pursued. Accordingly, the ECtHR found the complaint under ECHR Article 10 to be manifestly ill founded.

- The *Ali* case,[361] concerning the expulsion of a teenage boy from school during a police investigation into arson. The ECtHR agreed with the House of Lords that the exclusion of the pupil was a proportionate measure and did not interfere with the substance of the right to education. Accordingly, the ECtHR found that there was no violation of Article 2 of ECHR Protocol No. 1.

Baroness Hale suggests that the impact of the HRA cannot be over-estimated in such cases where the ECtHR endorses the decisions of the domestic courts:

> I think Strasbourg would say that they have enormously welcomed the fact that human rights issues can now be addressed directly by the UK courts. It means that when a case comes to them, they have the benefit of our views about whether or not there's been a breach.[362]

Cases where Strasbourg has deferred to the UK courts or Parliament

There are two main areas where the ECtHR has explicitly acknowledged that it will show particular deference to the domestic authorities: first, in cases raising contentious moral or ethical issues on which there is no established European consensus; and second, where the national authorities are seeking to balance competing ECHR rights. This section discusses both categories and refers to cases relating to the UK where the ECtHR has shown deference to the decisions of the UK Parliament.

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[360] The Northern Ireland Prison Service Standing Orders state that prisoners are not permitted to wear emblems outside their cells or display emblems in their cells. In HMP Maghaberry, an exception is made with respect to the wearing of shamrock on St Patrick's Day and the wearing of poppies on Remembrance Day as these emblems are deemed to be 'non-political and non-sectarian' if worn at the appropriate time. On Easter Sunday, 23 March 2008, Mr Donaldson affixed an Easter lily to his outer clothing in commemoration of the Irish republican combatants who died during, or were executed after, the 1916 Easter Rising. A prison officer asked him to remove the Easter lily and when he refused he was charged with disobeying a lawful order under the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. The applicant was subsequently found guilty of disobeying a lawful order.

[361] *Ali v UK*, No. 40385/06, 11.1.2011.

[362] Baroness Hale, Interview, 11 January 2012.

Contentious issues where there is no European consensus

As outlined in sections 2.4 and 9.2, it is primarily the duty of states[363] - through their governments, legislatures and courts - to 'secure to everyone within their jurisdiction the rights and freedoms' set out in the ECHR. That means that the Convention leaves to each member state, in the first place, the task of upholding the rights and freedoms it sets out. The Strasbourg court recognises through the concept of the 'margin of appreciation' that national authorities are in principle in a better position than the Court to assess the necessity of any restriction on a Convention right. Further, the breadth of the state's margin of appreciation will vary depending upon the context but states have a wide margin of appreciation in relation to contentious social issues on which there is no European consensus.

An example of a UK case where the Court has allowed a wide margin of appreciation is *Friend and others v UK*.[364] In this case, the ECtHR concurred with domestic court judgments that the ban on hunting with hounds was not in breach of anyone's right to private life, association or peaceful assembly, and that any interference with property rights was justified on grounds of public morals. The ECtHR agreed that it was a matter for the UK Parliament to decide.

Balancing competing rights

In a number of recent high profile cases, the UK courts have been concerned with striking a balance between conflicting rights, such as whether a newspaper's right to freedom of expression under Article 10 outweighs an individual's right to respect for private life under Article 8. In many of these cases, it may be difficult to find the 'right answer'. In such cases where a balance must be sought between competing ECHR rights, the President of the ECtHR has made it clear that:

> ... the Strasbourg Court should be particularly cautious about interfering with the way the balance is struck by national courts where those courts have sought to apply the relevant Convention principles and have struck a balance which is on its face reasonable and not arbitrary.

Sir Nicolas Bratza identifies *MGN Limited v UK*[365] as a good example of this approach (see also section 5.8). This case concerned the publication by *The Daily Mirror* of a series of articles (including a front-page story with accompanying

[363] Under ECHR Article 1.

[364] Nos. 16072/06 and 27809/08, 24.11.2009.

[365] *MGN Limited v UK*, No. 39401/04, 18.1.2011.

photographs) about Naomi Campbell leaving a Narcotics Anonymous meeting. The publisher of the newspaper brought the case to the ECtHR alleging two violations of Article 10 (freedom of expression). It also complained about being required to pay Naomi Campbell's legal costs, which totalled over £1m and included substantial success fees for her lawyers (see section 5.8 above). The ECtHR observed that the majority of the members of the House of Lords recorded the core Convention principles and case law relevant to the case. In particular, it underlined in some detail the particular role of the press in a democratic society and, more especially, the protection to be accorded to journalists and the importance of publishing matters of public interest. In addition, the Court noted:

> … the majority [of the House of Lords] recorded the need to balance the protection accorded under Articles 8 and 10 so that any infringement of the applicant's Article 10 rights with the aim of protecting Ms Campbell's privacy rights had to be no more than was necessary, neither Article having a pre-eminence over the other….[366]

Against this background, the Court concluded that, having regard to the margin of appreciation accorded to decisions of national courts in this context, the Court would require strong reasons to substitute its view for that of the final decision of the House of Lords:

> ... the Court does not find any reason, let alone a strong reason, to substitute its view for that of the final decision of the House of Lords… In such circumstances, the Court considers that the finding by the House of Lords that the applicant had acted in breach of confidence did not violate Article 10 of the Convention.[367]

7.4 Cases where Strasbourg has adopted the reasoning of the UK courts

This section analyses cases where the ECtHR has adopted the reasoning and/or analysis of the UK courts in its consideration of a complaint against the UK and concluded that there has been no human rights violation.

The HRA has had a profound influence on the way in which the UK courts have analysed human rights arguments. Sir John Laws, Court of Appeal judge, suggests that since the HRA has come into force, UK judges have given carefully analysed judgments on human rights issues which have been given due consideration by the

[366] *MGN Limited v UK*, para. 145.

[367] *MGN Limited v UK*, para. 156.

Strasbourg Court itself. He suggests this provides an important opportunity to influence the ECtHR judges and the development of Strasbourg case law.[368] Sir Nicolas Bratza endorses this assessment and has commented on a number of occasions that since the coming into effect of the HRA, the Strasbourg Court has been respectful of UK court decisions because of the high quality of the judgments, which have greatly facilitated the ECtHR's task of adjudication (Bratza, 2011: 507).[369]

A recent high profile case in the UK demonstrates the point. *Evans v UK*[370] concerned the domestic law relating to in-vitro fertilisation (IVF) (the Human Fertilisation and Embryology Act 1990). The 1990 Act required couples embarking on IVF treatment to be in agreement about the treatment and permitted either person to withdraw from the treatment at any time before the embryo was transferred into the woman. Ms Evans complained that the domestic law, which permitted her former partner effectively to withdraw his consent to the storage and use of her embryos created jointly by them, violated her rights under Article 2 (right to life), Article 8 (right to respect for private and family life) and Article 14 (prohibition against discrimination).

The Court of Appeal held that the clear policy of the 1990 Act was to ensure the continuing consent of both parties for the commencement of treatment to the point of implantation of the embryo, and that 'the court should be extremely slow to recognise or to create a principle of waiver that would conflict with the parliamentary scheme.' Lady Justice Arden stated that, '[a]s this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for Parliament…'[371]

Having been unsuccessful in the UK courts, Ms Evans took her case to Strasbourg and ultimately to the Grand Chamber. The ECtHR acknowledged that the case concerned Ms Evans' right to respect for her private life.[372] The Grand Chamber considered that the broad margin of appreciation afforded to such cases, which raised sensitive moral and ethical issues and on which there is no European consensus, must in principle extend both to the state's decision whether or not to enact legislation governing the use of IVF treatment and, having intervened, to the

[368] Sir John Laws, Interview, 16 January 2012.

[369] See also the article by Sir Nicolas Bratza in *The Independent*, 24 January 2012.

[370] No. 6339/05, 10.4.2007.

[371] *Evans v UK*, No. 6339/05 [GC], 10.4.2007, para. 26.

[372] *Evans v UK*, para. 71.

detailed rules it lays down in order to achieve a balance between the competing public and private interests.

The Grand Chamber made specific reference to the fact that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate.[373] The Court recognised that it would have been possible for Parliament to regulate the situation differently. However, it noted that the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it. The Grand Chamber concluded that, given the lack of European consensus on this point, the fact that the rules in the legislation were clear and that they struck a fair balance between the competing interests, there was no violation of Article 8 of the ECHR.[374]

7.5 Cases where Strasbourg and the UK courts have disagreed

In the past year, there has been increased media attention given to cases where the Strasbourg court and the UK courts have (at least appeared to) come into conflict. This section considers cases where Strasbourg has disagreed with the UK courts and cases where the UK courts have disagreed with, or declined to follow, Strasbourg jurisprudence.

Cases where Strasbourg has disagreed with the UK courts

As we have noted already, differences between the UK courts and Strasbourg are uncommon. Referencing, by way of example, the case of *S and Marper v UK*[375] (concerning police powers to retain fingerprints, cellular samples and DNA profiles of all persons: see below), Michael O'Boyle, Deputy Registrar of the ECtHR comments:

> Differences between the UK Supreme Court and the ECtHR are rare. Consider *Marper*. This case demonstrated a very different approach between the national court and the regional court around privacy rights. But these disagreements are not very frequent.[376]

[373] *Evans v UK*, para. 86.

[374] *Evans v UK*, paras. 91-92.

[375] *S and Marper v UK*, No. 30562/04 [GC], 4.12.2008.

[376] Michael O'Boyle, Interview, 29 November 2011.

Cases concerning prisoner voting rights

The most well publicised Strasbourg case in recent times is the prisoners' voting rights case - *Hirst v UK*[377] - where the ECtHR held that a blanket ban on the exercise of the right to vote by all prisoners serving sentences of imprisonment under section 3 of the Representation of the People Act 1983[378] was incompatible with the right to free elections guaranteed by Article 3 of Protocol 1 of the ECHR (see also section 8.3). It is important to point out that it was the blanket nature of the legislative ban that the ECtHR found problematic, not the ban as such. This point has not always been made clear in press reports on the case.[379] The tenor of the parliamentary debate on the issue has also been criticised.[380]

The effect of the ECtHR's judgment in *Hirst* was to oblige the UK to adopt domestic legislation which distinguished between different categories of prisoners. In 2010, in *Greens and MT v UK*, [381] a case highlighting the continued failure of the UK to amend the legislation imposing a blanket ban on the right to vote of convicted prisoners, the ECtHR (following its five-year-old Grand Chamber decision in *Hirst (No. 2)*) found a violation of Article 3 of Protocol 1. It explicitly required the UK to introduce legislative proposals to amend section 3 of the 1983 Act and, if appropriate, section 8 of the European Parliamentary Elections Act 2002, within six months of the date upon which the judgment became final.[382]

The ECtHR subsequently granted an extension of the six month time limit (which was due to expire on 11 October 2011) as a result of the Grand Chamber hearing of *Scoppola v Italy (No. 3)*[383] in November 2011, which raised analogous legal issues

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[377] *Hirst v UK (No.2)*, No. 74025/01 [GC], 6.10.2005.

[378] Section 3 of the Representation of the People Act 1983 imposes a blanket restriction on all convicted prisoners in detention irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.

[379] For example, 'MPs begin historic debate over whether to take a stand against Europe and overturn ruling that prisoners must have the vote', *Mail Online*, 18 February 2011.

[380] Michael O'Boyle, Interview, 29 November 2011; Sir Nicolas Bratza, Interview, 29 November 2011.

[381] *Greens and MT v UK*, Nos. 60041/08 and 60054/08, 23.11.2010.

[382] In *Greens and MT*, the ECtHR applied its 'pilot judgment' procedure which it developed as a means of dealing with large groups of identical cases that derive from structural or systemic problems. The Court will identify the dysfunction under national law that is at the root of the violation and give clear indications to the government as to how it can eliminate this dysfunction (Leach et al., 2010).

[383] No. 126/05, 18.1.2011.

as those in *Hirst* and in *Greens and MT*. The UK Government intervened in the hearing and was granted an extension of six months from the date of the *Scoppola* judgment.

An intense debate was generated by this case. Michael O'Boyle, Deputy Registrar of the ECtHR (O'Boyle, 2011: 1862-63) has stated that:

> The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in 2011… Over the years certain governments have discovered that it is electorally popular to criticise international courts such as the Strasbourg court: they are easy targets, particularly because they tend, like all courts, not to answer back… The issue of prisoners' voting rights was transformed into a national interrogation in the UK about the legitimacy of the ECtHR. The *Daily Mail* led the charge.[384]

Case concerning DNA retention

Interestingly, the Strasbourg Court conducted a similar analysis of the blanket nature of the law in *S and Marper v UK*.[385] Here, Strasbourg found that the UK power to retain fingerprints, cellular samples and DNA profiles of all persons who had been acquitted of offences as well as those who had been convicted of offences was 'blanket and indiscriminate' (section 5.7). A majority in the House of Lords concluded that the indefinite retention of DNA samples obtained from those suspected of committing a criminal offence did not even engage Article 8 (right to respect for private life).[386] The ECtHR reached a different conclusion, making specific reference to domestic legislation in other states, including Scotland, which operated a more proportionate scheme. This decision suffered nothing like the opprobrium directed at the *Hirst* judgment. Indeed, Sir Nicolas Bratza comments that the judgment was 'widely applauded in British political and legal circles'.[387] As discussed in section 5.7, in response to the ECtHR judgment, the UK Government is introducing a more proportionate regime for DNA retention modelled on the Scottish scheme. These changes are contained in the Protection of Freedoms Bill.

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[384] Citing *Daily Mail* articles of 5 February 2011, 'The European Human Rights judges [are] wrecking British law' and 7 February 2011, 'European Court of Human Rights is out of control - we must pull out'.

[385] *S and Marper v UK*, No. 30562/04 [GC], 4.12.2008.

[386] *R (S and Marper) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196.

[387] Sir Nicolas Bratza, 'Britain should be defending European justice, not attacking it', *The Independent*, 24 January 2012.

Case concerning the use of evidence obtained by torture

Another recent decision which has attracted a huge amount of media interest is *Othman (Abu Qatada) v UK*.[388] In this case, the ECtHR overturned the decision of the House of Lords, which had itself overruled the Court of Appeal. In turn, the Court of Appeal had overruled the Special Immigration Appeals Commission (SIAC). In summary, the Court of Appeal and the ECtHR ruled in Abu Qatada's favour; SIAC and the House of Lords ruled against him (see also section 5.4).

Othman (Abu Qatada) was arrested in the UK on 23 October 2002. He was taken into detention under the Anti-terrorism, Crime and Security Act 2001. When the 2001 Act was repealed in March 2005, Othman was released on bail and made subject to a control order under the Prevention of Terrorism Act 2005. As commentators have noted,[389] it is often forgotten that Othman has never been prosecuted under criminal or anti-terrorism laws in the UK.

On 10 August 2005, a memorandum of understanding was signed between the UK and Jordan. That memorandum set out a series of assurances of compliance with international human rights standards, which would be adhered to when someone was returned to one state from the other. On 11 August 2005, the Secretary of State served the applicant with a notice of intention to deport. The Secretary of State certified that the decision to deport the applicant was taken in the interests of national security. Othman appealed against that decision. He had been convicted in Jordan, in his absence, of involvement in two terrorist conspiracies in 1999 and 2000. It was alleged by the Jordanian authorities that Othman had sent encouragement from the UK to his followers in Jordan and that this had incited them to plant the bombs. Othman claimed that, if deported, he would be retried, which would put him at risk of torture, lengthy pre-trial detention and a grossly unfair trial based on evidence obtained by the torture of his co-defendants. Othman alleged, in particular, that he would be at real risk of ill-treatment contrary to Article 3 of the Convention, and a flagrant denial of justice, contrary to Article 6 of the Convention, if he were deported to Jordan.

SIAC dismissed his appeal, holding in particular that Othman would be protected against torture and ill-treatment by the agreement negotiated between the UK and Jordan, which set out a detailed series of assurances. SIAC also found that the retrial would not be in total denial of his right to a fair trial. The Court of Appeal partially

[388] No. 8139/09, 17.1.2012.

