

Equality, Dignity and Discrimination under Human Rights Law; selected cases

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INTRODUCTION

Background

The pursuit of equality is the driving force behind most post-war human rights treaties and instruments. It is the hallmark of what has been described as ‘second wave rights’; the first wave being famously characterised by the pursuit of life, liberty and happiness.¹

As Rabinder Singh QC has noted, “the idea that all human beings are equal is a very recent notion. Article 1 of the Universal Declaration of Human Rights (UDHR, 1948) proudly proclaims that all human beings are born free and equal in dignity and rights. Not only born free, as Rousseau had said..., but equal. And not, as the American Declaration of Independence had asserted, only (white) men but all human beings.”² [Bracketed words added].

In fact the first two articles of the UDHR are entirely devoted to the principle of equality. The second Article provides the original articulation of the modern formulation of anti-discrimination. It is effectively reproduced in the 1950 European Convention on Human Rights (ECHR) and has inserted itself, in a modified form, into domestic anti-discrimination legislation.³ In its day, this was a major step forward, pushing the notion of equality from the Enlightenment principle that all laws must be applied equally (equality before the law) to the assertion that states must use the law to root out discrimination.

However discrimination, as such, is only one aspect of the human rights concept of equality. As Rabinder Singh also commented in the same article, “in many ways the most important word in the European Convention on Human Rights is ‘everyone’. Most of the substantive articles of the Convention begin with the word ‘everyone’ The real challenge is to take that word seriously and accept that it means what it says.”

On this reading, one of the major purposes of human rights law, nationally and internationally, is to achieve greater equality. Or as Professor Conor Gearty has framed it, human rights help “to turn the *fact* of our equality into the basis of an *ethical theory* as to how we should act. We are equal; *therefore* we have a *right* to equality of respect; *therefore* we each deserve a chance to do the best we can with our lives, according to our own lights.”⁴

¹ *Values for a Godless Age*, Francesca Klug, Penguin, 2000, chapters 3-5.

² Rabinder Singh, ‘Equality: the neglected virtue’, [2004] 2 EHRLR 141.

³ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” ECHR, Article 14.

⁴ Conor Gearty, ‘Understanding equality: the need for discrimination’, speech at the Discrimination Law Association, 13 December 2004.

In other words, in human rights thinking, freedom from discrimination is a necessary but far from sufficient means of achieving equality. Equality is what we are born with, and the purpose of human rights laws is to ensure that we are *in practice all* able to live the lives we choose to live and participate in the community in which we live. There is, therefore, a *substantive* right to equality in certain spheres in human rights law. If ‘everyone’ is to really mean everyone, then laws must be fashioned to take account of difference as well as similarity and the state must intervene to prevent individuals from interfering with the rights of others.

The UDHR affirmed that economic, social and cultural rights are as important as civil and political rights in achieving the goal of greater equality. But even in the ECHR, equality is a defining principle of each substantive civil and political right: each one of us is entitled to express a view however much others may disagree with it; to have a religious belief of our choice or to have none; to organise our private life as we see fit etc. And as the state is required not only to refrain from breaching our rights, but to “secure [them] to everyone within their jurisdiction”,⁵ the European Court of Human Rights has established that governments have ‘positive obligations’, where appropriate, to provide the necessary resources to ensure that our rights are “practical and effective” not “theoretical or illusory”.⁶

Finally, it should be noted, that the value human rights law puts on equality is not entirely neutral. Everyone being treated equally badly is not a human rights concept. It is not sufficient to ensure that no-one is being discriminated against if the consequence is that all groups are treated with an equal lack of respect or lack of opportunity to participate in social and civic life. If equality is the main goal of ‘second wave’ human rights, dignity is its foundational value; as the first Article of the UDHR proclaims.⁷ Lord Walker has stated in a case concerning age discrimination that “in the field of human rights, discrimination is regarded as particularly objectionable *because it disregards fundamental notions of human dignity and equality before the law* (our emphasis).”⁸

A public authority will not comply with the Human Rights Act, therefore, if the services it provides, whilst non-discriminatory, do not demonstrably respect the worth and dignity of every individual. As Justice Munby notably said in a recent case in which the DRC intervened: “True it is that the phrase [human dignity] is not used in the Convention but it is surely immanent in Article 8, indeed in almost every one of the Convention’s provisions. The recognition and protection of human dignity is one of the core values – in truth, *the* core value – of our society...”⁹

⁵ ECHR, Article 1.

⁶ *Artico v Italy* (1981) 3 EHRR 1 para 33.

⁷ See para 2 above.

⁸ *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, para 49.

⁹ Munby J, *R (A and B) v (1) East Sussex County Council (2) The Disability Rights Commission (Interested Party)* [2003] EWHC 167 (Admin), para 86.

Cases

Attached is a selective summary of a few notable human rights cases, categorised according to the '6 equality strands' to be given specific protection by the CEHR. They were selected in order to clarify further the human rights principles of equality and discrimination. Not all of the cases were successful for the applicants; this often depends on the facts. But we have deliberately selected cases which have advanced or clarified the human rights principles of equality and discrimination; principles that CEHR will be under a duty to promote and monitor and encourage compliance with.

Most of the cases are domestic Human Rights Act cases but some are from the European Court of Human Rights. The European Court has been much better at recognising the principle of equality in substantive rights cases than through the application of Article 14 which prohibits discrimination directly. Domestically, however, there is a growing case law which recognises both.

*The similarities between human rights law and anti-discrimination law principles should be fairly self evident. The differences are less obvious.*¹⁰ Human Rights case law has been slow to recognise the principle of indirect discrimination¹¹ but there is growing jurisprudence on the need to recognise and cater for difference through specially tailored provision, which can amount to the same outcome in practice. The recognition of 'positive obligations' on government and public authorities to ensure fair and equal treatment, is much stronger in human rights law than in domestic anti-discrimination law.