[389] See, for example, Richard Norton-Taylor, 'Why is Abu Qatada not on trial?', *The Guardian*, 14 February 2012.

granted Othman's appeal.[390] It found that there was a risk that torture evidence would be used against him if he were returned to Jordan and that this would violate the international prohibition on torture and would result in a flagrant denial of justice in breach of Article 6 of the ECHR. On 18 February 2009, the House of Lords upheld SIAC's findings.[391] They found that the diplomatic assurances would protect Othman from being tortured. They also found that the risk that evidence obtained by torture would be used in the criminal proceedings in Jordan would not amount to a flagrant denial of justice.

Consideration of Article 3 in Othman

The ECtHR noted, in accordance with its well-established case law, that Othman could not be deported to Jordan if there were a real risk that he would be tortured or subjected to inhuman or degrading treatment. However, the Court decided that the diplomatic assurances obtained by the UK Government from the Jordanian Government were sufficient to protect Othman. It found that the agreement between the two Governments was specific and comprehensive. The assurances were given in good faith by a Government whose bilateral relations with the United Kingdom had, historically, been strong. In addition, the assurances would be monitored by an independent human rights organisation in Jordan, which would have full access to Othman in prison. There would therefore be no risk of ill-treatment, and no violation of Article 3, if Othman were deported to Jordan.

Consideration of Article 6 in Othman

As regards Article 6 of the Convention, however, the ECtHR agreed with the Court of Appeal that the use of evidence obtained by torture during a criminal trial would amount to a 'flagrant denial of justice'. Allowing a criminal court to rely on evidence obtained by torture would legitimise the torture of witnesses and suspects pre-trial. The ECtHR referred to Lord Bingham's observation in *A and others v Secretary of State for the Home Department (No. 2)*,[392] that torture evidence is excluded because it is 'unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice'.[393] Citing the Grand Chamber judgment of judgment in *Gäfgen v Germany*,[394] the ECtHR underlined that there is a crucial difference between a

[390] *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290.

[391] [2009] UKHL 10.

[392] [2005] UKHL 71, para. 52.

[393] *Othman (Abu Qatada) v UK*, No. 8139/09, 17.1.2012, para. 264.

[394] No. 22978/05 [GC], 1.6.2010, paras. 165-67.

breach of Article 6 because of the admission of torture evidence and breaches of Article 6 that are based simply on defects in the trial process or in the composition of the trial court.[395]

The Court found that torture was widespread in Jordan, as was the use of 'torture evidence' by the Jordanian courts. The Court also found that, in relation to each of the two terrorist conspiracies charged against Othman, the evidence of his involvement had been obtained by torturing one of his co-defendants. When those two co-defendants stood trial, the Jordanian courts had not taken any action in relation to their complaints of torture. The Court agreed with SIAC that there was a high probability that the incriminating evidence would be admitted at Othman's retrial and that it would be of considerable, perhaps decisive, importance. In the absence of any assurance by Jordan that the torture evidence would not be used against Othman, the Court therefore concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.

There has been intense media and public reaction to this decision.[396] The ECtHR's judgment has been reported as a landmark decision, expanding the level of protection for terrorist suspects resisting deportation. However, the 'flagrant denial of justice' test discussed by the ECtHR in the case has been recognised since 1989 in *Soering v UK*,[397] and subsequently reaffirmed in *Mamatkulov and Askarov v Turkey*[398] in 2005 and in *Al-Saadoon & Mufdhi v UK*[399] in 2010. Nevertheless, the *Othman* case is the first time that the ECtHR has found that this principle would be breached.

The ECtHR's decision is also entirely consistent with international law, which has declared its unequivocal opposition to the admission of torture evidence. There are 149 states parties to the United Nations Convention Against Torture (UNCAT), including all member states of the Council of Europe. Article 15 of UNCAT prohibits, in virtually absolute terms, the admission of torture evidence. It imposes a clear

[395] *Othman (Abu Qatada) v UK*, para. 265.

[396] For example Simon Jenkins argues that the 'role [of the ECtHR] in helping [Othman] avoid deportation is otiose... the court, frantic to administer Eurosceptic Britain a bloody nose, conflates opposition to torture with article 6 on getting a fair trial ... The [ECtHR] is bogged down in empire-building and is a mess', *The Guardian*, 7 February 2012.

[397] No. 14038/88, 7.7.1989.

[398] Nos. 46827/99 and 46951/99 [GC], 4.2.2005.

[399] No. 61498/08, 2.3.2010.

obligation on states and has been interpreted as applying to any proceedings, including, for instance, extradition proceedings.[400]

Cases where the UK courts have disagreed with, or declined to follow, Strasbourg

Case concerning use of hearsay evidence in criminal prosecutions

The most high profile recent example where the UK courts have declared their disapproval of the ECtHR's case law and its application within the UK context is the Supreme Court's judgment in *Horncastle*,[401] in which the Chamber decision of the ECtHR in *Al-Khawaja and Tahery v UK,*[402] was sharply criticised. The case concerned the use of hearsay evidence in criminal prosecutions, in particular, whether a conviction based solely on the statement of an absent witness would automatically prevent a fair trial and result in a breach of Article 6(1) of the ECHR. Mr Al-Khawaja alleged that his trial for indecent assault had been unfair because one of the two women who made complaints against him died before the trial and her statement to the police was read to the jury. Mr Tahery alleged that his trial had been unfair because the statement of one witness, who feared attending trial, was read to the jury.[403]

The Court of Appeal referred to the manner in which the Criminal Justice Act 2003 worked in practice and concluded that, provided its provisions were observed, there would be no breach of Article 6 of the ECHR if a conviction was based solely or decisively on hearsay evidence. The Court of Appeal did not, therefore, share the doubt expressed in *Al-Khawaja* as to whether there could be any counterbalancing factors sufficient to justify the introduction of an untested statement which was the sole or decisive basis for a conviction.

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[400] *Othman (Abu Qatada) v UK*, para. 266.

[401] *R v Horncastle and others (Appellants)* [2009] UKSC 14; *Al-Khawaja and Tahery v UK*, Nos. 26766/05 and 22228/06, 20.1.2009; and *Al-Khawaja and Tahery v UK*, Nos. 26766/05 and 22228/06 [Gc], 15.12.2011. The *Horncastle* case provides a key example of the domestic courts taking account of Strasbourg decisions (pursuant to HRA s.2) and then reaching their own conclusions.

[402] Nos. 26766/05 and 22228/06, 20.1.2009.

[403] The principal issue raised by the appeals was whether a conviction based 'solely or to a decisive extent' on the statement of a witness whom the defendant has had no chance of cross-examining necessarily infringes the defendant's right to a fair trial under ECHR Articles 6(1) and 6(3)(d).

The House of Lords endorsed the Court of Appeal's decision, stating that the jurisprudence of the Strasbourg Court in relation to Article 6(3)(d) had developed largely in cases relating to civil law rather than common law jurisdictions and this was particularly true of the 'sole or decisive' rule. The House of Lords also suggested that the Strasbourg Court had not given detailed consideration to the English law on admissibility of evidence, and the changes made to that law intended to ensure that English law complies with the requirements of Article 6(1) and (3)(d).[404] In those circumstances, the House of Lords decided that it would not be right to hold that the 'sole or decisive' test should have been applied rather than the provisions of the Criminal Justice Act 2003 Act, interpreted in accordance with their natural meaning, on the grounds that the:

> ... provisions [of the 2003 Act] strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason.[405]

The ECtHR Chamber judgment in *Al-Khawaja* in 2009 disagreed with the House of Lords and found a violation of Article 6(1) in conjunction with Article 6(3)(d) in both cases. Following a request by the UK Government, the *Al-Khawaja and Tahery* case was referred to the Grand Chamber of the ECtHR, which published its judgment on 15 December 2011.[406] The judgment carefully examined the objections of the UK to the ECtHR case law establishing the 'sole or decisive' rule**,** which provides that a conviction based solely or to a decisive extent on evidence of an absent witness, would be unfair (paras. 129-47). As a result of that examination, the Grand Chamber overturned the Chamber decision and held that where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence would not automatically result in a breach of Article 6(1).

In his concurring judgment, Sir Nicolas Bratza, President of the ECtHR, reflected on the willingness of the ECtHR to reconsider the core question of principle which arose in this case:

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[404] *R v Horncastle and others (Appellants)* [2009] UKSC 14, para. 107.

[405] *R v Horncastle and others (Appellants)*, para. 108.

[406] *Al-Khawaja and Tahery v UK*, Nos. 26766/05 and 22228/06 [GC], 15.12.2011.

> The judgment of the Grand Chamber … not only takes account of the views of the Supreme Court… but re-examines the safeguards of the [Criminal Justice Act 2003]… which are designed to ensure the fairness of a criminal trial where hearsay evidence is admitted… I share the view of the majority that to apply the rule inflexibly, ignoring the specificities of the particular legal system concerned, would run counter to the traditional way the Court has… approached the issue of the overall fairness of criminal proceedings.[407]

> Baroness Hale comments that the ECtHR in the *Al-Khawaja* Grand Chamber judgment did 'a remarkably clever job' and suggests that:

> ... it shows what a difficult tightrope they [the ECtHR judges] have to walk. The last thing they wanted to do was tell certain jurisdictions that they can act on unchallenged evidence ... but at the same time they did want to say that there may be circumstances in which it could be fair.[408]

Baroness Hale makes the point that it would only be in a rare case - as *Horncastle* was - where, even if an individual was successful at Strasbourg, the Supreme Court would not declare domestic legislation to be incompatible.[409]

Case concerning media neutrality prior to elections

Another example is *R (Animal Defenders) v Secretary of State for Culture, Media and Sport*,[410] where the House of Lords declined to follow a judgment of the ECtHR, which would have required the abandonment of the UK's strict rules on media neutrality prior to elections. This is a clear example of the UK courts taking account of Strasbourg jurisprudence, but not being bound by it. Lord Bingham expressly recognises in his judgment that the obligation under section 2 of the HRA is to take into account any Strasbourg decision, not to follow it as a strictly binding precedent. Given the 'importance of the case to the functioning of our democracy', Lord Bingham declared that the judgement of Parliament should be given great weight, for three main reasons:

[407] *Al-Khawaja and Tahery v UK* [GC], para. 3.

[408] Baroness Hale, Interview, 11 January 2012.

[409] Baroness Hale, Interview, 11 January 2012.

[410] [2008] 1 AC 1312.

> First, it is reasonable to expect that our democratically elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy… Second, Parliament has resolved, uniquely since the [HRA] came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe Article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the HRA. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance that it attaches to maintenance of this prohibition. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules … A general rule means that a line must be drawn, and it is for Parliament to decide where…[411]

7.6 Cases where the UK courts have consciously leapt ahead of Strasbourg

This section considers domestic cases where the UK courts have moved beyond Strasbourg jurisprudence in one of two circumstances: where Strasbourg case law is inconsistent or equivocal in its approach or where Strasbourg has not yet considered the particular human rights issue which is before the domestic courts. As Lord Irvine (2011) has emphasised:

> … the realities of life and litigation mean that our domestic Courts are inevitably called upon to consider issues in circumstances and contexts where the Strasbourg case-law will not provide any definitive answer or assistance. Sitting on our hands in such a case is most certainly not what Parliament intended.

Where Strasbourg jurisprudence is inconsistent or equivocal

An example of this category is *Re G (Adoption)*.[412] In this case, the House of Lords held that the Northern Ireland Assembly's blanket ban on homosexual couples jointly adopting, even where it would be in the best interests of the child for them to be

[411] *R (Animal Defenders) v Secretary of State for Culture, Media and Sport,* para. 33.

[412] *Re G (A Child) (Adoption: Unmarried couples)* [2008] UKHL 38.

allowed to do so, was incompatible with the claimants' Article 8 and Article 14 rights. The ECtHR case law was, at that time, equivocal.[413]

In *R (Limbuela and others) v Secretary of State for the Home Department*,[414] the House of Lords held that Article 3 must be interpreted to impose an obligation prohibiting the Government from reducing asylum seekers to a state of destitution. This was not a conclusion that could be said to derive clear support from the Strasbourg case law at the time.

In *Rabone and another v Pennine Care NHS Foundation Trust*,[415] the Supreme Court extended the obligations that Article 2 (the right to life) places on the state and its officials. The Supreme Court held that - in the specific circumstances of the case - an NHS Trust had violated the positive duty that it had, under Article 2, to protect a voluntary patient from the risk of suicide. The Justices in *Rabone* recognised that their decision was going beyond the existing Strasbourg jurisprudence, which has not considered whether the operational duty on the state to protect specific individuals from threats to their life, including suicide, could extend to a voluntarily detained mental health patient.[416]

Where the Strasbourg Court has not considered the issue

Case concerning tenancy succession rights for same-sex couples

Baroness Hale, a Justice of the Supreme Court, explains that in some cases, higher courts in the UK must make a 'best guess' as to what the ECtHR would do in a manner which is consistent with established principles of Strasbourg case law. She suggests that one of the best examples of such a case is *Ghaidan v Godin-Mendoza*.[417] The case concerned succession rights granted under the Rent Act

[413] In *Fretté v France,* No. 36515/97, 26.2.2002, the Court decided by a majority of 4 to 3 that it was within the margin of appreciation allowed to member states to discriminate against homosexuals as applicants to be adoptive parents. However, in a further case, *EB v France*, No. 43546/02 [GC], 22.1.2008 (which also concerned an adoption application by a homosexual, this time a woman), the ECtHR concluded that the difference in treatment was based substantially upon her sexual orientation and held that this constituted discrimination contrary to Article 14 of the ECHR.

[414] [2006] 1 AC 396.

[415] [2012] UKSC 2.

[416] Paras. 33-34.

[417] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

1977.[418] The legislation drew a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple became a statutory tenant by succession; the survivor of a homosexual couple did not. Mr Godin-Mendoza claimed that this difference in treatment infringed Article 14 of the ECHR (prohibition against discrimination) read in conjunction with Article 8 (right to respect for private and family life). Unless justified, a distinction founded on grounds such as sex or sexual orientation infringes the Convention right embodied in Article 14, as read with Article 8.

In April 1983, Mr Wallwyn-James was granted a residential tenancy of a basement flat in London. Until his death in January 2001, he lived there in a stable and monogamous homosexual relationship with Mr Godin-Mendoza. After the death of Mr Wallwyn-James, the landlord, Mr Ghaidan, claimed possession of the flat. The judge at first instance held that Mr Godin-Mendoza did not succeed to the tenancy of the flat as the surviving spouse of Mr Wallwyn-James within the meaning of paragraph 2 of Schedule 1 to the Rent Act 1977, but that he did become entitled to an assured tenancy of the flat by succession as a member of the original tenant's 'family' under paragraph 3(1) of that Schedule. Mr Godin-Mendoza's appeal was allowed.[419] The Court of Appeal held that Mr Godin-Mendoza was entitled to succeed to a tenancy of the flat as a statutory tenant.[420] In this case, the Court of Appeal correctly anticipated Strasbourg's later decision in *Karner v Austria*[421] so by the time the case was heard by the House of Lords, as Baroness Hale puts it, 'we weren't moving ahead of Strasbourg but deciding to the same effect'.[422]

Cases concerning access to a lawyer prior to police questioning

Lord Kerr develops this theme in his dissenting opinion in *Ambrose v Harris* (Procurator Fiscal) and two related cases referred to the Supreme Court by the

[418] Rent Act 1977, Schedule 1, para. 2.

[419] *Mendoza v Ghaidan* [2002] EWCA Civ 1533.

[420] On the ground that the application of HRA section 3 to paragraph 2 had the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.

[421] No. 40016/98, 24.7.2003.

[422] Baroness Hale, Interview, 11 January 2012.

Scottish Court of Appeal.[423] The cases arose following the decision of *Cadder v HM Advocate*,[424] where the Supreme Court held, having regard to the decision of the ECtHR in *Salduz v Turkey*,[425] that the State's reliance on admissions made by an accused who had no access to a lawyer while he was being questioned as a detainee at a police station was a violation of his rights under Article 6(3)(c), read with Article 6(1) of the ECHR. The issues in *Ambrose* and the related cases[426] before the Supreme Court concerned whether the right of access to a lawyer applies only to questioning which takes place when the person has been taken into police custody; and, if the rule applies at some earlier stage, from what moment does it apply. The Supreme Court held, by a majority of four to one, in two of the cases,[427] that reliance at the trial on the evidence that was obtained in response to police questioning without having had access to legal advice was not a breach of Article 6. It decided in the third case[428] that it was incompatible with Article 6.