The following introductory points will hopefully aid comprehension of the principles raised in each of the attached cases (they are aligned to the relevant cases which are listed in brackets at the end of each point). We have tried to use non-technical terms where possible and to provide a policy orientated, non-legal analysis where we can. **The purpose is to begin to explore how human rights principles might be used to intersect with the anti-discrimination legislation that CEHR will be empowered to enforce.**

General Human Rights and Equality Principles

1. **The Human Rights Act (HRA)**, which incorporates the European Convention on Human Rights (ECHR) into UK law, **can play a vital role in 'plugging some of the protection gap' in domestic anti-discrimination law.** 'Everyone' living in a given jurisdiction can claim rights under the HRA, including non-citizens and asylum seekers. Areas not covered by current domestic anti-discrimination law can receive some protection under the HRA, e.g. 'judicial acts' which are exempt under the RRA

¹⁰ See *Discrimination and Human Rights: The Case of Racism*, Sandra Fredman, (Ed.), Oxford University Press, 2001.

¹¹ Indirect discrimination was effectively recognised in, for e.g. the *Belgian Linguistics Case* (1979-80) 1 EHRR 252.

or caring responsibilities which are not recognised under the SDA can receive protection through the 'right to a fair trial' and the 'right to family life' (respectively) under the HRA.

2. **Article 14 of the ECHR, prohibiting discrimination, applies only to the civil and political rights** in the ECHR. However it is *not necessary for there to have been a substantive breach of any of the rights in the ECHR to allege discrimination* under the Human Rights Act .
3. All public authorities and other bodies carrying out 'functions of a public nature', are required to act compatibly with the rights in the ECHR and not discriminate "on any ground" (HRA s6¹²). This means, in effect, that **the HRA prohibits discrimination in relation to all the strands given specific protection by the Equality Bill in the exercise of their civil and political rights**. The exercise of **many of these civil and political rights involves access to "goods, facilities and services"** in the public sector (and sometimes private sector, *see case E1*) from which there is currently no protection, or variable protection, against discrimination in domestic law for some of the equality strands. This includes – minimally – the police, immigration and prison services, local authorities, housing and education services, schools, hospitals, public care homes, the NHS and allied health services.
4. It is well established by both European and domestic case law that **the scope of Article 14 extends to discrimination on grounds of sexual orientation, gender reassignment (post-operative), age and disability (including mental and physical health). Sex, race and religion are explicitly covered**. The category 'other status' (see f.n.3) has allowed for the categories of prohibited discrimination to evolve over time to include marital status, trade union membership and imprisonment, for example. Other potential protected categories could include carers or groups defined by a common language.
5. **The Human Rights vision of equality extends significantly beyond discrimination to encompass fairness of treatment, dignity, respect and access to the fundamental rights which enable participation in a democratic society** (see case C4.2). It is not a human rights principle for all groups to be treated equally badly or disrespectfully.

Specific Principles Highlighted in the Cases Below

6. The ECHR does not require everyone to be treated equally in order to avoid breaching Article 14. The European Court of Human Rights allows Member States **to treat groups unequally in certain circumstances in order to 'correct factual inequalities' between them (case A1)**.

¹² The courts have narrowed the definition of public authority, arguably beyond the original intention of the HRA, to mean, in effect, 'governmental', so excluding many private and voluntary care homes and similar non-governmental service providers. *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366.

7. The European Court of Human Rights has recognised that to avoid discrimination or secure equal rights, it **may be necessary sometimes to treat an individual or group differently** precisely **because their situation is different** from others (**cases C1.1, C4.3**).
8. **Equality can be advanced through the state being required to secure substantive rights** equally to all individuals and groups, for example to a private life, to liberty, to dignity or to freedom of religion without individuals having to 'prove' discrimination as such, which can be difficult to do when there are no obvious 'comparators' or other in an 'analogous situation' (e.g. **cases A2.1, A2.2; B4.1, B4.2; C1.1, C1.2, C2.2, C4.2; F2**).
9. **'Respect'** for fundamental rights means more than 'acknowledge' or 'take into account', it can imply a 'positive obligation' to facilitate a different way of life, or ensure that individuals can participate in the life of their community if they choose (**case B4.2; C4.2**).
10. Discrimination, equality and **proportionality** are closely linked. If a measure is disproportionate in that it does not achieve its stated aim because others in an "analogous situation" (similar to 'comparators' under domestic discrimination law) are treated differently, it will be discriminatory (**case B1**). Similarly, if a measure is discriminatory, this may help to show why it is disproportionate.
11. Rather than list 'exceptions' to the principle of non-discrimination, the European Court of Human Rights has recognised there can be **'objective justifications'** for discrimination but the reasons given have to support the conclusion. If the reason for discrimination, or for limiting a substantive right, is disproportionate in that it is not necessary to pursue a legitimate aim, it will be unjustified. The burden is on the applicant to establish a different or unfair treatment and then the burden shifts to the authority to justify it (**case C3**).
12. Human rights are often thought only to trigger a duty on the state not to interfere with them. But they can also introduce a secondary duty on a public authority to protect individuals from an interference with their rights by other individuals or a tertiary duty to facilitate the exercise of a fundamental right. This latter requirement on states to "secure" equal access to fundamental rights can create a **'positive obligation' on a public body to provide the relevant resources**. Other than in disability discrimination legislation, there is little recognition of 'positive obligations' in this sense in UK domestic discrimination law. Under the HRA discrimination does not have to be proven to trigger a 'positive obligation' on the state; a breach of a fundamental right which can only be effectively secured through resource provision can trigger such a provision (**case C4.1, C4.3; D3**).
13. **Discriminatory treatment can amount to degrading treatment** under Article 3, the right not to be subject to torture or inhuman and degrading treatment (a link first

established in *East African Asians v UK*, 1981). This right cannot be justifiably limited so the threshold for breaching it is high. Treatment which does not sufficiently take account of difference can also breach Article 3 (**case C4.3**).

14. **The Human Rights Act is intended to influence public policy as well as provide individuals with legally enforceable rights.** A number of cases have led directly to changes in practice and procedure to comply with a judgement or to deter future legal challenge. Under the Equality Bill¹³, the CEHR will have a duty to “encourage public authorities to comply with the s6 of the HRA”. This will involve clarifying the principles developed through case law to a far wider group of authorities than those directly affected in a given case. The duty to “encourage good practice” will mean extrapolating further from the case law to advise the relevant authorities, private as well as public, to develop policies and procedures which would pre-empt legal challenge and enhance standards of service delivery in line with human rights principles. (**See, for e.g., cases B3; C2.2, C4.2; D2.1, D2.2, D3, E1, E3 F2**).

¹³ Clause 9 (1) (d)

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A. GENDER

1. Sex Discrimination

Regina (Hooper and Others) v Secretary of State for Work and Pensions

Court of Appeal, 18 June 2003; House of Lords, 5 May 2005

FACTS:

Hooper and others claimed that, had they been women, they would have received widow's payment, widowed mother's allowance and widow's pension upon the deaths of their spouses. They claim this breach of article 14 (prohibition of discrimination) when read with article 8 (right to respect for private and family life) ECHR. They accept that they can make no complaint in domestic law about the events that occurred before the HRA came into force on 2 October 2000.

PRINCIPLES RAISED: Historic inequalities can provide justification for unequal treatment

i) Court of Appeal:

The Secretary of State accepted that all widow's benefits fall within the ambit of either article 8 or article 1 Protocol 1 (peaceful enjoyment of possessions) or both. Therefore, they must not be applied in a discriminatory manner as article 14 is engaged. Widow's pension was (and for those still entitled to it, still is) paid weekly to widows under 65 who were 45 when their husband died. The justification for this benefit was that those who were eligible for it had special financial needs (they were likely to be unemployed and dependent upon earnings of their husband). The payment had ceased as this was no longer the position. In this case N claimed the state has taken too long to bring this payment to an end and complained against discrimination in favour of women. Deciding at what point the distinction between men and women reduced to such an extent that article 14 required the state to take action to remove the favourable treatment accorded to widows was a matter for the Secretary of State and the court would accord a considerable discretionary area of judgment, or 'margin of appreciation', as difficult questions of economic and social policy were involved. However, the burden lies on the Secretary of State to provide objective justification for what was without question discrimination in favour of women. The Secretary of State had failed to discharge this burden. By 1995, if not earlier, the difference in economic activity between women and men no longer justified discriminating between them by paying, indiscriminately, pensions to widows aged between 45 and 65.

ii) House of Lords:

The European Court of Human Rights allows Member States to treat groups unequally in order to 'correct factual inequalities' between them. *In taking decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, the European Court allows Member States a generous 'margin of appreciation'.* Such decisions are ordinarily recognised by the courts to be matters for the judgment of the

elected representatives of the people. Once it is accepted that older widows were historically an economically disadvantaged class which merited special treatment but were gradually becoming less disadvantaged, the question of the precise moment at which such special treatment is no longer justified becomes a social and political question within the competence of Parliament. The preservation of widow's payment was objectively justified.

OUTCOME:

The law on widow's benefits had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999.

2. Gender reassignment

2.1 Goodwin v UK

European Court of Human Rights, 11 July 2002

FACTS:

Two post-operative male-to-female transsexuals appealed to the court (their cases were joined together as they dealt with similar facts) and raised issues as to the legal recognition of transsexual people in relation to marriage and definition of gender, birth certificates and social security, employment and pensions.

PRINCIPLES RAISED: Gender-reassignment (post-operative) requires legal recognition

The European Court of Human Rights found that the lack of legal recognition of the gender re-assignment of transsexual persons was a breach of article 8 (the right to respect for private and family life) and the right to marry contained in article 12 of the ECHR. It noted in particular that there was "clear and uncontested evidence of a continuing international trend in favour not only of increased societal acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals". It also noted that the UK had failed to take any effective steps to change the position since the Court's previous ruling on the same issues (*Sheffield and Horsham v UK* (1996)). It therefore concluded that the UK could no longer claim that the matter falls within its "margin of appreciation", or discretionary area of judgement, with regards to the appropriate means of achieving recognition of the rights protected under the Convention.

OUTCOME:

The lack of legal recognition of the new gender of post-operative transsexuals was a breach of article 8 and 12. No damages awarded, court considered the finding of a violation was just satisfaction for the breach.

2.2 *Bellinger v Bellinger*

House of Lords, 10 April 2003

FACTS:

B, who applied to the court, was registered male at birth. Since 1975 B had dressed and lived as a woman and underwent treatment and surgery. In 1981 B went through a ceremony of marriage with a man. She sought a declaration that the marriage was valid under s.11(c) of the Matrimonial Causes Act 1973 which provided that a marriage was void unless the parties were respectively male and female.

PRINCIPLES RAISED: Gender-reassignment (post-operative) requires legal recognition

The court made a formal declaration under s4 HRA that the relevant section of the Matrimonial Causes Act 1973 was incompatible with articles 8 (the right to private and family life) and 12 (the right to marry) ECHR and therefore the Human Rights Act.

OUTCOME:

The government announced in December 2002 that it proposed to implement *Goodwin v UK* fully with legislation and the draft Gender Recognition Bill was published in July 2003. The Gender Recognition Act 2004 came into force on 4 April 2005. It provides a mechanism for gender re-assignment to be legally recognised. Once a full gender recognition certificate has been obtained, a transsexual person is entitled to be treated in their acquired gender for all purposes, including marriage. They can also obtain a revised birth certificate showing their new gender. The Act also amends the Sex Discrimination Act to ensure that, once a transsexual person has been recognised in the “acquired gender”, they can no longer be discriminated against on grounds of gender reassignment in employment or vocational training on the basis of genuine occupational qualification.

3. Women in prison

‘Prison Babies case’ R (P) v Secretary of State for the Home Department and R (Q) v Secretary of State for the Home Department

Court of Appeal, July 2001

FACTS:

Two imprisoned mothers challenging a blanket Prison Service rule, requiring compulsory removal of all babies from imprisoned mothers at 18 months old. The policy did not allow any deviation even where exceptional circumstances (such as the imminent expiry of the mother’s sentence) might mean that not removing the child would be in the child’s best interest.

PRINCIPLES RAISED: Proportionality requires flexibility

Compulsory separation of mother and baby in prison was a serious interference by the state in the child’s right to respect for family life and the mother’s right to respect for family life

under article 8. The state must justify their interference with this right. Whatever the justification for a general rule, Convention law required each application of that rule to individuals to be proportionate. Where there was a very serious intervention, such as separating a mother and baby, the more compelling the justification for it had to be. To meet the test of proportionality, greater flexibility was required in applying the policy, and the prison service had to consider the welfare of the individual child, including the extent of harm to the child from separation or from remaining in the prison environment, and the quality of alternative arrangements.