Lord Kerr in his dissenting judgment made the following comments about the UK courts' relationship with Strasbourg:

> It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR.[429]

[423] *Ambrose v Harris* (Procurator Fiscal, Oban) (Scotland); *Her Majesty's Advocate v G* (Scotland); *Her Majesty's Advocate v M* (Scotland) [2011] UKSC 43: References from the Appeal Court of the High Court of Justiciary, at the request of the Lord Advocate [2011] UKSC 43.

[424] [2010] UKSC 43.

[425] No. 36391/02 [GC], 27.11.2008.

[426] *Her Majesty's Advocate v G* (Scotland) and *Her Majesty's Advocate v M* (Scotland).

[427] *Ambrose v Harris* (Procurator Fiscal, Oban) (Scotland); *Her Majesty's Advocate v M* (Scotland).

[428] *Her Majesty's Advocate v G* (Scotland).

[429] *Ambrose v Harris* (Procurator Fiscal, Oban) (Scotland); *Her Majesty's Advocate v G* (Scotland); *Her Majesty's Advocate v M* (Scotland) [2011] UKSC 43: References from the Appeal Court of the High Court of Justiciary, at the request of the Lord Advocate [2011] UKSC 43, para. 129.

Lord Kerr suggests that, ‘as a matter of elementary principle,’ it is the [UK] court’s duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available. Lord Kerr argues that it is the duty of UK courts not only to ascertain 'where the jurisprudence of the Strasbourg court clearly shows that it currently stands', but also to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view:[430]

> If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so.[431]

The President of the ECtHR, Sir Nicolas Bratza, comments that it is right and positive for the protection of human rights that the national courts should (using the words of Baroness Hale) sometimes consciously leap ahead of Strasbourg.

7.7 Judicial dialogue between Strasbourg and the UK

Sir Nicolas Bratza has stated that, whilst suggestions are often made to the contrary by senior politicians, members of the Government and certain sections of the media, ‘Strasbourg has spoken, the case is closed’ is not the way in which the Strasbourg judges view the respective roles of the two courts (Bratza, 2011). He does acknowledge, however, that where the Grand Chamber of the ECtHR has laid down a clear principle, there is a clear expectation that the principle should be followed and applied by the UK Supreme Court.

Michael O’Boyle, Deputy Registrar of the ECtHR, considers that the relationship between UK courts and Strasbourg is one of ‘cross-fertilisation’:

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[430] *Ambrose v Harris* (Procurator Fiscal, Oban) (Scotland); *Her Majesty’s Advocate v G* (Scotland); *Her Majesty’s Advocate v M* (Scotland) [2011] UKSC 43: References from the Appeal Court of the High Court of Justiciary, at the request of the Lord Advocate [2011] UKSC 43, para. 129.

[431] *Ambrose v Harris* (Procurator Fiscal, Oban) (Scotland); *Her Majesty’s Advocate v G* (Scotland); *Her Majesty’s Advocate v M* (Scotland) [2011] UKSC 43: References from the Appeal Court of the High Court of Justiciary, at the request of the Lord Advocate [2011] UKSC 43, para. 130.

> The UK courts are referring to judgments of the Strasbourg Court where they are relevant and the ECtHR has been inspired by statements made in the judgment of the House of Lords / Supreme Court. The starting point is one of great admiration for the way the Human Rights Act 1998 has worked out in practice.[432]

Sir Nicolas Bratza (2011: 511) suggests that there is room for increased dialogue between the judges of the courts, both informally but more significantly, through their judgments.[433] He cites the *Horncastle / Al Khawaja* series of cases as a pertinent recent example of the development of a more meaningful dialogue between the two courts (see also ECtHR, 2012c: para. 27):

> It is important that superior national courts should, as Lord Phillips put it in the *Horncastle* judgment, on the rare occasions when they have concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of the domestic process, 'decline to follow the Strasbourg decision, giving reasons for adopting this course'.

Baroness Hale comments that the *Al-Khawaja* case was the closest the UK domestic courts and Strasbourg have come to conflict since the coming into force of the HRA. She suggests that the re-evaluation by the Grand Chamber 'probably avoided confrontation' and proved that 'the dialogue was effective - it is the best example of the dialogue working'.[434]

Lord Phillips, in evidence to the JCHR in November 2011 (JCHR, 2011a: 2) explained the importance of this judicial dialogue:

> In as much as we are not obliged to follow, as a matter of law, the Strasbourg jurisprudence domestically, we are supreme as a Supreme Court. But if you ask, at the end of the day, what really matters, I would say that it is what the Strasbourg court says about the meaning of the ECHR. I say 'at the end of the day' because there is scope for dialogue between our court, or any other domestic court, and the Strasbourg court, before the end of the day is reached.

[432] Michael O'Boyle, Interview, 29 November 2011.

[433] In February 2012, the ECtHR (2012c: para. 28) stated that it is considering whether there should be a new procedure for dialogue between national courts and the Strasbourg Court in the form of an 'advisory opinion jurisdiction'.

[434] Baroness Hale, Interview, 11 January 2012.

Joshua Rozenberg, legal commentator, comments that for this reason, *Al-Khawaja* was very significant - it was a demonstration of the system working as it should -

> The Supreme Court politely but firmly asked Strasbourg to think again, and even provided in *Horncastle* a statistical review of how the hearsay rule was being dealt with in other countries. The Supreme Court asked Strasbourg to think again and it did. It has, according to Sir Nicolas Bratza, very largely, although not entirely, adopted the approach of the UK Supreme Court… It is entirely right that the courts should be working in this way.[435]

7.8 Conclusion

The HRA gives effect in domestic law to the rights and freedoms contained in the ECHR. Section 2 of the HRA requires UK courts to 'take into account' any decision of the ECtHR or Committee of Ministers in so far as they are relevant in any case concerning a Convention right. This means that domestic courts are required to take account of all the case law of the ECtHR, not merely those cases brought against the UK.

There has been significant debate around section 2 of the HRA. Lord Phillips has brought some much needed clarity to the debate and suggested that if the wording 'take account' gives a message at all, it is that UK courts are not bound by decisions of the Strasbourg court as binding precedent. Lord Irvine, the Lord Chancellor at the time the HRA was introduced, has gone further, suggesting that the existence of a recent and closely analogous decision of the Grand Chamber of the ECtHR should always be afforded great respect by our courts. However, such a decision can never absolve domestic judges from the high constitutional responsibility incumbent upon them under section 2 - they must decide the case for themselves and it is not open to them simply to acquiesce to Strasbourg.

As a matter of domestic law, UK courts can interpret Convention rights in a manner different to that of Strasbourg. However, because the UK elected to enact rights and freedoms contained in an international treaty (the ECHR) into domestic law, UK courts are faced with the possibility that should their judgments depart radically and without justification from established Strasbourg jurisprudence, then it is likely that the decision will be referred to Strasbourg.[436] Moreover, this may result in the

[435] Joshua Rozenberg, Interview, 20 December 2011.

[436] It is important to note in this context that even if a UK Bill of Rights is introduced to replace the HRA, unless the UK withdraws from the ECHR, complaints of violations of Convention rights will continue to be examined by Strasbourg.

decision being overturned. On this analysis, the argument that the finding of a violation by the ECtHR is a matter for the Government under its international treaty obligations, and not something for the domestic courts to worry about (as asserted by, amongst others, Lord Irvine) is overly simplistic. Findings of violations are a matter for **both** Government and the domestic courts.

The claim that the Strasbourg Court is excessively interventionist is not supported, either by the statistical data (examined in section 4.2) or by our review of applications against the UK that eventually resulted in a judgment at Strasbourg. As section 4.2 outlines, of the applications lodged at the ECtHR against the UK between 1966 and 2010, only three per cent resulted in a judgment and only 1.8 per cent resulted in the finding of a violation.

Cases against the UK resulting in a judgment can accurately be categorised into cases where Strasbourg has deferred to national authorities; cases where Strasbourg has adopted the reasoning and analysis of the UK courts; cases where Strasbourg and the UK courts have disagreed; and cases where the UK courts have consciously leapt ahead of Strasbourg. Differences between the UK courts and Strasbourg are rare. When differences occur, this is mostly due to the domestic courts taking a different approach to the protection of Convention rights from the approach taken by the ECtHR.

The legal commentator, Joshua Rozenberg, notes that there is very little public understanding of the relationship between the domestic courts in the UK and the ECtHR and that this lack of understanding can be exploited all too easily, particularly by hostile sections of the press and senior politicians with political axes to grind. He is critical of such an approach, commenting, ‘it can be very convenient to blame a foreign court, but it’s not a very mature approach’.[437]

Since the coming into effect of the HRA, the Strasbourg Court has been respectful of UK court decisions because of the high quality of their judgments. The ECtHR President, Sir Nicolas Bratza, comments that the great majority of the Strasbourg Court’s most significant decisions in the past three years followed the conclusions reached by the appeal courts in the three UK jurisdictions - England and Wales; Scotland and Northern Ireland. He ventures that it is right and positive for the protection of human rights that the national courts should sometimes consciously leap ahead of Strasbourg. On the rare occasions that the UK courts have disagreed

[437] Joshua Rozenberg, Interview, 20 December 2011.

with ECtHR jurisprudence, the ECtHR has demonstrated a willingness to engage in a ‘judicial dialogue’ with the superior courts of the UK.

8. The implementation of Strasbourg judgments in the UK

8.1 Introduction

This chapter considers the record of the United Kingdom in implementing European Court of Human Rights (ECtHR) judgments. It discusses the consequences when judgments are not complied with. Finally, it assesses the role of parliament in the implementation process.

As explained in section 2.4, once a judgment of the ECtHR becomes final, it is legally binding on the state in question. The Committee of Ministers of the Council of Europe then has the role of supervising the enforcement of judgments. This may require 'individual measures' to be taken - for example, specific steps to end the unlawful situation or compensate the victim. Some judgments will require the authorities to introduce broader 'general measures', such as changes to law or policy, which are intended to prevent further violations of the same type.

8.2 The United Kingdom's record

In the latest report by the Ministry of Justice on the implementation of human rights judgments, it was suggested that 'the UK's overall record on the implementation of judgments continues to be a strong one' (Ministry of Justice, 2011a: 12). The report noted that at the end of 2010 there were 30 UK cases pending before the Committee of Ministers (the body responsible for the supervision of the implementation of ECtHR judgments - see section 2.3), which represented just 0.34 per cent of the total (from all 47 Council of Europe states).[438]

By way of example, the following changes have been implemented recently as a result of ECtHR judgments concerning the UK (Ministry of Justice, 2011a: 10-25):

- The transfer of responsibility for the release of prisoners with long-term, fixed sentences from the Home Secretary to the Parole Board.[439]

- An announcement that the powers to stop and search individuals under sections 44-46 of the Terrorism Act 2000 would no longer be used.[440]

[438] This figure is alternatively stated as being 0.32 per cent at p. 47 of the report.

[439] Following *Clift v UK*, No. 7205/07, 13.7.2010 (amending s. 145 of the Coroners and Justice Act 2009).

[440] Following *Gillan and Quinton v UK*, No. 4158/05, 12.1.2010. Provisions to repeal and replace the stop and search powers are included in the Protection of Freedoms Bill.

- The introduction of legislation to enable challenges to court orders prohibiting reporting on criminal trials in Scotland.[441]

- The abolition of the Certificate of Approval scheme which required individuals subject to immigration control to have permission to marry from the Secretary of State.[442]

In three of these cases, it has accordingly already proved possible to take remedial steps in respect of ECtHR judgments which only date back to the period between June and December 2010.

It is indeed a commonly held view that the UK has a good record in implementing ECtHR judgments. Lord Phillips, the President of the Supreme Court, giving evidence recently to the Joint Committee on Human Rights (JCHR, 2011a: 12), said:

> I do not think this country is really open to very much criticism for failing to implement the Convention. There are one or two well-known cases in which it might be said that so far we have not had regard to our international obligations, but very few.

The JCHR (2010: 19) has also acknowledged that the UK's record of implementing judgments of the ECtHR is 'generally a good one'. Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, says that the UK's standing as regards respect of the ECHR has generally been high within the Council of Europe.[443] Christos Giakoumopoulos and Zoe Bryanston-Cross, from the Department for the Execution of Judgments (in Strasbourg), confirmed not only that the UK's record is 'one of the best we have in the Council of Europe', but also that in certain respects the UK leads by example:

> … in many instances [the Department] very much relies on the policy of the UK within the Committee of Ministers to push reluctant member states [on implementation].[444]

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[441] Following *Mackay and BBC Scotland v UK*, No. 10734/05, 7.12.2010.

[442] Following *O'Donoghue and others v UK*, No. 34848/07, 14.12.2010 (amending the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 by way of a remedial order under section 10 of the Human Rights Act 1998, as a result of the House of Lords judgment in *R (Baiai) v Secretary of State for the Home Departments* [2009] 1 AC 287.

[443] Thomas Hammarberg, Interview, 28 November 2011.

[444] Christos Giakoumopoulos and Zoe Bryanston-Cross, Interview, 27 November 2011.

One recent example that they offered of this support and encouragement given to other states is the series of meetings held involving the Historical Enquiries Team (within the Police Service of Northern Ireland) and prosecutors from Chechnya. Giakoumopoulos and Bryanston-Cross underlined that the UK is occasionally the subject of 'important and difficult' judgments (such as some of the judgments relating to Northern Ireland), and yet those judgments are nevertheless implemented.

8.3 The consequences of the non-implementation of Strasbourg judgments by the UK

We have discussed some examples of the positive impacts of the decisions of the ECtHR within the UK in Chapter 5. As an **international** court serving 47 European states, the decisions of the ECtHR have had a significant impact across the continent. This was recently acknowledged again by the Minister for Human Rights, Lord McNally (2011: 2):

> The Convention system has been instrumental in raising human rights standards across Europe….For example, the decriminalisation of homosexuality, the recognition of the freedom of religion in former Soviet countries and the prevention of ill-treatment by the police. These are great achievements that have positively affected the lives of millions of people.

The other side of this coin, however, is the negative impact which results from the failure to implement ECtHR judgments. In light of the UK's generally good record on implementation, it is perhaps something of a paradox that the national discourse about the ECtHR has been dominated recently by an example of the non-execution of a judgment - the failure by successive governments since 2005 to resolve the question of prisoner voting rights, as highlighted by the ECtHR in its judgments in *Hirst* and *Greens and MT* (section 7.5).[445]

[445] The Ministry of Justice has recently acknowledged that 'the UK … has a high proportion of leading cases outstanding for more than two years (eight cases)' (Ministry of Justice, 2011a: 8). Of those, six cases related to the investigation of deaths in Northern Ireland. The Ministry of Justice also noted that difficulties may arise in the implementation of some decisions: 'the Government recognises that there will always be some particularly sensitive and difficult areas in which progress towards implementation will not be as rapid as in other cases. This is a consequence of the complexity of the issues raised in such cases' (Ministry of Justice, 2011a: 8). In its 2010 report on the implementation of ECtHR judgments, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe drew attention to problems in the implementation of the decisions in *Hirst v UK* (prisoner voting rights) and *S. and Marper v UK* (retention of DNA and biometric data) - see Committee on Legal Affairs and Human Rights (2010): 7-9.