OUTCOME:

In P's case it could not be concluded that harm to the child on separation would be sufficient to outweigh all the other relevant considerations. P's appeal dismissed. In Q's case no suitable placement could be found for the child, who was strongly attached to her mother. The harm done by the child's separation from Q may be very considerable. Q's appeal allowed and case sent back to be reviewed by the Prison Service.

Following this judgment and other cases on Mother and Baby Units, the Prison Service Order on the management of mother and baby units was updated in January 2005 to replace the Order issued in 2000. It updates the requirements for the proper operation of Mother and Baby Units. In particular, it reflects the outcome of recent court judgments on Mother and Baby Units and provides new instructions and advice on assessing whether separation of a mother and child is in the child's best interests.

4. Rape

B v Secretary of State for Home Department

Court of Appeal, 1 February 2005

FACTS:

B had sought asylum in the UK after she was separated from her family in the Democratic Republic of Congo in 1998 at the age of 13 and was repeatedly raped by a soldier.

PRINCIPLES RAISED: Rape could be a form of inhuman/degrading treatment which the state is obliged to provide protection from

When considering a claim for asylum, the risk of psychiatric injury and the risk of being subjected to rape have different relevance under the Refugee Convention and the ECHR. Under the Refugee Convention the risk of psychiatric injury could not give rise to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (under article 1A(2) of the Convention). Nor will the risk of being raped give rise to such a fear unless a state agency is involved. The right not to be subjected to inhuman or degrading treatment under article 3 ECHR puts an obligation on the UK not to place someone in a situation where they could experience such treatment. Even though there is no right to asylum under the HRA, deporting a woman for

whom there are grounds for fearing she could be subjected to rape could breach the UK's obligations under article 3.

OUTCOME:

B's appeal was allowed to the extent that her appeal under the ECHR had not been adequately considered by the adjudicator (who hears appeals against asylum decisions) and must be remitted to another adjudicator for proper consideration of her claim under the ECHR.

B RACE AND NATIONALITY

1. Detention of foreign nationals

A and others v Secretary of State for the Home Department

House of Lords, 16 December 2004

FACTS:

The men whose appeals were being heard were foreign nationals who could not be deported as that would have resulted in a breach of article 3 of the ECHR (the prohibition of torture, inhuman and degrading treatment). They were certified by the Secretary of State as suspected international terrorists, and detained without trial under the Anti-terrorism, Crime and Security Act 2001. The legislation involved the UK derogating from its obligations under article 5 of the ECHR, (the right to liberty).

PRINCIPLES RAISED: Discrimination and proportionality linked

The House of Lords formally declared that s23 of the Anti-Terrorism, Crime and Security Act was incompatible with the HRA as the detention provisions were disproportionate and discriminated on the ground of nationality. The measures did not rationally address the threat to the security of the UK presented by Al Qaeda terrorists because they did not address the threat presented by terrorists who were UK nationals. The detention of some suspects and not others, defined by nationality or immigration status, violated article 14 (prohibition of discrimination) and could not be justified.

To comply with human rights principles, limits on human rights have to be proportionate. Limits on human rights cannot be proportionate if the means chosen do not achieve the stated legitimate end; the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem. The detention powers were not 'strictly required' because, if they were, they would apply to UK nationals too who might also be suspected of international terrorism. The HRA applies equally to all, regardless of nationality or immigration status. Non-UK citizens suspected of terrorism were in an analogous situation to UK-citizen suspects so the Anti-Terrorism, Crime and Security Act discriminated on grounds of nationality and breached article 14.

OUTCOME:

The relevant provisions of the Anti-Terrorism, Crime and Security Act 2001 have since been repealed and replaced by the Prevention of Terrorism Act 2005.

2. Homelessness and nationality***R (Morris) v Westminster City Council and First Secretary of State***

Administrative Court, 7 October 2004

FACTS:

M and her daughter had been given leave to enter the UK as visitors. M subsequently obtained a British passport as a British citizen by descent. M applied to the local authority for accommodation. The application was refused under s.185 of the Housing Act 1996 on the basis that as M's daughter had been subject to immigration control, M could not rely on the need to accommodate her daughter as grounds for giving M herself a priority need for accommodation.

PRINCIPLES RAISED: Nationality/citizenship discrimination prohibited in exercise of right to family life and homelessness assistance

There is no right to a home under article 8 (right to respect for private, family life and home) but provisions for homelessness assistance for people with children fall within article 8 as they are intended to promote family life. As the provisions for homeless assistance fall within the scope of the ECHR they cannot be applied in a discriminatory manner. Discrimination on grounds of nationality and citizenship is a breach of human rights. The court made a formal declaration of incompatibility under s4 HRA that s185(4) of the Housing Act 1996 was incompatible with article 14 (prohibition on discrimination) to the extent that it required a dependant child of a British citizen to be disregarded when determining whether the British citizen has a priority need for housing, when that child is subject to immigration control.

OUTCOME:

The case is due to be appealed in the Court of Appeal.

3. Investigating a racist attack***R (Amin) v Secretary of State for Home Department***

House of Lords, 16 October 2003

FACTS:

Zahid Mubarek was killed by his cellmate in a Young Offenders Institution. The cellmate was on remand for racist offences and his history of racist and disturbed behaviour had been well-known to police authorities. As the cellmate pleaded guilty to the murder there

was no significant inquiry at trial into any possible role the prison's policy, procedures or conduct might have had in Zahid's death. The Prison Service accepted responsibility for his death. An internal inquiry was held by the Prison Service, in addition to a police investigation into whether the Prison Service or any of its employees should be prosecuted. A coroner's inquest was opened but was adjourned pending the cellmate's trial for murder and was never resumed. The Commission for Racial Equality conducted an investigation into racial discrimination in the Prison Service, which made specific reference to the circumstances of Zahid's death. Its report was published in July 2003 and was not before the first instance court or the Court of Appeal. The secretary of state refused the request of Zahid's family to establish an independent public inquiry into his death. Zahid's uncle applied to the courts seeking an inquiry on the grounds that the state's "positive obligation" to protect the right to life required an effective investigation into the death.

PRINCIPLES RAISED: Right to life and "positive obligations" on state

Previous European Court of Human Rights cases have decided that under article 1 (State Parties must secure rights in Convention) and 2 (right to life), states must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. Article 2 of the Convention may also imply in certain well-defined circumstances a "*positive obligation*" on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Where a death has occurred in custody the state is additionally under a duty under article 2 to publicly investigate before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. In this case the inquiries and investigations held did not satisfy the investigative duty of article 2 and an independent public investigation had to be held.

OUTCOME:

Following this case the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks, amending its Risk Assessment Form to allow information-sharing between operational and care staff and to identify high risk factors. On 29 April 2004 David Blunkett announced the establishment of a non-statutory public inquiry into the murder.

4. Travellers and Gypsies

Romani Gypsies are recognised as a separate racial group for the purposes of the Race Relations Act 1976 (after test case *CRE v Dutton* in 1989). Irish Travellers have been recognised as separate ethnic group since 2000. Article 8 of the HRA (right to respect for private and family life and home) is engaged where Gypsies and Travellers are challenging planning and housing decisions by local authorities.

4.1 South Buckinghamshire District Council v Porter and two other cases

House of Lords, 22 May 2003

FACTS:

These cases concerned Gypsies who were living on land in breach of planning control. In each case the local authority applied for and obtained an injunction under s.187B Town and Country Planning Act 1990 to restrain the breach.

PRINCIPLES RAISED: Equality and proportionality

In seeking injunctions to restrain breach of planning controls, local authorities must have regard to article 8 (right to respect for private and family life) and consider whether Gypsies' removal from a site is proportionate to the public interest in preserving the environment. Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought (protection of the environment) but also that it does not impose an excessive burden on the individual whose private life and home is at stake.

OUTCOME:

Local authority appeals dismissed.

4.2 R (Price) v Carmarthenshire County Council

High Court, 24 January 2003

FACTS:

P was an Irish Traveller, living in a caravan on land owned by the council. P was living there by agreement with the council until alternative suitable accommodation was found by either party. Under s.193 Housing Act 1996 the council was under a duty to secure accommodation for P. It offered P a house as a temporary measure, which was refused. Council sought to evict P.

PRINCIPLES RAISED: Equality and positive obligations

Article 8 requires respect to be given for private life, family life and home. 'Respect' means more than 'acknowledge' or 'take into account', it implies some positive obligations on public authorities. 'Respect' includes the positive obligation to act so as to facilitate the gypsy way of life, without being under a duty to guarantee it to an applicant in any particular case. Article 8 requires the public authority to assess whether and to what extent it would be compatible with the applicant's position to require occupation in conventional housing.

OUTCOME:

The matter had to go back to the council to be reconsidered in accordance with the law.

C DISABILITY DISCRIMINATION

1. Learning difficulties and detention under the Mental Health Act 1983

1.1 R (on the application of MH) v Secretary Of State for the Department of Health *Court of Appeal 3 December 2004*

FACTS:

M has Down's Syndrome. She had been living at home with her mother but was then detained under s.2 of the Mental Health Act 1983. M's mother had sought a discharge but had been barred under s.25 of the Act. Just before the order detaining M was due to expire, an application had been made to displace M's mother as nearest relative and M had therefore remained subject to detention under the s.2 order well beyond the normal period of 28 days. M complained that her disability was sufficiently serious for her to have been unable either to make an application to a mental health review tribunal herself against the s.2 order or to authorise others to make an application on her behalf. She argued that her detention was incompatible with article 5, the right to liberty.

PRINCIPLE RAISED: Equality and liberty; positive obligation on the state to recognise difference

The state was obliged to place an incapacitated patient in the same position as other patients with regard to access to the mental health review tribunal (MHRT). There was no mechanism enabling an incapacitated patient like M to apply to the tribunal to contest their detention under s.2 of the Mental Health Act, therefore s2 was inconsistent with article 5(4) (everyone deprived of liberty shall be entitled to take proceedings to decide lawfulness of detention). The court made a formal declaration under s4 HRA that s2 of the Mental Health Act was incompatible with article 5(4) as it was not attended by a provision for a reference to a court when a patient is detained under to s.2 who is incapable of exercising their right to appeal to the MHRT.

OUTCOME:

M's appeal was allowed but the case is being appealed to the House of Lords.

1.2 HL v UK

European Court of Human Rights, 5 October 2004

FACTS:

HL is autistic, unable to speak, his level of understanding is limited, he is frequently agitated and he has a history of self-harming. He lacks the capacity to consent or object to medical treatment. He was admitted as an 'informal patient' at a hospital, his committal under the Mental Health Act was considered but not thought necessary as he did not resist admission. Eventually he was detained under s5(2) of Mental Health Act. He claimed the time spent in psychiatric hospital as an informal patient amounted to a deprivation of his liberty under article 5 (right to liberty and security).

PRINCIPLES RAISED: Equality and liberty

The right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to or disagreeing with the proposed action. The lack of procedural safeguards (fixed procedural rules by which the admission and detention of compliant incapacitated persons was conducted) gave rise to a violation of article 5(1).

OUTCOME:

Court found a violation of article 5. Costs and expenses awarded.

2. Terminal illness

2.1 A Local Authority (Claimant) v Mr Z (Defendant) and The Official Solicitor (Advocate to the Court)

High Court, 3 December 2004

FACTS:

Z had cerebella ataxia, a condition which attacked the part of the brain that controlled the body's motor functions. She had become increasingly disabled by the condition, which was incurable and irreversible. Although she continued to live at home, she required extensive support from the local authority and her needs had grown as her condition had deteriorated. Z had attempted suicide and wished her husband to arrange an assisted suicide in Switzerland. Her husband informed the local authority, which concluded that the wife was a vulnerable person living in its area and obtained an injunction from the High Court to prevent the husband removing Z from England for this purpose.

PRINCIPLES RAISED: Equality and autonomy

The right to life under article 2 is engaged where an individual suffering from a terminal degenerative disease asks a family member to arrange a trip abroad to undertake assisted suicide. The local authority has a duty to investigate the position of the individual as a vulnerable adult to consider what was their true position and intention and to consider whether they are legally "competent". Where the individual is not "competent" they must provide assistance to determine and give effect to the individual's best interests.

Where the individual is "competent", the positive obligation on the state to protect life under article 2 is weaker than if the individual lacks "competence". Article 3 (right to be free from torture, inhuman or degrading treatment) and 8 (right to respect for private and family life) rights are also engaged. *"...in the context of a person of full capacity, whilst the right to life is engaged, it does not assume primacy (at the hands of another especially) over the rights of autonomy and self-determination"*. The local authority must allow the individual to give effect to their decision in any lawful way, although that should not preclude the giving of advice or assistance in accordance with what are perceived to be the person's best

interests and they must inform the police if they suspect a criminal offence might be involved.