There has been considerable comment about the negative effects of not complying with ECtHR judgments, including the impact upon the influence which the UK is able to exert internationally. For example, the JCHR has suggested that the UK's position has been considerably undermined by the long delays in the implementation of certain decisions,[446] where there was no political will to do so (JCHR, 2010: 14-15). Amos (forthcoming 2012) argues that the fact that the Government and Parliament were not in agreement over the issue of prisoner voting 'has had a negative impact on the legitimacy of the HRA, ECHR, UK courts and the ECtHR'. The Council of Europe Human Rights Commissioner, Thomas Hammarberg, has no doubt that the UK's position could have an acutely adverse impact:

> If the UK takes a negative line and tries to push through decisions that would undermine the authority of the Court, arguing that there should be a possibility to overrule [ECtHR judgments] at the national level … that would be very destructive ... that would be the beginning of the unravelling of the system and … would have serious consequences throughout Europe.[447]

The former Lord Chancellor, Lord Mackay of Clashfern, who insists that the UK has 'a Convention duty to do what Strasbourg says', is also concerned about the effects of the UK's non-compliance on other states:

> I am convinced that in every walk of life, example is better than precept.[448]

Christos Giakoumopoulos and Zoe Bryanston-Cross also believe that the rhetoric emanating from the UK about the non-execution of judgments could have a negative effect on the UK's position within the Council of Europe, and they confirm that it would impact on the capacity of the Committee of Ministers to influence states:

> There are concerns that the UK position may be infectious. In the Committee of Ministers, it is important to have a number of strong states taking a very explicit view about the binding nature of judgments of the ECtHR based on a general commitment to the rule of law…no matter what the substance or the subject matter of the particular case. The UK was

[446] Such as *A v UK*, No. 25599/94, 23.9.1998 (concerning the corporal punishment of children (see section 5.6) and cases relating to the investigation of the use of lethal force by state agents in Northern Ireland (section 5.3).

[447] Thomas Hammarberg, Interview, 28 November 2011.

[448] Lord Mackay, Interview, 13 December 2011.

> historically a leader in this regard. This could be undermined with the current UK position. The danger is that some states reference the UK position and take the view that judgments are negotiable.[449]

Thomas Hammarberg (2011: 6) emphasises the importance of the principle of states acting in concert to protect human rights:

> … the Convention is built on the notion of a collective guarantee…a reciprocal agreement between state parties that recognises that they - and their people - have an interest in the protection of human rights also in other states.
>
> The fact that one state has a treaty right to question the behaviour of other states, provided that it accepts the *quid pro quo*, has been of enormous importance in the efforts to ensure respect for human rights globally.

For some observers,[450] exaggerated criticism of the Human Rights Act by ministers is likely to have a negative effect upon the UK's status internationally, as well as on the protection of human rights in third countries. In one indication of such impact, in 2011 the *Tehran Times* reported on David Cameron's criticism of the HRA as being a contributory cause of the English riots. Under the headline, 'Cameron calls for less [sic] human rights', the paper paraphrased the Prime Minister as saying that 'human rights … can interfere with morality, and are thus not always a good thing'.[451]

Smith (2011) concludes:

> It is surely not helpful to repudiate the concept of universal human rights at home while saying we are advancing them abroad.

The Attorney-General, Dominic Grieve (2011), has recently recognised the importance of compliance with the Convention to the UK's ability to hold sway at the international level:

> It is only by setting an example at home that the UK is able to exert influence in the international arena and retain the moral authority to

[449] Christos Giakoumopoulos and Zoe Bryanston-Cross, Interview, 27 November 2011.

[450] Such as Roger Smith, Director of JUSTICE. See Smith (2011).

[451] 'Cameron calls for less human rights', *Tehran Times,* 16 August 2011.

> intervene and to enforce international law as we did successfully to protect the civilian population in Libya and to allow Libyans to pursue their aspirations for a more open and democratic government.

8.4 Parliament and the implementation of Strasbourg judgments

This section considers the role of the UK Parliament in the implementation of ECtHR judgments.[452] The Strasbourg system is sometimes criticised for lacking 'democratic legitimacy' (see also sections 6.3 and 9.5). For some politicians and commentators in the UK, questions about the implementation of particular judgments of the ECtHR may reflect the pervasive tensions in a democracy as to the respective roles of parliament and the courts - when there is a conflict, who decides?[453] As explained in section 3.2, in the domestic context, the Human Rights Act (HRA) 1998 respects and maintains parliamentary sovereignty, as the ultimate decision as to whether to amend the law rests with parliament, not the courts.

A recent high-profile example of tension between the UK and Strasbourg concerns the issue of prisoner voting rights. In February 2011, MPs voted by 234 votes to 22 to keep the ban on prisoner voting, in direct contradiction of a ruling by the ECtHR.[454]

This case has led to complaints that the Strasbourg Court is undermining parliamentary sovereignty.[455] Thomas Hammarberg argues that, as an international court, the ECtHR operates outside such conflicts, at a supra-national level. He refers to:

> ... an agreed European position when it comes to the division between the judiciary and Parliament… The fact that there is a European Court does

[452] As we discuss in section 2.3, the Parliamentary Assembly of the Council of Europe (which is made up of members of national parliaments) also has a role in the supervision of the enforcement of ECtHR judgments, through the work of its Committee on Legal Affairs and Human Rights. Research is currently being carried out by the Human Rights and Social Justice Research Institute at London Metropolitan University on the role of national parliaments in human rights implementation. The project, funded by the Nuffield Foundation, focuses on Germany, Netherlands, Romania, Ukraine and the UK. See: http://www.nuffieldfoundation.org/democratic-legitimacy-human-rights-implementation.

[453] This was a dominant theme of the backbench debate about prisoners' voting rights on 10 February 2011. For example, Labour MP Ian Davidson asked 'Is not the basic issue whether we in this country should decide our line on whether prisoners should be able to vote - or should it be decided by somebody else?'; *Hansard*, HC Vol. 523, Col.563, 10 February 2011.

[454] *Hirst v UK* (No.2), No. 74025/01 [GC], 6.10.2005.

[455] See, for example, Broadhurst (2011) and Pinto-Duschinsky (2011).

> not change that relationship… The ECtHR only takes on the cases when the domestic judicial process has been exhausted in the UK.[456]

Professor Alan Miller of the Scottish Human Rights Commission refutes any suggestion that the Strasbourg system undermines parliamentary sovereignty, which he considers is appropriately accommodated by the 'margin of appreciation' doctrine.[457]

As noted in section 2.4, a fundamental premise of the Strasbourg system is that it is the shared responsibility of all branches of the state - the executive and parliament, as well as the courts - to ensure effective national implementation of the Convention, both by preventing human rights violations and ensuring that remedies for them exist at the national level. Thus, implementation is a political process as well as a legal one. The Parliamentary Assembly of the Council of Europe has recently elucidated why national parliaments are considered to have a key role:

> The double mandate of parliamentarians - as members of the Assembly and of our respective national parliaments - can be of fundamental importance to ensure that standards guaranteed by the Strasbourg Court are effectively protected and implemented domestically without, in the vast majority of cases, the need for individuals to seek justice in Strasbourg. Hence the utility of stressing... the key role parliaments can play in stemming the flood of applications submerging the Court by, for instance, carefully examining whether (draft) legislation is compatible with the Convention's requirements and in helping states to ensure prompt and full compliance with the Court's judgments.[458]

The relevance of parliamentary scrutiny

The extent to which there has been parliamentary scrutiny of questions arising in human rights cases may be an important factor in adjudications by the Strasbourg Court. In the course of its response to the *S and Marper* judgment of the ECtHR (sections 5.7 and 7.5), the UK Government suggested that 'where a complex issue has been subjected to Parliamentary scrutiny, there is an argument that a wide

[456] Thomas Hammarberg, Interview, 28 November 2011.

[457] Alan Miller, Interview, 10 January 2012.

[458] Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Report, Doc. 12811, 3 January 2012, para. 55.

margin of appreciation should be applied'.[459] The extent of domestic parliamentary scrutiny was highly relevant, for example, to the ECtHR's judgment in the case of *SH and others v Austria*[460] (concerning restrictions on in vitro fertilisation) in which the Court alluded to 'the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field'. Murray Hunt, legal adviser to the JCHR, emphasises that the **quality** of the debate is critical, in order to ensure that there is an 'earned deference'.[461]

In *Greens and MT v UK*,[462] a 2010 case which concerned the issue of prisoner voting rights, the ECtHR indicated that there had not been adequate parliamentary scrutiny and debate on the matter since the Grand Chamber judgment on the same issue in *Hirst* in 2005.[463] In applying its pilot judgment procedure[464] in the *Greens* judgment, the Strasbourg Court stipulated an obligation of parliamentary involvement - by requiring that the Government must 'bring forward … legislative proposals intended to amend the 1983 Act … in a manner which is Convention-compliant'.[465]

[459] Home Office Memorandum on the Protection of Freedoms Bill, February 2011, para. 13.

[460] No. 57813/00 [GC], 3.11.2011, para. 114.

[461] Murray Hunt, Interview, 19 December 2011.

[462] Nos. 60041/08 and 60054/08, 23.11.2010.

[463] In *Greens*, the ECtHR cited (at para. 41) the JCHR's statement that the UK Government's delay in bringing forward proposals for consideration by Parliament was 'unacceptable' (JCHR, 2010: 35). The *Greens* judgment also cites (at para. 44) the Committee of Ministers Interim Resolution CM/ResDH(2009)160, 3 December 2009, which recalled that the Court (in *Hirst v UK No. 2*) had found 'no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'. The *Greens* judgment refers (at para. 42) to a short debate in the UK Parliament on 2 November 2010, in which the Parliamentary Secretary to the Cabinet Office had stated that the Government was 'actively considering how to implement the judgment and that once decisions had been made, legislative proposals would be brought forward'.

[464] See Leach et al. (2010); Leach (2011: 84-88).

[465] Nos. 60041/08 and 60054/08, 23.11.2010 (operative para. 6(a)).

The role of the Joint Committee on Human Rights

In the UK, Parliament has taken an active role in the implementation of ECtHR judgments in recent years, notably through the work of the JCHR[466] in monitoring the Government's responses to judgments. The JCHR itself (JCHR, 2010: 7), has acknowledged the impetus provided by the Council of Europe[467] to develop parliamentary involvement in such processes:

> The role of national Parliaments has increasingly been recognised as crucial in achieving more effective national implementation of the Convention.

The JCHR (2010: 8) has also explicitly affirmed the necessity of parliament's role in the process of implementing ECtHR decisions with the UK context, because the Court is not prescriptive as to **how** implementation is carried out:

> … judgments of the European Court of Human Rights leave a considerable amount of discretion to the State concerned as to precisely how it amends its law, policy or practice to meet these obligations. The process of implementing a judgment of the European Court of Human Rights is therefore an unavoidably political process, constrained by the legal obligations (to stop the breach, provide a remedy for the individual concerned and to prevent new or similar breaches), but a political process nonetheless.

According to the JCHR (2010: 9), this approach has many advantages:

> … it increases the political transparency of the Government's response to Court judgments. In so doing it helps both to ensure a genuine democratic input into legal changes following Court judgments and to address the perception that changes in law or policy as a result of Court judgments lack democratic legitimacy.

[466] The JCHR comprises twelve members appointed from both the House of Commons and the House of Lords. Its current membership is: Baroness Berridge, Lord Bowness, Baroness Campbell of Surbiton, Rheman Chishti MP, Mike Crockart MP, Lord Dubs, Dr Hywel Francis MP (Chair), Lord Lester of Herne Hill, Lord Morris of Handsworth, Dominic Raab MP, Virendra Sharma MP and Richard Shepherd MP.

[467] In particular, through the Interlaken Declaration, 19 February 2010: http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

The JCHR has proposed various ways in which its role should be enhanced in relation to the implementation of ECtHR judgments. These include timelier reporting to parliament about any judgment of the ECtHR in an application against the UK and the systematic provision to parliament of Action Plans detailing the response to adverse judgments, at the same time as they are submitted to the Committee of Ministers (JCHR, 2010: 66). The JCHR has called on the Government to provide it with a memorandum covering the following:

- all judgments against the UK;
- all measures taken to implement such judgments;
- the progress made towards the implementation of all other outstanding judgments;
- the UK's record on implementation according to the latest available statistics from the Council of Europe;
- the progress made towards the implementation of Committee of Ministers' recommendations on national implementation; and
- the implications of Strasbourg judgments against other states for the UK's legal system.

The JCHR has also proposed that there should be an annual debate in Parliament on its report scrutinising the Government's memorandum about UK judgments (JCHR, 2010: 67).

The authors consider that these proposals by the JCHR would (especially if introduced in a systematic manner) have the important beneficial effect of developing and improving Parliament's role in the implementation of Strasbourg judgments.

8.5 Conclusion

This chapter has discussed the generally exemplary record of the UK in implementing judgments of the European Court. Strasbourg judgments concerning the UK usually lead to swift changes in legislation or national practice. This view of the UK's positive record is shared within the Council of Europe - the UK often leads by example on the question of implementation, which encourages compliance by other states.

The one notable recent exception, where there has been significant resistance to complying with an ECtHR judgment, concerns the issue of prisoner voting rights, which has not been resolved since the Grand Chamber judgment was delivered in the *Hirst* case in 2005. Whilst the Westminster Parliament has indicated its position clearly, there has been considerable comment about the negative effects of not complying with ECtHR judgments. Concerns have been expressed that the UK's stance on prisoner voting, and the accompanying negative rhetoric about the ECtHR, could impact upon the capacity of the Committee of Ministers to influence states, and thus weaken the notion that states should act collectively in order to uphold human rights standards. It may result in a wider refusal to implement ECtHR judgments across the Council of Europe. It has also been anticipated that there may be a negative impact more broadly upon the influence which the UK is able to exert internationally.

Some politicians and commentators have criticised the ECtHR for superseding the will of Parliament. However, as the JCHR has argued, the Strasbourg Court is not prescriptive as to **how** implementation is carried out and affords states considerable discretion in this regard. There is increasing recognition of the crucial role played by parliaments in the implementation of ECtHR judgments, which is both a legal and political process. Effective parliamentary scrutiny of questions arising in human rights cases may be an important factor in the way in which the Strasbourg Court reaches its decisions - although the **quality** of the parliamentary debate will be an important consideration.

In the UK, the Joint Committee on Human Rights carries out significant work focusing on the implementation of Strasbourg judgments. It has proposed ways in which its role may be further enhanced, including timelier reporting to Parliament about judgments and the systematic provision of Action Plans which set out details of the UK Government's response to adverse judgments. Such developments would have the beneficial effect of enhancing Parliament's role in the implementation of ECtHR judgments.

9. The value for the UK of the European human rights framework

9.1 Introduction

This chapter outlines the relationship between the UK's domestic system for protecting human rights and the supervisory role played by the European regional human rights mechanism under the European Convention on Human Rights (ECHR). It seeks to clarify misperceptions about the manner in which the Strasbourg system operates. The chapter considers the value of the European regional human rights system to the UK and reflects upon the status of the UK within the regional system.

9.2 The relationship between the domestic and regional human rights systems

In the last few years, there have been increasingly vocal complaints that the European human rights system is encroaching on the domestic sovereignty of the United Kingdom and the Strasbourg Court is intruding on matters that should be left to the national Westminster Parliament (notably, the right of prisoners to vote; see section 8.4). These criticisms - and the hostility accompanying them - have been most pronounced in England.[468] It is important at the outset of this chapter to explain accurately the relationship between the UK's domestic system for protecting human rights (primarily through the mechanism of the Human Rights Act (HRA) 1998) and the supervisory role played by the European regional human rights system under the ECHR. There is a significant amount of confusion about the nature of this relationship, which has been compounded by inaccurate comments from a number of senior politicians, as well as misleading media reporting.[469]

The UK's duty to ensure human rights at the domestic level

It is a fundamental feature of the European machinery of human rights protection established by the ECHR that it is **subsidiary** to the national systems safeguarding human rights (section 2.4).[470] It is first and foremost the duty of states - through their governments, legislatures and courts - to protect human rights. Article 1 of the ECHR

[468] Several of our interviewees commented on the different perception that Scotland and Northern Ireland have of the European human rights system; see also sections 3.4 and 9.3.

[469] For example, '"Human rights laws put lives at risk": Cameron tells Euro court it harms fight against terror', *Mail Online*, 26 January 2012; 'The Prime Minister must defy the European Court', *Daily Express*, 11 February 2011. The populism of much political debate was exemplified by David Cameron's comment that complying with the ECtHR judgments on prisoner voting made him feel 'physically sick'; *Hansard*, HC Vol. 517, Col. 921, 3 November 2010.