OUTCOME:

The local authority had acted correctly, notifying the police of Mr Z's intended course of action. The local authority's duties did not extend beyond those described, and, in particular, the authority was under no duty to seek continuation of the injunction.

2.2 R (Burke) v General Medical Council (GMC) (Disability Rights Commission interested party)

High Court, 30 July 2004

FACTS:

B suffered from spino-cerebellar ataxia with peripheral neuropathy, a progressively degenerative condition that would eventually result in an inability to swallow and a need for artificial nutrition and hydration (ANH) by tube to enable B to survive. B was likely to retain full cognitive faculties until very shortly before his death and would therefore be aware of the pain and extreme distress that would result from dehydration and malnutrition. B wished to be fed and provided with appropriate hydration until he died of natural causes. He did not want a decision to be made by doctors that his life was not worth living and therefore to withdraw ANH. B sought judicial review of the GMC guidance ("Withholding and Withdrawing Life-prolonging Treatments: Good Practice in Decision-Making") on when ANH can be withdrawn. He claimed withdrawal is unlawful in certain respects and incompatible with his rights under articles 2 (right to life), 3 (prohibition on torture, inhuman and degrading treatment), 6 (right to fair trial), 8 (right to respect for home and family life) and 14 (prohibition of discrimination).

PRINCIPLES RAISED: Equality, dignity and autonomy

Personal autonomy and dignity are fundamental rights protected by articles 3 and 8 ECHR. Personal autonomy, protected by article 8, includes such matters as choosing how to pass one's final days and how to manage one's death. The dignity interests protected by the Convention included, under article 3, the right to die with dignity and the right to be protected from treatment, or from a lack of treatment, which would result in one dying in avoidably distressing circumstances. A failure to provide life-prolonging treatment in circumstances exposing the patient to "inhuman or degrading treatment" would in principle involve a breach of article 3. Even if the patient's suffering had not reached the severity required to breach article 3, a withdrawal of treatment in the same circumstances might still breach article 8 if there were sufficiently adverse effects on his physical or moral integrity or mental stability. Personal autonomy, protected by article 8 means that in principle it is for the "competent" patient, not his doctor, to decide what treatment should or should not be given in order to avoid what the patient would find distressing. Important as sanctity of life is, it has to take second place to personal autonomy.

If the patient was "incompetent" and had left no binding and effective advance directive then it was for the court to decide what was in his best interests, with a very strong presumption

in favour of taking all steps which would prolong life. However, this is not absolute. Important as the sanctity of life was, it might have to take second place to human dignity.

In light of these principles, the guidance published by the GMC was vulnerable to criticism and was in certain respects incompatible with B's rights under articles 2, 3 and 8, not to deprive a person of his life intentionally, not to subject him to inhuman or degrading treatment, and not to interfere with his physical and psychological integrity and dignity.

OUTCOME:

The case is currently under appeal in the Court of Appeal.

3. Treatment without consent

Glass v UK

European Court of Human Rights, 9 March 2004

FACTS:

A mother and her son applied to the court. The son is disabled but not terminally ill. The mother wished her son to live out his natural life span. An unqualified 'Do Not Resuscitate Order' was placed on the son's notes without the mother's consent. Morphine was administered to the son by the health trust against the mother's wishes and without obtaining the sanction of the court.

PRINCIPLES RAISED: Equality and proportionality

Imposing treatment on a child in defiance of his mother's objections gave rise to an interference with the child's right to respect for private life, and in particular his right to physical integrity under article 8.

The court must consider whether the interference was 'necessary in a democratic society' as outlined in article 8(2). The treatment administered to the child pursued the legitimate aim of serving his interests. But the health trust should have sought the intervention of the High Court once it was established that they could not reach a compromise with his mother on treatment.

OUTCOME:

Breach of article 8 found and damages awarded.

4. Undignified treatment

4.1 Bernard v Enfield

High Court, 25 October 2002

FACTS:

The case concerned a severely disabled woman (C) with limited mobility, dependent on an electronic wheelchair, and who suffered from incontinence and diabetes. Husband cared for her and their six children. The family was housed in local authority housing and the social services department undertook a number of assessments of C's needs, which indicated that the property was unsuitable since C could not use her wheelchair or access the first-floor accommodation and was confined to the lounge. The care plan stated that C needed assistance to move to a suitably-adapted property. The local authority accepted that it was under a duty to make arrangements for the provision of suitably-adapted accommodation under s.21(1)(a) National Assistance Act 1948, but provided no explanation for the failure to comply with that duty or to act on social services' recommendation. The family lived in the unsuitable conditions for 20 months.

PRINCIPLES RAISED: Equality, dignity and positive obligations

Following assessments by social services stating that housing was unsuitable for a disabled person's use, the local authority was under an obligation under article 8 (right to respect for private and family life) to take positive steps to enable the disabled person and her family to lead as normal a family life as possible. These positive steps included the provision of suitably adapted accommodation, which would have secured the disabled person's physical and psychological integrity and restored her dignity as a human being. The failure to act showed a singular lack of respect for her private and family life and was a breach of article 8. If a public body took steps once a problem had been drawn to its attention, it might be the case that nothing more would be required in order to afford "just satisfaction" for a breach of human rights. That was not the case here and an award of damages was necessary.

OUTCOME:

Court awarded £10,000 damages under s8 HRA for the breach of article 8.

4.2 R (A and B) v East Sussex County Council (Disability Rights Commission interested party)

High Court, 10 February 2003

FACTS:

Two young women suffered profound physical and learning disabilities and greatly impaired mobility. The local authority had a policy prohibiting care staff from lifting manually, they could only use hoists. The two women challenged this as a breach of their rights under articles 3 (prohibition on torture, inhuman and degrading treatment) and 8 (right to respect for private life).