[470] *Belgian Linguistics v Belgium*, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23.7.1968, para. 10.

requires states to 'secure to everyone within their jurisdiction the rights and freedoms' set out in the Convention. That means that the ECHR leaves to each member state, in the first place, the task of securing the rights and freedoms it sets out. There is an expectation that in ratifying the ECHR, states undertake to ensure their domestic legislation is compatible with it.[471]

Article 13 of the ECHR reinforces the primary duty of states to secure the human rights set out in the ECHR. Article 13 requires states to provide 'an effective remedy before a national authority' to any individual who claims that their rights under the ECHR have been violated. Furthermore, the rule of exhaustion of domestic remedies obliges those who seek to bring a case to the European Court of Human Rights (ECtHR) claiming a violation of their human rights to use first the remedies provided by their domestic legal system.[472] In other words, an individual in the UK complaining of a breach of his or her human rights under the ECHR must first pursue this claim through the UK courts. The **principle of subsidiarity** underlines the position that an application to the ECtHR is intended to be a measure of last resort. It means that:

> States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system.[473]

States are given some discretion as to the manner in which they provide individuals with such relief under Article 13. The ECtHR has noted that in many spheres, such as the right to a fair trial, the best solution in absolute terms is prevention.[474]

Taken together, then, Article 1 and Article 13 mean that it is in the first place for the national authorities and courts to prevent or, when they fail do so, examine and put right any violation of the ECHR. The European regional human rights system is

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[471] *Maestri v Italy*, No. 39748/98 [GC], 17.2.2004, para. 47.

[472] The rule in ECHR Article 35(1) is based on the assumption, reflected in Article 13 (with which it has close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudła v. Poland* [GC], No. 30210/96, 26.10.2000, para. 152). The only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient.

[473] See *Kudła v Poland*, No. 30210/96 [GC], 26.10.2000 and *Handyside v UK*, Series A, No. 24, 7.12.1976; *Ananyev and others v. Russia*, Nos. 42525/07 and 60800/08, 10.1.2012, para. 93.

[474] See, for example, *Cocchiarella v Italy*, No. 64886/01 [GC], 29.3.2006, para. 74.

founded on the notion that it is states which are best placed to decide the most appropriate manner to respect and protect human rights at the domestic level.

9.3 The status of Convention rights in UK law

As section 3.2 outlines, the HRA gives effect in domestic law to the rights and freedoms in the Convention[475] and makes available in UK courts a remedy for breach of a Convention right, without the need to go to Strasbourg. According to Lord Phillips, in his oral evidence to the Joint Committee of Human Rights (JCHR, 2011a: 3), this means that the UK courts are:

> … domestically addressing the same issues that can be brought before the Strasbourg court, but hopefully dealing with those issues as a matter of our domestic law so that Strasbourg will not have to deal with them…

Chapter 3 considers the protection of human rights in the UK under the HRA and Chapter 7 examines the relationship between the UK courts and the ECtHR. In this section, we examine the status of Convention rights in domestic law.

The HRA has been described as 'a clever and elegant piece of legislation which set in place a scheme which preserves the distinct roles of the judges and politicians in the constitutional order of the United Kingdom' (White and Ovey, 2010: 102).[476] Lord Lester QC expands, describing the HRA as an 'ethical compass' guiding the executive, legislative and judicial branches of our democratic system in the direction of 'Magnetic North':

> The genius of the Human Rights Act 1998 is that it places responsibility on all public authorities under section 6 and Ministers in their accountability to Parliament under section 19; the declaration of incompatibility under section 4 to recognise parliamentary sovereignty; the extra-legislative creation of a Joint Committee of Human Rights as a watchdog; and the interpretative obligation under section 3... That is the system that we now have, which in my view is a subtle and rather brilliant system.[477]

[475] The HRA gives direct effect in domestic law to the rights set out in Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of the First Protocol, and Article 1 of Protocol 13, as read with ECHR Articles 16 to 18. The HRA does not give direct effect to Articles 1 and 13 of the ECHR, or to Protocols 4, 7 and 12, which have not been ratified by the UK.

[476] For detailed commentaries on the operation of the HRA, see Clayton and Tomlinson (2009); Lester et al. (2009).

[477] Lord Lester QC, Interview, 13 December 2011.

Sir John Laws, Lord Justice of Appeal, suggests that part of the reason for the current intense debate around the HRA is because we are at a transitional stage between a majoritarian democracy and a constitutional democracy:

> … the difference is that whereas a majoritarian democracy concentrates on the trump card of the sovereign legislature, a constitutional democracy regards other rights (especially, for example, Articles 6 and 8-11 of the Convention) not merely as legal rights but as **constitutional fundamentals**.[478]

Sir John Laws believes that if we see human rights as being a development and an elaboration of British constitutional fundamentals, this would go a long way towards combating the crude response that the ECHR is an import. Further, it would enable us to develop a jurisprudence better suited to our own constitutional traditions:

> The recognition of human rights as constitutional fundamentals goes a long way to giving the UK the benefits of a written constitution without having to have one (therefore avoiding possible [drafting] pitfalls, for example that the constitution is too inflexible…). That is to be welcomed because it develops the British state in line with modern aspirations without extinguishing the very old virtues of the common law method of incremental decision-making.[479]

Commentators from Northern Ireland[480] and Scotland[481] assert that the HRA has a fundamental value as a common framework binding the devolved nations of the UK. As noted in section 3.4, the HRA and the ECHR is integrated into the UK constitutional framework within which devolved powers are exercised in Northern Ireland, Scotland and Wales. The HRA is entrenched in the Scotland Act 1998, the Government of Wales Act 1998 and the Belfast / Good Friday Agreement and Northern Ireland Act 1998. The HRA provides a coherent framework and minimum threshold of protection of human rights throughout the UK. The Scottish Human Rights Commission argues that this level of integration of the HRA into the constitutional arrangements of the devolved nations assists consistent interpretation

[478] Sir John Laws, Interview, 16 January 2012.

[479] Sir John Laws, Interview, 16 January 2012.

[480] For example, Monica McWilliams, Interview, 23 December 2011.

[481] For example, Alan Miller, Interview, 10 January 2012.

of human rights standards and principles across the devolved nations (Scottish Human Rights Commission, 2011).

Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission, agrees (McWilliams, 2010: 45-46) and comments that proposals to amend the HRA:

> … have created a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place … The Human Rights Act is central to the constitutional DNA of the UK. It underpins the devolution settlements while simultaneously elucidating the common values of the constituent nations.

Sir John Laws suggests that some of the contrasting opinions about the application of the ECHR - and Convention rights - in domestic law arise from different views about the very nature of democracy. One view, he argues, is to consider that democracy includes the kind of rights enshrined in the Convention (such as the political rights contained in Articles 8 to 11 of the ECHR). However, he prefers the view - 'more naturally the British view' - that such rights are not part and parcel of the universal franchise:

> If you take the view that there is a tension between constitutional aspirations that are not part of the elective process on the one hand, and the virtues of the sovereignty of parliament on the other, that…raises a question whether the judges are to decide the non-elective questions, or whether they are essentially for the elected arms of government.[482]

Lord Lester suggests that some politicians are 'intellectually hostile' to a rights-based political theory. This is a strain of thought that is:

> … profoundly, deeply anti-rights in its conceptual origins. It is deep within the English political and philosophical psyche.[483]

This opposition to a rights-based approach, according to Lord Lester, views the dynamic interpretation approach of the ECtHR as being 'undue judicial activism'.

[482] Sir John Laws, Interview, 16 January 2012.

[483] Lord Lester QC, Interview, 13 December 2011.

9.4 The supervisory role of the European Court of Human Rights

As noted in section 9.2, the ECtHR is primarily a supervisory body and subsidiary to the national systems safeguarding human rights. This is explicitly recognised by the ECHR, which states that the ECtHR may only deal with a matter 'after all domestic remedies have been exhausted'.

Article 19 of the ECHR sets out the ECtHR's supervisory role. The basic principle is that it is for the states to guarantee the Convention rights at national level[484] and for the Court to ensure, through the examination of individual applications[485] (or, exceptionally, inter-state cases)[486] that states meet their obligations in this regard. As the Court has made clear:

> … under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged.[487]

Article 46 obliges states to comply with the final judgment of the ECtHR in any case to which they are a party by adopting appropriate general and specific measures and taking remedial action in respect of cases which could give rise to similar issues.[488] In general, states are free to choose the means by which they will discharge their legal obligations under Article 46, provided such measures are compatible with the conclusions set out in the Court's judgment.

As noted in section 2.4, the Interlaken Declaration adopted by Council of Europe ministers in 2010 reaffirms the subsidiary nature of the supervisory mechanism established by the Convention and the fundamental role which national authorities

[484] Articles 1 and 13.

[485] Article 34.

[486] Article 33.

[487] See, for example, *Opuz v Turkey*, No. 33401/02, 9.6.2009, para. 165; *Nikolova and Velichkova v Bulgaria*, No. 7888/03, 20.12.2007, para. 61.

[488] Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference Switzerland, 3 July 2009.

(i.e. governments, courts and parliaments) must play in guaranteeing and protecting human rights at the national level.[489]

Defining the scope of Strasbourg's supervisory role

The role of the ECtHR is to interpret and guarantee the rights and freedoms set out in the ECHR in order to establish common minimum standards for the protection of human rights across the 47 nations and 800 million people of the Council of Europe. The ECtHR does not seek to identify or define the most appropriate way to protect human rights. States are given discretion under the ECHR to decide how they will 'secure' the rights and freedoms in the Convention and what steps they will take to remedy any violation of human rights found either by their domestic courts or by the ECtHR.

The limits of the ECtHR's supervisory role are defined by the doctrine of the margin of appreciation, which recognises that states (and their national authorities) are in the main best placed to decide how human rights should be applied. There are two different ways in which the ECtHR has employed the margin of appreciation doctrine. The first, defined as the **structural** concept, addresses the limits or intensity of review of the ECtHR in view of its status as a supranational court. The principles of subsidiarity (section 9.2) and state consensus[490] are deployed to support the structural use of the margin of appreciation. The second way the ECtHR has used the margin of appreciation doctrine, defined as the **substantive** concept, seeks to address the relationship between individual freedoms and collective goals (the public interest). In this substantive sense, the margin of appreciation has its greatest application when balancing the rights contained in the first paragraphs of Article 8 (right to respect for private life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) against the permissible interferences which may be justified under the second paragraphs of the rights (Letsas, 2007: Chapter 4).

The first case where the Court discussed the margin of appreciation was a case against the United Kingdom. In *Handyside v UK*,[491] the Court examined whether the

[489] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, p. 6.

[490] In interpreting the scope and application of ECHR rights, the ECtHR seeks to identify and respect any convergence of practice amongst states parties: see section 9.6.

[491] *Handyside v UK*, No. 5493/72, 7.12.1976, paras. 48-49.

forfeiture of the *Little Red School Book*,[492] a reference book for school children containing a 26 page section concerning 'Sex', on grounds of obscenity, violated the right to freedom of expression under Article 10 of the ECHR. The ECtHR stated that Article 10(2) gives member states a margin of appreciation:

> This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[493]

In this way, the Court made clear that it is not the ECtHR's task to take the place of the national courts, but rather to review the decisions they deliver in the exercise of their domestic authority. The domestic margin of appreciation thus goes hand in hand with European supervision. As Murray Hunt, Legal Adviser to the Joint Committee on Human Rights, observes:

> ... [w]hen we [the UK] signed up to the ECHR, we signed up to the principle of subsidiarity, which assumes the responsibility to implement these [Convention] rights as interpreted by the Strasbourg Court.[494]

Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the domestic legislation but also the decision applying it, even one given by an independent court. However, the ECtHR will not examine these decisions in isolation. Rather, it will view them in the light of the case as a whole and all the relevant data available, including the arguments and evidence adduced in the domestic courts. Only then will it conclude whether the reasons given by the national authorities to justify any actual measures of 'interference' with the Convention rights are relevant and sufficient.[495]

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[492] Richard Handyside had purchased the British rights of *The Little Red Schoolbook*, written by two Danish authors, in September 1970. The book had first been published in Denmark in 1969 and subsequently in translation in several other European and non-European countries. After having arranged for the translation of the book into English, Mr Handyside prepared an edition for the UK with the help of a group of children and teachers and intended to publish the book in the UK in April 1971.

[493] *Handyside v UK*, No. 5493/72, 7.12.1976, citing *Engel and others v Netherlands,* Nos. 5100/71, 5101/71, 5102/71 and 5370/72, 8.6.1976, para. 100; and *Golder v UK*, No. 4451/70, 21.2.1975, para. 45.

[494] Murray Hunt, Interview, 19 December 2011.

[495] *Handyside v UK,* para. 50.

9.5 Challenges to the legitimacy of the European Court of Human Rights

This section considers criticisms of the role and approach of the ECtHR, which seek to challenge the Court's legitimacy as a supranational adjudicating body (see also section 6.3). A number of criticisms of the ECtHR are based on misconceptions which attribute to the Court a far broader impact than it actually has (or indeed would wish to have). For example, Lord Hoffmann criticises the ECtHR's uniformity of application of abstract rights and has argued that the ECtHR 'has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights' (Hoffman, 2009: 422). However, it has never been the Court's function to seek to 'unify' the national laws of European states. Sir Nicolas Bratza (2011: 509) dismisses this critique:

> I am… unpersuaded by the argument frequently advanced that the Strasbourg Court is too ready to interfere with established laws and practices in its search to impose uniform standards on Member States. The Court's judgments are replete with statements that customs, policies and practices vary considerably between Contracting States and that we should not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in the particular area. I do not think that this is mere cant. The Strasbourg Court does in my perception pay close regard to the particular requirements of the society in question when examining complaints that a law or practice in that society violates the Convention.

Jonathan Sumption QC (2011: 16) is critical that the ECtHR seeks to establish a consensus on human rights standards across the Council of Europe, commenting in the following terms:

> Even where the case for recognising a Europe-wide human right is strong, the varying political and constitutional arrangements of different countries will mean that the same rights and the same derogations are not equally necessary or desirable in all places, and will not always require the same measures to make them effective.

It is important to remember that each state has freely decided to ratify the ECHR and to become bound by each of its standards. Further, both the ECtHR and the Committee of Ministers (in fulfilling its role of supervising the execution of the ECtHR's judgments) have consistently refrained from imposing particular measures on states that are required to be implemented in order to comply with a judgment -

states are left to decide what particular steps are needed. The ECtHR will not, for example, quash decisions made by national authorities or their courts, nor will it strike down domestic legislation or otherwise require that particular measures be carried out.[496] The state is therefore free to choose how it should comply with a judgment, or put another way, each state has discretion as to how to honour its obligations under the Convention.[497] As Masterman (forthcoming 2012: 17) states:

> As the Convention organs are 'not seeking to harmonise constitutional traditions'[498] member states are free to determine the method of achieving compatibility in accordance with the rules of their national legal system in response to a finding by the European Court of a breach.

Other criticisms of the ECtHR seem to have at their genesis, a xenophobic mistrust of foreign judges (Bratza, 2011: 505; Hammarberg, 2011: 6). Thomas Hammarberg, Council of Europe Commissioner for Human Rights, detects a degree of arrogance behind questions such as 'how could those judges [of the ECtHR] from those countries be wiser than we are ourselves?'[499]

In a recent study conducted by University College London (UCL) about perceptions of the legitimacy of the ECtHR[500] (based on interviews with politicians, judges and lawyers from UK, Ireland, Germany, Turkey and Bulgaria), the authors found that whilst the ECtHR is seen as a 'pioneer institution changing mind-sets', it faces conflicting expectations about its legitimacy (Çali et al., 2011: 12) (see also section 6.8):

> The double emphasis on the balance between law and politics and on the degree of intervention therefore shows that the Court faces legitimacy standards that are pulling in different directions … respondents demand that the Court acts as a human rights pioneer, that it finds the right balance between law and politics, and that it intervenes just the right amount in domestic matters.

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[496] See, for example, *Schmautzer v Austria,* No. 15523/89, 23.10.1995, paras. 42-44; *Lundevall v Sweden*, No. 38629/97, 12.11.2002, para. 44.

[497] See, for example, *Selçuk and Asker v Turkey*, Nos. 23184/94 and 23185/94, 24.4.1988, para. 125; *Iatridis* v *Greece*, No. 31107/96 [GC], 19.10.2000*,* para. 33.

[498] Masterman is quoting from Clapham (1992: 181).

[499] Thomas Hammarberg, Interview, 28 November 2011.

[500] The study sought to assess perceptions of the legitimacy of the ECtHR according to a 'constitutive dimension', a 'performance dimension', and a 'social (or popular) dimension'.

Such demanding expectations may explain some of the recent criticism of the ECtHR from within the UK. Ben Emmerson QC warns that exaggerated attacks on the legitimacy of the ECHR have the potential to undermine the ‘careful work’ of the ECtHR and risk upsetting the balance of mutual respect that has been developing between the national and international courts, working in partnership (Emmerson, 2011).

Significantly, the central finding of the UCL study (Çali et al., 2011: 35) was that the ECtHR is considered to have a high level of legitimacy:

> There is strong constitutive support for a human rights court above and beyond the state in actively intervening in states’ domestic decisions in rights protections.

The UCL project’s interviewees in Strasbourg emphasised the basis for the legitimacy of the ECtHR as being its long term impact upon member states, especially the newer democracies (Çali et al., 2011: 33). As we discuss in the next sections, the role of the Court as a supranational body, operating across the whole European continent, is a significant factor.

9.6 The value of the European human rights system

This section explores the nature of the European human rights system and considers the influence of the European regional system on the promotion and protection of human rights.

The collective nature of the European human rights system

As outlined in section 2.2, the European human rights system originated as a system of collective guarantee of human rights. This is a foundational principle of the European system, with the close connection between the effective protection of human rights and peace providing the underlying rationale, as the preamble of the ECHR recognises.

The notion of the collective guarantee is essentially a reciprocal agreement by states, embodied in the Convention and its machinery of supervision, that each of them and their peoples has an enduring interest in how fundamental rights are being protected in other states. O'Boyle (2011: 1867) argues that it is justified on the basis that:

> … it was legitimate for states to be concerned with how human rights were being protected in other States… in return, each Party would itself be

> exposed to the same possibility of scrutiny through the operation of the right of individual petition or a case brought against it by another State.

Alan Miller endorses this notion of collective guarantee, commenting:

> Human rights are universal. In an interconnected world, it is important to have a shared understanding of human rights and their practical application.[501]

Lord Lester QC suggests that the European human rights system reflects:

> … our common humanity and the universal value placed on the secular legal protection of the rights and freedoms of individuals within a framework of common values and supranational protection.[502]

Noting that the ECHR 'is suffused with both common sense and principles of common humanity', the Attorney-General, Dominic Grieve (2011), has emphasised its historical and regional significance:

> The Convention is an integral part of the post-war settlement and has played an important and successful role in preventing the re-emergence of totalitarianism in Western Europe. And it continues to play a pivotal role in ensuring that the new democracies of Eastern Europe respect and protect the Convention rights and freedoms of all their citizens. It is easy to forget how beneficial it has been across Europe.

Code of minimum standards

The ECHR sets out a series of human rights and fundamental freedoms (set out in section 2.2) and recognises the rights of the individual under international law.[503] This changes the fundamental nature of the relationship between the individual and the state. Under the ECHR, individuals can claim fundamental rights and freedoms and demand that national authorities respect and protect these rights. The ECHR regional framework requires governments to account for their actions and to justify their decisions when these interfere with the rights and freedoms of individuals within their

[501] Alan Miller, Interview, 10 January 2012.

[502] Lord Lester QC, Interview, 13 December 2011.

[503] Any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of a right under the ECHR by a state Party is entitled to bring an application to the ECtHR under Article 34 of the ECHR.

state. Chapter 5 discusses in detail the development in the protection of individual rights and freedoms by the ECtHR with specific reference to the UK.

The jurisdiction of the ECtHR spans a diversity of cultural, social and political systems. It is 'confronted on a daily basis with virtually the full range of human rights challenges of the utmost importance within the societies concerned' (Steiner et al., 2008: 964). The role of the ECtHR is to interpret and guarantee the rights and freedoms set out in the ECHR in order to establish common minimum standards for the protection of the rights and freedoms across the Council of Europe. The ECtHR does not seek to identify or define the most appropriate way to protect human rights. The ECtHR is concerned with articulating a set of common standards which pervade and shape the domestic law and practice of the 47 states who are parties to the ECHR.

The European human rights system is recognised as the most developed and effective regional framework for the protection of human rights in the world (Steiner et al., 2008: 933-34):

> The European Convention's transformation of abstract human rights ideals into a concrete legal framework followed a path which has characterised virtually all subsequent attempts.

The European human rights system has achieved this status for a number of reasons:

- The ECHR was the first comprehensive human rights treaty in the world.
- The ECHR established the first international complaints procedures and the first international court for the determination of human rights complaints by individuals.
- The ECtHR has generated some of the most important jurisprudence on human rights, which has been imported by (and also informed by) the international human rights system as well as by other regional systems.[504]

[504] An example of a ECtHR case which has established important principles for human rights adjudication internationally is *Opuz v Turkey*, No. 33401/02, 9.6.2009, which has 'potentially far-reaching consequences for the way in which States deal with cases of violence in the home' (Londono, 2009: 658). On the African system of human rights protection, see Murray and Evans (2008). On the Inter-American system, see Pasqualucci (2003).

- The ECHR and the ECtHR have set common human rights standards across the states of the Council of Europe.

9.7 The value of a supranational court[505]

Forty-seven states with diverse legal and economic traditions and varying (and sometimes competing) international priorities recognise the authority of the ECtHR in deciding how they should treat citizens and non-citizens. There is widespread support amongst our interviewees for the supranational model of adjudication entrenched in the European human rights system. Lord Mackay of Clashfern comments that the whole object of the European human rights system was to deal with a situation where there was internal abuse of minorities. He maintains that without a supranational authority, interpreting and applying the ECHR, the ECHR would have had no effect - the structure of a supranational court is necessary for human rights to be enforceable.[506] Lord Mackay continues:

> The secret of the balance of success in a supranational court is the extent to which it properly recognises the margin of appreciation and for it not to micro-manage the legal system of the individual countries, but to see that broadly they conform to the obligations to which they have undertaken under the ECHR.[507]

Developing this theme, Jack Straw MP comments:

> I am not in any doubt that the fact that this Court has for over more than 50 years established and adjudicated on standards of human rights has led to a wider understanding of their importance and gradually to an improvement in human rights by the state parties, including the back markers like Russia and Turkey.[508]

Identifying a 'European consensus'

One of the major strengths of the supranational authority of the ECtHR is the development of a normative system of common standards across multiple jurisdictions. In cases concerning sensitive issues, the Strasbourg Court will look for

[505] Supranational is defined here as extending beyond or transcending established borders held by separate nation states.

[506] Lord Mackay, Interview, 13 December 2011.

[507] Lord Mackay, Interview, 13 December 2011.

[508] Jack Straw MP, Interview, 10 January 2012.

a 'European consensus' to guide its deliberations. According to Françoise Tulkens, the Vice-President of the ECtHR, the notion of a 'European consensus' has played a significant role in regulating the pace of the development of the ECHR (ECtHR, 2011b: 9). The Strasbourg Court is well placed to examine evidence, data and national practices across Council of Europe states in order to identify any (emerging) convergence of domestic laws or legal practice. The existence of a European consensus influences the ECtHR's interpretation of the ECHR in specific cases. For example, in a 2009 case defining states' positive obligations under Article 3 of the ECHR to protect victims of domestic violence, the ECtHR noted:

> … in interpreting the provisions of the Convention and the scope of the State's obligations in specific cases… the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the [Convention on the Elimination of Discrimination Against Women], as well as giving heed to the evolution of norms and principles in international law through other developments such as the [Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women], which specifically sets out States' duties relating to the eradication of gender-based violence.[509]

In the same way, the **absence** of a European consensus will also influence the ECtHR and the Court has indicated its willingness to extend a wide margin of appreciation to states:

> ... where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.[510]

Providing guidance on human rights issues of general importance

Another strength of the supranational model is that the Strasbourg Court is uniquely placed to determine certain issues of general importance concerning the protection of human rights across the whole of Europe. The 47 judges selected from each of the states of the Council of Europe, together with the Registry lawyers appointed from a variety of jurisdictions, provide a repository of knowledge and expertise on domestic legal systems and legal practice and procedure across Europe. The Court is not only

[509] *Opuz v Turkey*, No. 33401/02, 9.6.2009, para. 164.

[510] *X, Y and Z v UK*, No. 21830/93 [GC], 22.4.1997, para. 44.

well placed, therefore, to provide an objective overview (free of national self-interest) of human rights issues of general concern, but it has the independence and expertise to identify national state practices interfering with the adequate protection of human rights across Europe. A good example is the case of *NA v UK*,[511] concerning the return of Tamils to Sri Lanka during the country's civil war. The Strasbourg Court's judgment was given in a case involving the UK but it raised an issue affecting a number of states in Europe that were removing Tamils to Sri Lanka, including Denmark, Finland, France, Germany and the Netherlands. The ECtHR considered it important in those circumstances that there should be a lead judgment which could provide guidance to immigration authorities across the states (Bratza, 2011: 508).

Interpretative authority of the Court's jurisprudence

As explained in section 2.4, the ECtHR provides final authoritative interpretation of the rights and freedoms defined in the ECHR. The interpretative authority of the judgments of the ECtHR imposes a duty on national legislators and courts to take into account the ECHR as interpreted by the Strasbourg Court even in judgments concerning violations that have occurred in other states - an imperative which has been reinforced by the Interlaken process of reform of the Court. This is justified on the ground that any judgment of the ECtHR that has relevance to the domestic practice of a state should be considered and applied without waiting for a concrete case to be brought against that state alleging a violation of the ECHR. The Court has made clear that in its supervisory role, it will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other states.[512] In addition, under section 2 of the HRA, domestic courts must take into account **all** case law of the Strasbourg Court (as discussed in Chapter 7).

For example, the ECtHR held in 1979, in *Marckx v Belgium*,[513] that children born out of wedlock must not be the subject of discrimination. French law was discriminatory, but France did not make the necessary changes to the law until it was itself the subject of a judgment by the ECtHR in 2000 in the case of *Mazurek v France*.[514]

[511] *NA v UK*, No. 25904/07, 17.7.2008.

[512] See, for example, *Opuz v Turkey*, No. 33401/02, 9.6.2009, para. 163.

[513] No. 6833/74, 13.6.1979.

[514] No. 34406/97, 1.2.2000.

Another example is the 1981 case of *Dudgeon v UK*,[515] where the ECtHR held that homosexual acts between consenting adults must not be criminalised (sections 5.7 and 6.5). Cyprus waited until the *Modinos v Cyprus*[516] judgment in 1993 finally to decriminalise such acts.

On the other hand, there are examples of positive state practice. In response to *Hirst v UK*[517] - the prisoner voting rights case (discussed in sections 7.5 and 8.3), both Ireland and Cyprus took action to comply with the judgment.

Third party interventions

Where states have concerns that the particular circumstances in their national jurisdiction may not be fully understood, they may enter into a conversation with the ECtHR by means of a third party intervention. A state is entitled[518] to intervene to submit written comments and/or take part in hearings where one of its nationals is an applicant (Leach, 2011: 49). In addition, any 'concerned' person (whether an individual, an organisation or a state) is also permitted to intervene if it is considered to be 'in the interest of the proper administration of justice'.[519]

Sir Nicolas Bratza has argued that the UK has a responsibility to monitor cases against other states and suggests that it should selectively make third party interventions in cases which have a direct bearing on the UK or where UK domestic practice is sufficiently particular that further explanation of domestic practice may be necessary. Bratza specifically refers to the example of *Salduz v Turkey*[520] (discussed in sections 6.4 and 7.6), where 'despite the potential importance of the issue raised in the Grand Chamber for one part of the United Kingdom, there was no intervention' (Bratza, 2011: 511). The Scottish Human Rights Commission agrees with this assessment and has been emphasising the positive value of intervening where such a scenario arises again and has been actively encouraging the Scottish Government to engage more proactively at the Strasbourg level (through UK membership).[521]

[515] No. 7525/76, 22.10.1981.

[516] No. 15070/89, 22.4.1993.

[517] No. 74025/01 [GC], 6.10.2005.

[518] Under Article 36(1) of the ECHR.

[519] ECHR Article 36.

[520] No. 36391/02 [GC], 27.11.2008.

[521] Alan Miller, Interview, 10 January 2012.

Murray Hunt, legal adviser to the JCHR, comments that the UK Government does not systematically monitor upcoming cases and judgments against other states:

> There ought to be a prescribed procedure for Government to notify Parliament, national human rights institutions and civil society if it is going to intervene so that there is an opportunity to ask the minister what [the state] is going to argue. Again, there is a lack of formal requirements on the Government to state what they're doing in enough time for the various actors to exercise some level of scrutiny.[522]

The JCHR has recommended that the UK Government should give systematic consideration to whether Court judgments against other countries have implications for UK law, policy or practice and to keep Parliament informed of any such implications (as happens in, for example, the Netherlands and Switzerland) (JCHR, 2010: 56-58). The UK Government has responded that 'primary responsibility for identifying significant cases against other states which are relevant to the UK lies with the department which leads on the relevant policy area'. Moreover, the Justice Secretary, Ken Clarke, has rejected suggestions that the UK adopt a more coordinated system for monitoring Strasbourg case law by conferring this responsibility on specialised staff within the Ministry of Justice and Foreign and Commonwealth Office.[523] We discuss the role of Parliament in the implementation of judgments of the ECtHR in detail in section 8.4.

9.8 The position of the UK within the European human rights system

This section examines the role that the UK has played in the European human rights system and the benefits membership of this regional system has provided to the UK. It also considers concerns about the impact of hostility to the ECtHR expressed by some politicians and commentators.

The UK's role in the European human rights system

The UK has played a significant role in the creation and evolution of the European human rights system (section 2.2). Sir Nicolas Bratza, President of the ECtHR (Bratza, 2011: 506), has said that the United Kingdom not only played a key role in creating the Convention system, but its influence in bringing about effective human rights protection throughout the European Continent has been incalculable:

[522] Murray Hunt, Interview, 19 December 2011.

[523] The Government's Human Rights Policy and Human Rights Judgments, Oral Evidence HC 1726–I, Rt Hon Kenneth Clarke MP, Oral Evidence, 20 December 2011, Q23.

> The Human Rights Act and the manner of its implementation by judges in the UK have set a shining example to other states of how Convention rights can be brought home. The withdrawal of the United Kingdom from the Convention would do untold damage to the system itself. It would also, in my view, do immeasurable harm to the standing of the United Kingdom within the wider community of Europe in which it plays such an important part.

Christos Giakoumopoulos and Zoe Bryanston-Cross, members of the Department of Execution of Judgments, comment that the UK's record on implementation of judgments is one of the best in the Council of Europe:

> The UK is generally a very good 'implementer' of judgments, including important and difficult judgments. That makes it a particularly strong state at the Committee of Ministers to encourage other states to implement [judgments by the ECtHR finding against them]. Consider for example the Northern Ireland judgments [on the duty to investigate deaths] and recent exchanges between Chechen prosecutors and the Historical Enquiries Team in Northern Ireland.[524]

The Attorney General, Dominic Grieve (2011), makes the connection between a positive human rights record at home and the UK's significant political influence at the European level. He suggests that it is only by setting an example at home that the UK is able to exert influence in the international arena and retain the moral authority to intervene and to enforce international law.

Chapter 8 discusses the UK's record on implementing decisions of the ECtHR.

The positive benefits of the European human rights system for the UK

Dominic Grieve has stated (2011) that:

> The benefits of remaining within the Convention and retaining our position as a leader of the international community are seen by the government to be fundamental to our national interest.