PRINCIPLES RAISED: Equality, dignity and competing rights

Where a local authority has imposed a policy prohibiting manual lifting by their care staff of disabled people in their own homes, article 8 rights are engaged and rights under articles 3 and even under article 2 (right to life) may be engaged. Article 8 is engaged as it protects the disabled persons' dignity and also their right to participate in the life of the community

and have access to an appropriate range of recreational and cultural activities. Article 8 also protects the care workers right to physical and psychological integrity and dignity. In balancing the competing rights, any interference must be proportionate. The local authority policy must consider the physical, emotional, psychological or social impact upon the disabled person. A lifting policy is most unlikely to be lawful where either on its face or its application it imposes a blanket proscription of all manual lifting or imposes a blanket proscription except in circumstances where life is in issue, or where any other means are a physical impossibility.

OUTCOME:

During the case the local authority and the Disability Rights Commission worked together to amend the authority's Safety Code of Practice on Manual Handling to include consideration of the dignity and rights of the people being lifted. The court was satisfied that 'the general policy and approach it proclaims is compatible with the relevant requirements of both domestic and human rights law'. Copies of this Code of Practice were sent out to all local authorities by the DRC to encourage them and other care providers to review their policies in the light of this decision.

4.3 Price v UK

European Court Human Rights, 10 July 2001

FACTS:

P was disabled (all four limbs for-shortened as a result of thalidomide). She was committed to prison for seven days for contempt of court in civil proceedings. As it was not possible to take her to prison until the next day P spent that night in a cell in Lincoln Police Station. The cell, which contained a wooden bed and a mattress, was not adapted for use by a disabled person. P alleges that she was forced to sleep in her wheelchair since the bed was hard and would have caused pain in her hips, that the emergency buttons and light switches were out of her reach, and that she was unable to use the toilet since it was higher than her wheelchair and therefore inaccessible. During the night P complained repeatedly of cold and was seen by a doctor who noted that the facilities were inadequate for a disabled person. She spent a further two nights in a prison's health care centre.

PRINCIPLES RAISED: Equality, dignity, positive obligations on state to address difference

There was no evidence of positive intention to humiliate or debase applicant but to detain a severely disabled person in conditions where she is dangerously cold, risks developing bed sores because her bed is too hard or unreachable and is unable to go to the toilet or keep clean without the greatest difficulty, constitutes degrading treatment contrary to article 3. To avoid unnecessary hardship – that is, hardship not implicit in the imprisonment of an able-bodied person – P should have been treated differently from other people because her situation was significantly different.

OUTCOME:

P suffered some moral damage as a result of her detention which could not be compensated solely by the finding of a violation and the sum of £4,500 was awarded in respect of non-pecuniary damage. P was awarded £4,000 in respect of her legal costs and expenses.

D AGE

Many of the principles outlined in the previous sections are relevant in relation to age.

1. Pension sharing

R (Smith) v Secretary of State for Defence and the Secretary of State for Work and Pensions (interested party)

High Court, 26 July 2004

FACTS:

S was the ex-wife of a retired army general. Under a pension sharing order made in divorce proceedings S was awarded a half share in her former husband's pension by virtue of the Welfare Reform and Pensions Act 1999. Her husband began to receive his half share at 60 but on the basis of s37 of the 1999 Act, S's share would not be paid until she also reached 60. S claimed she had the right to receive her half of the pension at the same time as her husband. She claimed the Pensions Schemes Act 1993 breached her rights under article 1 Protocol 1 (right to peaceful enjoyment of possessions), article 8 (right to respect for private life) and article 14 (prohibiting discrimination) on grounds of her gender or status as an ex-wife.

PRINCIPLES RAISED: HRA provides protection against discrimination on grounds of age

Pension credit rights were a "possession" for the purposes of ECHR Protocol 1 Article 1 and Article 8 embraced respect for a person's need for financial support both under and over 60 years old.¹⁴ The provision did not breach the rights under either of these articles, but as it fell within the ambit of both of these articles, S had a right to enjoy the provision without discrimination. The provision differentiates not only directly on grounds of age but also indirectly on grounds of gender when it delays payment to a pension credit member until age 60 even in circumstances in which the active member is receiving or will receive his pension prior to age 60. Therefore the Secretary of State must establish an objective and reasonable justification for the provision; that it is a proportionate response to a legitimate aim. The disputed sections were justified by the need to provide income in old age and to

¹⁴ Also established in *R (Carson & Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37 that contributory, and by assumption non-contributory, social security benefits were a 'possession' within the meaning of ECHR Protocol 1, Article 1.

encourage those who had acquired rights under pension sharing orders to work until they reach pensionable age.

OUTCOME:

The court found in favour of the Secretary of State for Defence.

2. Care homes

2.1 Cowl and others v Plymouth City Council

Court of Appeal, 14 December 2001

FACTS:

C and others were residents of a residential care home owned and run by the council. They were aged between 66 and 92, were frail and in poor health. They applied for judicial review of the council's decision to close a residential care home. The decision to close the home emanated from the need to reduce its projected overspend. C submitted that at least three of the residents had a legitimate expectation that the care home would be their home for life following express assurances to that effect from employees of the council. They also argued that the decision to close the home infringed their rights under articles 2 (right to life), 3 (right to be free from torture, inhuman and degrading treatment) and 8 (right to respect for home and family life) of the ECHR.

PRINCIPLES RAISED: Equality and proportionality

Article 8 did not give a right to a home. Although it may be engaged, it is a right where a balancing exercise has to be carried out between the rights of C and the financial considerations, which are matters for the council.

OUTCOME:

The court dismissed the appeal by C but set out the terms of an agreement by the parties to investigate the effect of the closure on C. Before a final decision was made on closure the council would take into account the emotional, psychological and physical health of the residents and comply with its obligations under the HRA, in particular articles 2, 3 and 8. Following the assessment a report was issued. An appendix was added to the report on 'Draft guidelines for local authorities when considering and implementing the closure of a residential care home for older people'.

The following case has been added to highlight the issues surrounding the definition of public authorities under s6 HRA:

2.2 Heather and others v Leonard Cheshire Foundation

Court of Appeal, 21 March 2002

FACTS:

LCF was the UK's leading voluntary sector provider of care and support services to the disabled, which it provided under contracted out arrangements with a number of local authorities. H and others were residents who had lived at the home for over 17 years when LCF decided to close the home and to place them in smaller, community-based units in the surrounding area. H contended that: (i) LCF exercised functions of a public nature so as to be a public authority within s.6 Human Rights Act 1998, with the consequence that LCF owed them a duty to comply with their article 8 right to respect for their home, and that the decision to close the home was a breach of that duty because it went against their legitimate expectation that the home would be their "home for life".