Lord Mackay of Clashfern is more expansive. He suggests that on the whole, the European human rights system 'has led us to examine ourselves in a way that

[524] Christos Giakoumopoulos and Zoe Bryanston-Cross, Interview, 27 November 2011.

wouldn't have happened before, to look at our developments and go forward in a way that is just and fair'.[525]

Anthony Speaight QC, a member of the Commission on a Bill of Rights, agrees that the European human rights system has brought some 'very major benefits' to the UK. He gives as an example the 'Belmarsh case'[526] in which the House of Lords found the indefinite detention without charge or trial of foreign nationals suspected of terrorism to be incompatible with Article 5 of the ECHR - as, later, did the ECtHR:

> The House of Lords did most of the work in this instance but could only make a Declaration of Incompatibility. The Strasbourg Court was able to finish the job. This was a tremendously important case - the then Labour Government had embarked on a policy of internment that was fundamentally in conflict with [the] basic principle of human rights. (see also section 5.5).[527]

Jack Straw MP also recognises that 'there are plenty of positives'. He specifically refers to the changes that were made to the operation of the security and intelligence services in the UK, 'some of which arose explicitly as a result of ECHR judgments and others which were nudged forward by them' (see also section 5.7).'[528]

Lord Lester QC suggests there is a more fundamental value to the UK of membership of the European human rights system:

> One of the great values of the European human rights system is that it tends to encourage a **United** Kingdom, as opposed to a dis-United Kingdom, since it provides a set of common values…
>
> The Scotland Act 1998 and the Northern Ireland Act 1998 were introduced before the HRA came into force. There was recognition that when you are devolving power, there has to be a mechanism where the international responsibility of the UK to comply with its [international] obligations can be fulfilled. The way this was done was by embodying the Convention rights

[525] Lord Mackay, Interview, 13 December 2011.

[526] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[527] Anthony Speaight QC, Interview, 4 January 2012.

[528] Jack Straw MP, Interview, 10 January 2012.

> in the devolution settlements… So even before the HRA, you have this history.[529]

Chapter 5 examines the concrete impact that the European human rights system has had on the rights and freedoms of individuals in the UK.

Concerns about the impact of current British hostility to the ECtHR

In recent months, there has been pointed criticism directed at the ECHR and the ECtHR by senior politicians within the UK, including the Prime Minister and members of the Westminster Government,[530] together with sections of the British press. This hostility reached its height in relation to the ECtHR's decision in *Hirst v UK*[531] on prisoners' voting rights and the UK Parliament's rejection of the judgment. There have been calls from some MPs and commentators[532] for the UK to consider withdrawal from the jurisdiction of the ECtHR, if not from the ECHR itself. These proposals have the potential to damage not only the reputation of the UK internationally, but also profoundly to impact on the pan-European system of human rights protection.

Justice Secretary Ken Clarke has ruled out withdrawal from the Convention,[533] as has the Attorney General, Dominic Grieve (2011). However, a recent report endorsed by several Conservative MPs states that, 'If necessary, the UK should be prepared to withdraw from the ECHR' (Broadhurst, 2011: 1). [534] The report acknowledges that withdrawal from the Convention could lead to the required majority of Council of Europe member states voting to expel the UK for a serious violation of Article 3 of the Statute of the Council of Europe,[535] but concludes (Broadhurst, 2011: 76):

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[529] Lord Lester QC, Interview, 13 December 2011.

[530] For example, 'Human rights laws put lives at risk': Cameron tells Euro court it harms fight against terror', *Mail Online*, 26 January 2012; 'The Prime Minister must defy the European Court', *Daily Express*, 11 February 2011.

[531] No. 74025/01 [GC], 6.10.2005.

[532] See, for example, Broadhurst (2011) and the report written by Michael Pinto-Duschinsky (2011), who has since become a member of the Commission on a Bill of Rights.

[533] *Hansard*, HC Vol. 536, Col. 154, 23 November 2011.

[534] See also Daniel Hannan, 'Britain should withdraw from the European Convention on Human Rights', *Daily Telegraph*, 12 February 2011.

[535] Article 3 of the Statute states that 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council …'.

> However, in the (unlikely) scenario that the UK would be made to leave as a result of withdrawing from the ECHR, ECHR withdrawal should still be pursued if the necessary amendments to the Convention cannot be agreed.

On the issue of the UK's membership of the European Union, the same report notes that 'it does not seem plausible that the UK would have to leave the EU because it had withdrawn from the ECHR' (Broadhurst, 2011: 76); however, it does not expressly rule out this possibility.

A 2011 Policy Exchange report written by Michael Pinto-Duschinsky also argues for possible withdrawal from the ECtHR.[536] Pinto-Duschinsky (2011: 13) proposes that if, after 'time-limited negotiations', the UK does not succeed in negotiating certain reforms to the ECtHR, including ways of ensuring that 'judges at Strasbourg give greater discretion to the domestic judges of each member state':

> ... the UK should consider withdrawing from the jurisdiction of the … Court … and establishing the Supreme Court in London as the final appellate court for human rights law.

On the issue of Council of Europe membership, Pinto-Duschinsky (2011: 51) argues that it is 'hard to see' how withdrawal from the jurisdiction of the ECtHR would constitute a serious substantive breach by the UK of the rule of law and of human rights and fundamental freedoms such as to justify expulsion. However, he does not set out any evidence in support of this view. As to the implications for the UK's membership of the EU, Pinto-Duschinsky (2011: 53) suggests:

> If the United Kingdom withdrew from the jurisdiction of the Strasbourg Court and if, for this reason, it was obliged to denounce the ECHR treaty in order to do so, it is conceivable that the other members of the European Union would vote unanimously that this action in itself constituted a 'risk of a serious breach' of the core values of the EU.

However, he considers such a scenario 'hard to imagine' (Pinto-Duschinsky, 2011: 54).

There is no single authoritative view of whether withdrawal from the jurisdiction of the ECtHR would automatically lead to the UK's withdrawal from the EU (Rycroft, 2008:

[536] Mr Pinto-Duschinsky later became a member of the Commission on a Bill of Rights, but resigned in March 2012.

64-65). This is because, while ratification of the ECHR is a condition of accession to the EU, it is not expressly stated as a condition of continued membership. However, giving evidence to the Select Committee on Constitutional Affairs, the then Lord Chancellor, Lord Falconer, stated:

> … in practice … the European Union has made it clear that they expect all members to adhere to the [ECHR]. Indeed, we make it a condition as a European Union before anybody who is new joins in … [T]o all intents and purposes, I believe it is not possible to be a member of the European Union and to have left or denounced the … Convention.[537]

As Elliott (2011) comments, a further complication is that even if the UK withdrew from the ECHR (or from the jurisdiction of the ECtHR), 'the UK would remain bound, in areas to which EU law applies, by EU human rights law, the sources of which include the ECHR itself and the (in some respects) more extensive EU Charter of Fundamental Rights' (section 2.2).

There are growing concerns, within the UK and in Strasbourg, about the increasing hostility to the European regional human rights system demonstrated by senior politicians, and sections of the British press and expressed in the terms set out above. Sir Nicolas Bratza, President of the ECtHR, comments:

> One worries about contagion. There is a risk of this attitude in the UK to judgments of the Court negatively impacting on other states and complaints being made of double standards [in relation to implementation of ECtHR judgments]. This could result in a wider refusal to implement ECtHR judgments across the Council of Europe.[538]

Murray Hunt, Legal Adviser to the JCHR, cautions that to fail to change the law in response to a Court judgment is damaging not only to the European regional human rights system but also to the country's interests abroad, sending a signal to states that are the worst human rights violators that the states with better human rights records do not take the ECtHR seriously. He concludes:

[537] Evidence to Constitutional Affairs Committee and Home Affairs Committee, 31 October 2006, Q96.

[538] Sir Nicolas Bratza, Interview, 29 November 2011.

> I really do not think it can be overestimated how far that ties the hands of the ECtHR, the Council of Europe generally and the Foreign and Commonwealth Office.[539]

The critical attitude of some Westminster politicians to the ECtHR is not replicated across the devolved nations of the United Kingdom. Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission, is critical of the Westminster Government's position:

> There have been complaints that the influence of the ECtHR is 'toxic'. This could not be further from the truth. During the conflict in Northern Ireland, the ECtHR operated as a 'higher body' overseeing justice in Northern Ireland.[540]

Alan Miller of the Scottish Human Rights Commission agrees, commenting:

> The irresponsible manner in which politicians and certain members of the judiciary are undermining the status and jurisdiction of the ECtHR is unprecedented and does not serve any positive purpose. It undermines the reputation of the UK and encourages non-implementing states failing to promote and protect human rights from progressing forwards in their journey.[541]

9.9 Conclusion

The European human rights system is founded upon the principle of the collective guarantee of human rights. The ECHR sets out a list of human rights and fundamental freedoms and established a regional mechanism that allows individuals to hold governments and their agents to account. It also created an independent supranational court that is divested of the interests of the state and whose judges bring a wide range of perspectives and political and legal experiences. Today, the 47 member states of the Council of Europe recognise the authority of the ECtHR and there is worldwide support for the supranational model of adjudication entrenched in the European human rights system.

Michael O'Boyle, citing Robert Badinter, former French Justice Minister, concludes that without the ECtHR, European civilisation would not be as it is today and 'Europe

[539] Murray Hunt, Interview, 19 December 2011.

[540] Monica McWilliams, Interview, 23 December 2011.

[541] Alan Miller, Interview, 10 January 2012.

would not be eyed enviously by other continents as a beacon of human rights protection' (O'Boyle, 2011: 1877).

It is a fundamental feature of the European machinery of human rights protection established by the ECHR that it is subsidiary to the national systems safeguarding human rights. It is first and foremost the duty of states - through their governments, legislatures and courts - to protect human rights.

The HRA created a domestic scheme of human rights protection which preserves the distinct role of the judges at the same time as safeguarding parliamentary sovereignty.

The HRA gives effect in domestic law to the rights and freedoms in the Convention and makes available in UK courts a remedy for breach of a Convention right, without the need to go to Strasbourg. This means that the UK courts are domestically addressing the same issues that can be brought before the ECtHR.

The limits of the ECtHR's supervisory role are defined by the doctrine of the margin of appreciation, which recognises that states (and their national authorities) are in the main best placed to decide how human rights should be applied. It is not the Strasbourg Court's task to take the place of national courts, but rather to review the decisions they deliver in the exercise of their domestic authority. The domestic margin of appreciation thus goes hand in hand with European supervision.

The ECtHR has been criticised for over-reaching its authority and interfering with established domestic laws and practices in order to impose uniform standards and laws on member states. However, the Court's jurisprudence clearly recognises that customs, policies and practices vary considerably between states and that the ECtHR will not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in a particular area.

The JCHR has recommended that the UK Government give systematic consideration to whether Court judgments against other countries have implications for UK law, policy or practice and to keep parliament informed of any such implications. The President of the ECtHR suggests that the UK should selectively make third party interventions in cases which have a direct bearing on the UK or where UK domestic practice is sufficiently particular that further explanation of domestic practice may be necessary.

In recent months, the ECHR and/or the ECtHR has been criticised by some British politicians and sections of the press. There have been calls from some MPs and commentators for the UK to consider withdrawal from the jurisdiction of the ECtHR, if not from the ECHR itself. These proposals have the potential to damage not only the reputation of the UK internationally, but also profoundly to impact on the European system of human rights protection.

The Wilton Park Conference, held in November 2011 at the start of the UK's Chairmanship of the Council of Europe (section 1.2), concluded that politicians and other public figures might 'tread with conscience' when discussing human rights, especially in public announcements, as governments' legitimacy is not only based on democracy, but respect for fundamental rights.

10. Conclusions

10.1 The UK and the European system of human rights protection

Development of the European system of human rights protection

The UK was among the first states to ratify the European Convention on Human Rights (ECHR) and played a pivotal role in its creation: British politicians and jurists were among its principal architects and the treaty reflects the UK's common law legal tradition. The UK opted into the right of individual petition and the jurisdiction of the ECtHR in 1966. On successive occasions in the 1970s, 1980s, and early 1990s, the UK had the opportunity to withdraw its acceptance of these key aspects of the Convention system, but chose not to do so (as, indeed, no democracy has ever done). In 1998, the right of individual petition and the jurisdiction of the Court were made compulsory for all states which are members of the ECHR.

Since the mid-1990s, the Strasbourg system has expanded hugely due to an influx of eastern and central European states whose membership of the Convention signalled a break with their authoritarian past. Forty-seven nations - some 800 million people - are now within the European human rights system, which is widely accepted as the most effective international regime for enforcing human rights in the world. No democracy has ever withdrawn from the Convention.

Cases before the European Court of Human Rights

The vast number of cases pending at the ECtHR - 151,600 as of 31 December 2011, of which 3,650 are applications from the UK - stems principally from systemic failures of implementation by a handful of countries and has prompted a process of reform to ensure the institutional survival of the Convention system. David Cameron has stated that the ECtHR 'should ensure that the right to individual petition counts; it should not act as a small claims court'. The judgments of the ECtHR demonstrate the serious and substantive nature of the matters it considers. Of all ECtHR judgments finding at least one violation in 2011, 36 per cent involved a violation of Article 2 (the right to life) or (Article 3) the prohibition against torture or inhuman or degrading treatment, which are considered to be of fundamental importance. Of judgments relating to the UK between 1966 and 2010, one in 12 involved a violation of Article 2 or Article 3, while around one third involved a violation of Article 6 (the right to a fair trial).

The UK's 'rate of defeat' at Strasbourg

Statistical data for cases relating to the UK reveal that the UK has a very low 'rate of defeat' at Strasbourg, both in absolute terms and in comparison with other states. Of all the applications brought against the UK at the ECtHR in the past decade, the vast

majority fell at the first hurdle: only three per cent were declared admissible. An even smaller proportion - 1.8 per cent - eventually resulted in a judgment finding at least one violation. In other words, the UK 'lost' only one in fifty cases brought against it in Strasbourg. If adjustment is made for repetitive cases (i.e. cases where the violation has the same root cause and therefore multiple judgments are counted as a single judgment), the rate of defeat falls to 1.4 per cent, or around one in 70. The latest figures for 2011 show a rate of defeat of just 0.5 per cent, or one in 200.

Compared to selected comparator states, the UK has among the lowest number of applications per year brought against it. It also has a lower percentage of these applications declared admissible and loses proportionately fewer of the cases brought against it than most.

Overall, suggestions that the UK loses a significant number of cases at Strasbourg, or that the ECtHR is 'over active' in finding violations in UK cases, are not supported by the data.

The impact of Strasbourg judgments on the UK

While judgments against the UK have been relatively few in number, they have frequently been substantive and serious in nature. Strasbourg judgments have been concerned with the most fundamental of human rights. A significant number of judgments have also gone to the heart of individual liberties. In relation to the UK, the ECtHR cannot be characterised as a 'small claims court'.

Many ECtHR judgments have had a far-reaching impact on the fundamental rights and freedoms of individuals in the UK - and in other Council of Europe states. Notable among these are cases relating to torture and inhuman or degrading treatment and those concerned with protection of life and investigation into deaths - accounting for one in 12 cases since the UK accepted the jurisdiction of the ECtHR. Other important impacts include legal reform to prevent the indiscriminate retention of the DNA profiles of innocent people and to protect people in the UK from unnecessary intrusion into their privacy through the use of secret surveillance. It is also due to a Strasbourg judgment that police can no longer stop and search people without needing any grounds for suspicion. Legislation outlawing forced labour and servitude has its origins in a Strasbourg ruling, thereby protecting some of the most vulnerable individuals in the UK from extreme exploitation. Judgments of the ECtHR have been significant milestones in the movement for equal rights for lesbian, gay, bisexual or transgender people. They have also been instrumental in bringing about the banning of corporal punishment in UK schools and restricting the physical

punishment of children in the family. There have also been significant ECtHR judgments protecting the freedom of the UK media.

The relationship between the UK courts and Strasbourg

The Human Rights Act (HRA) 1998 gives effect in domestic law to the rights and freedoms contained in the ECHR. Section 2 of the HRA requires UK courts to 'take into account' any decision of the ECtHR or the Committee of Ministers. This means that domestic courts are required to take account of **all** the jurisprudence of the ECtHR, not merely those cases brought against the UK, but are not bound by it.

As a matter of domestic law, UK courts can interpret Convention rights in a manner different to that of Strasbourg. However, because the UK elected to enact rights and freedoms contained in an international treaty (the ECHR) into domestic law, UK courts are faced with the possibility that should their judgments depart radically and without justification from established Strasbourg jurisprudence, then it is likely that the decision will be referred to Strasbourg and this may result in the decision being overturned. On this analysis, the argument that the finding of a violation by the ECtHR is a matter only for the Government under its international treaty obligations, and not something for the domestic courts to worry about is overly simplistic. Findings of violations are a matter for **both** the Government **and** the domestic courts.

Cases against the UK resulting in a judgment of the ECtHR can be categorised as those where:

- Strasbourg has deferred to national authorities. This category includes cases where the Strasbourg Court has agreed with the conclusions of the UK domestic courts and/or has deferred to the domestic courts or Parliament.

- Strasbourg has adopted the reasoning and analysis of the UK courts. This category includes cases where the ECtHR has adopted the reasoning and/or analysis of the UK courts in its consideration of a complaint against the UK and concluded that there has been no human rights violation.

- Strasbourg and the UK courts have disagreed. This category includes cases where Strasbourg has disagreed with the UK courts and cases where the UK courts have disagreed with, or declined to follow, Strasbourg jurisprudence.

- The UK courts have consciously leapt ahead of Strasbourg. This category includes domestic cases where the UK courts have moved beyond Strasbourg jurisprudence in one of two circumstances: Strasbourg case law is inconsistent

or equivocal in its approach or Strasbourg has not yet considered the particular human rights issue which is before the domestic courts.

Since the coming into effect of the HRA, the Strasbourg Court has been respectful of UK court decisions because of the high quality of their judgments, which have greatly facilitated the ECtHR's task of adjudication. On the rare occasions that the UK courts have disagreed with ECtHR jurisprudence, the Strasbourg Court has demonstrated a willingness to engage in a 'judicial dialogue' with the superior courts of the UK - the recent case of *Al-Khawaja* being the pre-eminent example.

The implementation of Strasbourg judgments in the UK

The UK has a generally exemplary record in implementing judgments of the ECtHR. Strasbourg judgments concerning the UK usually lead to swift changes to the law or the way that the law is applied. This view of the UK's positive record is shared within the Council of Europe - the UK often leads by example on the question of implementation, which encourages compliance by other states.

The one notable recent exception, where there has been significant resistance to complying with an ECtHR judgment, concerns the issue of prisoner voting rights, which has not been resolved since the Grand Chamber judgment was delivered in the *Hirst* case in 2005. There has been considerable comment about the negative effects of not complying with ECtHR judgments. Concerns have been expressed that the UK's stance on prisoner voting, and the accompanying negative rhetoric about the ECtHR, could impact upon the capacity of the Committee of Ministers of the Council of Europe to influence states, and thus weaken the notion that states should act collectively in order to uphold human rights standards. It may result in a wider refusal to implement ECtHR judgments across the Council of Europe and a weakening of the rule of law. It has also been anticipated that there may be a negative impact more broadly upon the influence which the UK is able to exert internationally.

Parliaments - and in the UK, particularly the JCHR - play a crucial role in the implementation of ECtHR judgments, which is both a legal and political process. Effective parliamentary scrutiny of questions arising in human rights cases may be an important factor in the way in which the Strasbourg Court reaches its decisions - the **quality** of the parliamentary debate being an important consideration.

10.2 Debate about human rights protection in the UK

Debate about human rights protection in the UK is far from settled. The unpopularity of the HRA has been widely asserted but the evidence should not be misconstrued.

Polls indicate overwhelming public support for the rights guaranteed in the HRA and for the existence of legislation to protect human rights, even if there has at times been disquiet about the way that the Act is applied (or is perceived to have been applied) so as to benefit certain groups unfairly.

The Commission on a Bill of Rights is due to report by the end of 2012 on options for creating a new UK Bill of Rights 'that incorporates and builds on' all the UK's obligations under the ECHR. However, significant obstacles exist in relation to this process which may undermine its ability to reach an outcome which enjoys democratic legitimacy. Any future reform of human rights law in the UK will be greatly complicated by the devolution settlements, of which the HRA and the ECHR are an integral part.

Under the HRA, all public authorities in the UK must act in a way which is compatible with Convention rights. This requirement provides a basis for moving beyond a purely legalistic approach to human rights towards a 'human rights culture' in public services. Accounts of the HRA's first decade confirm that such a culture has largely failed to materialise, although there are positive examples of public authorities respecting human rights as a result of a greater understanding of their Convention obligations. There is also evidence of a stronger institutional commitment in the devolved nations to realising Convention rights in policy and practice.

We have found that the 'dialogue' between the courts and parliament that the HRA was designed to facilitate has resulted in relatively few declarations of incompatibility. On average, courts have declared legislation to be incompatible with Convention rights less than three times a year and on most occasions the incompatibility has been remedied by primary legislation or a remedial order.

10.3 Debate about the European system of human rights protection

The evolution of the Convention and Strasbourg case law

The ECHR is considered to be a 'living instrument': this means that the ECtHR seeks to interpret the Convention in the light of present day conditions and social norms rather than assess what was intended by the architects of the Convention 60 years ago. Some politicians and commentators have accused the Strasbourg Court of taking an overly expansive approach. This complaint is primarily based on the propositions that the Convention is being applied in ways that would not have been foreseen by those who drafted it; that the ECtHR has got its priorities wrong, or that it is taking an over-activist approach which interferes unduly with decisions made by national bodies (notably parliaments).

This report demonstrates, however, that it has always been a fundamental principle that the Convention should be interpreted and applied by taking account of changes in society, in morals, and in laws, as well as technological innovations and scientific developments. As a consequence, the meaning of particular terms in the Convention will necessarily develop over time. This approach enables the ECtHR to take account of relevant developments and commonly accepted standards within Council of Europe states. It has also permitted the development in recent years of positive Convention obligations, the effect of which has been to provide increased human rights protection for some of the most vulnerable people in society, including the victims of rape, domestic violence and human trafficking.

The Strasbourg Court is not alone in adopting an evolutive approach. In the UK, judges are used to applying an evolutive approach to the common law and in interpreting statutes. For example, English courts developed over time the concept of marital rape where previously husbands had enjoyed effective immunity from such a charge. The President of the Supreme Court, Lord Phillips, sees the dynamic interpretation applied both in Strasbourg and as part of the common law as being very similar.

Many experts acknowledge the necessity of the Convention case law evolving, but they also consider that there are limits to the ECtHR's dynamic approach. To define such limits requires a balance of approaches between legal certainty and flexibility.

Clarity and consistency of Strasbourg judgments

Strasbourg judgments have on occasions been criticised - sometimes justifiably - for their lack of clarity and consistency. Such criticisms in part reflect the complexity of the task of interpreting the Convention at the supranational level. Senior figures in the Court have recognised the paramount importance of ensuring clarity and consistency and various mechanisms have been developed to try to ensure the consistency of the Court's case law.

The value for the UK of the European human rights framework

The European human rights system originated as a system of collective guarantee of human rights. The ECHR sets out a list of human rights and fundamental freedoms and established a regional mechanism that allows individuals to hold governments and their agents to account. It also created an independent supranational court that is divested of the self-interests of the state and whose judges bring a wide range of perspectives and political and legal experiences. Today, the 47 member states of the Council of Europe recognise the authority of the ECtHR and there is worldwide

support for the supranational model of adjudication entrenched in the European human rights system.

It is a fundamental feature of the European machinery of human rights protection established by the ECHR that it is **subsidiary** to the national systems safeguarding human rights. It is first and foremost the duty of states - through their governments, legislatures and courts - to protect human rights.

The HRA created a domestic scheme of human rights protection which preserves the distinct role of the judges at the same time as safeguarding parliamentary sovereignty. It gives effect in domestic law to the rights and freedoms in the Convention and makes available in UK courts a remedy for breach of a Convention right, without the need to go to Strasbourg. This means that the UK courts are domestically addressing the same issues that can be brought before the ECtHR.

The limits of the ECtHR's supervisory role are defined by the doctrine of the **margin of appreciation**, which recognises that states (and their national authorities) are in the main best placed to decide how human rights should be applied. It is not the Strasbourg Court's task to take the place of national courts, but rather to review the decisions they deliver in the exercise of their domestic authority. The domestic margin of appreciation thus goes hand in hand with European supervision.

The ECtHR has been criticised for over-reaching its authority and interfering with established domestic laws and practices in order to impose uniform standards and laws on member states. However, the Court's jurisprudence clearly recognises that customs, policies and practices vary considerably between states and that the ECtHR will not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in a particular area.

The UK Government remains committed to being a party to the ECHR. The Attorney General, Dominic Grieve, recently stated (Grieve, 2011), that:

> The benefits of remaining within the Convention and retaining our position as a leader of the international community are seen by the government to be fundamental to our national interest.

The conduct of public debate in the UK about the European human rights system

Media reporting about the Strasbourg system of human rights protection has at times been misleading, as have some statements by some politicians and commentators. Recent examples include suggestions that the UK 'loses' three quarters of cases brought against it (when the true figure is one in 50); or that ECtHR judges are 'unelected' (they are, in fact, elected by the Parliamentary Assembly of the Council of Europe). Interviewees for this research concur that it is important that public and political debate about human rights protection in the UK - and the UK's relationship with Strasbourg - is temperate and well-informed.

In recent months, the ECHR and the ECtHR have been criticised by some British politicians and sections of the press. There have been calls from some MPs and commentators for the UK to consider withdrawal from the jurisdiction of the ECtHR, if not from the ECHR itself. These proposals have the potential to damage not only the reputation of the UK internationally, but also profoundly to impact on the European system of human rights protection and the protection of human rights in the UK.

The Wilton Park Conference, held in November 2011 at the start of the UK's Chairmanship of the Council of Europe, concluded that politicians and other public figures might 'tread with conscience' when discussing human rights, especially in public announcements, as governments' legitimacy is not only based on democracy, but respect for fundamental rights.

This salutary reminder is echoed by Edwin Bussuttil, a former member of the European Commission of Human Rights, in a book marking 50 years of the Strasbourg Court (Council of Europe, 2010b: 169):

> No government on earth is immune from the possibility or error or injustice, even in countries with the best record for the administration of justice and civil liberties … No state will fall short of its democratic credentials in the domain of human rights if it is prepared to make amends for its deficiencies. Error is human, it is only persistence in error that is reprehensible since democracy must necessarily ensure its own credibility.

Appendix 1 Interviewees

1	Sir Nicolas Bratza	President, European Court of Human Rights
2	Zoe Bryanston-Cross	Department for the Execution of Judgments, Council of Europe
3	Andrew Drzemczewski	Head of the Legal Affairs and Human Rights Department, Parliamentary Assembly of the Council of Europe
4	Ambassador Eleanor Fuller	Permanent Representative of the UK to the Council of Europe
5	Christos Giakoumopoulos	Department for the Execution of Judgments, Council of Europe
6	Baroness Hale of Richmond	Justice of the Supreme Court
7	Thomas Hammarberg	Council of Europe Commissioner for Human Rights
8	Murray Hunt	Legal Adviser, Joint Committee on Human Rights
9	Sir John Laws	Lord Justice of Appeal
10	Lord Lester of Herne Hill QC	Member of the House of Lords (Liberal Democrat); member of the Joint Committee on Human Rights; member of the Commission on a Bill of Rights
11	Lord Mackay of Clashfern	Conservative peer, former Lord Chancellor
12	Professor Monica McWilliams	University of Ulster; former Chief Commissioner, Northern Ireland Human Rights Commission
13	Professor Alan Miller	Chair, Scottish Human Rights Commission
14	Michael O'Boyle	Deputy Registrar, European Court of Human Rights
15	Joshua Rozenberg	Legal commentator
16	Anthony Speaight QC	Member, Commission on a Bill of Rights
17	Jack Straw MP	Member of Parliament (Labour)

Appendix 2 Questionnaire

Review of European Court of Human Rights Judgments

Thank you for agreeing to be interviewed for this research project commissioned by the Equality and Human Rights Commission. This questionnaire covers the broad areas of interest to this project and will serve as a general guide to the interview. Please see the information sheet for the aims of the project and an explanation of our approach to confidentiality and consent.

The relationship between the UK and Strasbourg

1. Are there any aspects of the relationship between the European Court of Human Rights (ECtHR) and the UK that concern you?

2. Do you have any concerns about the way in which public debate about this relationship is conducted in the UK?

3. We are interested in your view of the relationship between the UK courts and the ECtHR. Are there cases that you consider to be particularly significant? For example, these might include cases in which:

- Strasbourg has endorsed the conclusions of UK courts (or has declared complaints brought against the UK inadmissible).
- Strasbourg has adopted the reasoning and analysis employed by the UK courts.
- Strasbourg has disagreed with the UK courts.
- The UK has intervened before Strasbourg.
- The positions of Strasbourg and the UK courts have been in conflict.

4. A number of judges in the UK have expressed frustration about what they view as the lack of clarity or consistency in certain aspects of Strasbourg case law. Do you think this criticism is justified?

5. What is your view about the impact of Strasbourg case law on the domestic courts? Specifically, what is your view about the way in which domestic courts have interpreted their duty in s.2 of the Human Rights Act to ‘take into account’ Strasbourg case law when considering a Convention right?

6. It has been suggested that the Court’s evolutive approach to the Convention has led to a narrowing of the margin of appreciation. Do you agree with this view?

7. Some UK politicians and commentators have expressed concern about the Strasbourg court in some instances overreaching itself and intruding on parliamentary sovereignty. In your opinion, is this a valid concern?

8. The President of the ECtHR, Nicolas Bratza, has said that states bear some responsibility to intervene in specific cases in order to ensure that the Court is aware of the consequences of its judgments on domestic law and practices that it might not otherwise fully appreciate. Do you agree?

9. What is your view about the way in which dialogue is conducted between judges of national courts and the Strasbourg Court? Can you suggest any ways in which it could be strengthened?

10. Some UK parliamentarians and commentators have called for the UK to contemplate breaking treaty obligations or withdrawing from the European Convention on Human Rights. What do you consider to be the implications of this debate for the Convention system as a whole?

Impact and implementation

11. We are interested in your view of the impact that ECtHR judgments have had on the protection of human rights within the UK. What do you consider to have been the most significant impacts? For example, this might include impact in relation to changes to law or policy in particular areas.

12. In your view, how effective is the UK Government's system for the implementation of ECtHR judgments? Are there any aspects of the system that you would like to see changed?

The value of a regional human rights framework

13. What is your view about the value of having a regional human rights instrument setting out minimum human rights standards?

14. Do you think there is particular value to the existence of a court with supranational jurisdiction operating in a regional context?

Summing up

- Is there anything that we haven't discussed during this interview that you feel is important for this research?

- Is there any documentation you could provide that will give us further information or insights about what we have discussed?

Appendix 3 Sections of the Human Rights Act

Section 3.2 of this report explains how the Human Rights Act (HRA) 1998 gives direct effect in domestic law to the fundamental rights and freedoms in the European Convention on Human Rights (ECHR). It makes particular reference to sections 2, 3, 4 and 6 of the HRA, which are set out below.

Section 2 of the HRA – Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any -

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section ‘rules’ means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section -

(a) by … the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland -

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Section 3 of the HRA - Interpretation of legislation

(1) 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 the Convention rights.

(2) This section -

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 4 of the HRA - Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied -

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section 'court' means —

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.]

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Section 6 of the HRA – Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act 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.

(3) In this section ‘public authority’ includes —

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) [repealed 1 October 2009 by Constitutional Reform Act 2005 …]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) ‘An act’ includes a failure to act but does not include a failure to —

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

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Contacts

England

Equality and Human Rights Commission Helpline
FREEPOST RRLL-GHUX-CTRX
Arndale House, The Arndale Centre, Manchester M4 3AQ
Main number: 0845 604 6610
Textphone: 0845 604 6620
Fax: 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline
FREEPOST RSAB-YJEJ-EXUJ
The Optima Building, 58 Robertson Street, Glasgow G2 8DU
Main number: 0845 604 5510
Textphone: 0845 604 5520
Fax: 0845 604 5530

Wales

Equality and Human Rights Commission Helpline
FREEPOST RRLR-UEYB-UYZL
3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT
Main number: 0845 604 8810
Textphone: 0845 604 8820
Fax: 0845 604 8830

Helpline opening times:
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This report examines the impact of the European Court of Human Rights (ECtHR) on the UK. Through a review of selected cases and interviews with key stakeholders, the report demonstrates that criticisms of the ECtHR by some politicians and parts of the media are ill-founded. The UK 'loses' only a very small proportion of cases brought against it and has a positive record overall in implementing judgments at the domestic level. ECtHR judgments have added significant protections to the rights and freedoms of individuals in the UK and the European human rights framework is of great value not only to the UK, but to all member states of the Council of Europe.

Equality and Human Rights Commission