PRINCIPLES RAISED: Definition of "public authority" under s6 HRA

A charity providing residential care on behalf of the local health and social services was not a "public authority" under s.6 HRA. The court reached this decision with reference to the following criteria: i) there was no "material distinction" between the type of services being provided to publicly-funded and those provided to privately paying residents; ii) the presence of public funding does not conclusively show that a body is a "public authority"; iii) the charity was not exercising any statutory powers in providing services to the residents. But the Court of Appeal emphasised that the commissioning local authority retained its obligations as a "public authority" to protect residents' human rights. Consequently, the court suggested that, in future, local authorities ought to consider including terms in new contracts with private sector service providers to safeguard the human rights of service-users and to avoid contracting-out causing disparities in human rights protection between client groups.

OUTCOME:

H's appeal dismissed.

3. Children's rights***R (L and others) v Manchester City Council and another case***

High Court, 26 September 2001

FACTS:

The council paid lower rates of benefits to foster carers who were family members of the child than to non-relative foster carers. L (two families with foster children who were related to them) alleged that the rates paid were in fact so low as to be grossly inadequate and in conflict with the principle of the child's welfare; and discriminatory. Supporting the latter point, they also argued that the council's failure to do any calculations relating to the families' financial needs showed they had simply not engaged with the question of risk to article 8 rights (right to respect for private and family life).

PRINCIPLES RAISED: Discrimination, proportionality and “positive obligations”

Article 8 placed an obligation on the local authority to take “all appropriate positive steps” to ensure that children should live with their families (subject to contrary welfare considerations under the Children Act 1989 and article 8(2)). The benefit payments were encompassed by the local authority’s positive duties to respect family life. Therefore they should not be made in a discriminatory manner. There was a difference in treatment on grounds of “family status”. In assessing whether the difference in treatment was proportionate the court applied the “anxious scrutiny” test, that is, if fundamental human rights are engaged the decision must be subjected to “the most anxious scrutiny”. The court found that the council’s blanket and inflexible application of limits on payments to non-family fosterers, and the council’s failure to submit any evidence justifying the levels paid, meant the policy fell foul of article 14.

OUTCOME:

There was a breach of articles 8 and 14.

E SEXUAL ORIENTATION

1. Statutory tenancies for same-sex couples

Ghaidan v Godin-Mendoza

House of Lords, 21 June 2004

FACTS:

G lived with another man who was the tenant of a flat in London. When the tenant died the landlord claimed possession. The county court judge ruled that G was not a statutory tenant in that he could not succeed to the tenancy of the flat as a surviving spouse under the Rent Act 1977 Sch.1 para.2. The judge ruled that he was entitled to an assured tenancy (a legal right to live in the flat) by succession as a member of the original tenant’s family under the Rent Act Sch.1 para.3(1), but this is less advantageous than statutory tenancy.

PRINCIPLES RAISED: Equality and proportionality; HRA provides protection against discrimination on grounds of sexual orientation

On an ordinary reading of para.2(2) of the Rent Act 1977 Sch.1, the survivor of a heterosexual couple could become a statutory tenant by succession but the survivor of a homosexual couple could not. This provision fell within the ambit of the right to respect for a person’s home guaranteed by article 8. Article 8 does not require the state to provide security of tenure for members of a deceased tenant’s family, nor the right to be provided with a home, but if the state makes legislative provision it must not be discriminatory; it must not draw distinction on the grounds of sexual orientation unless the difference in treatment can be “objectively justified”. The distinction on grounds of sexual orientation in this case had no legitimate aim and was made without good reason. Therefore, the difference of

treatment infringes article 14 read in conjunction with article 8. The social policy underlying the extension of security of tenure under para 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of a homosexual couple living in a close stable relationship. The courts used its interpretative powers under s3 HRA to eliminate the discriminatory effect of para 2. Para 2 should be read and given effect to as though the survivor of a homosexual couple living together were the surviving spouse of the original tenant.

OUTCOME:

Appeal of the landlord dismissed.

2. Definition of unmarried couple

Secretary of State for Work and Pensions v M

Court of Appeal, 19 October 2004

FACTS:

M is a mother of two children. The children live with their father but M shares the responsibility for their maintenance. She now lives with another woman and shares outgoings with her. The criteria for reducing the liability of absent parents for child maintenance on account of their current housing costs are confined to heterosexual couples. Her liability is therefore greater than if she were living in a heterosexual relationship.

PRINCIPLES RAISED: HRA provides protection against discrimination on grounds of sexual orientation

Previous cases in the European Court of Human Rights have shown that discrimination on the grounds of sexual orientation in the enjoyment of any aspect of the rights accorded by article 8 (right to respect for private and family life and home) was prohibited, unless the state could show a “compelling and proportionate justification” that would bring the discrimination within its “margin of appreciation”, the discretion allowed to states as to the appropriate manner in which to achieve its policy objectives.

The operation of the child support scheme came within the ambit of article 8 as the scheme set out to support family life by making allowance for the joint expenses of an absent parent's new household. Since the scheme discriminated between one family unit and another on the grounds of its members' sexuality article 14 was engaged. This discrimination could not be justified so the legislation was incompatible with article 14 in conjunction with article 8. The definition of "unmarried couple" in reg.1(2) of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 was disapplied so that an absent parent living in a same sex relationship was treated in the same way as an absent parent living in a heterosexual relationship.

OUTCOME:

The appeal by the Secretary of State was dismissed but the case is being appealed to the House of Lords.

3. 'Nearest relative'***R (SG) v Liverpool City Council and Secretary of State for Health***

High Court, 21 October 2002

FACTS:

SG was the same-sex partner of a detained mental health patient, whose local council had refused to afford her status of 'nearest relative'. This is a statutory role carrying important responsibilities in decision-making on the detention and treatment of the patient. With heterosexual couples the wife or husband automatically qualifies for nearest relative status and co-habitees qualify after 6 month period. For any other category of relationship the Mental Health Act 1983 sets a 5-year residence requirement. SG was excluded, having only lived with patient for 3 years. SG argued that article 8 (right to respect for private and family life) includes in its scope issues of sexuality, personal choice and identity.

PRINCIPLES RAISED: HRA provides protection against discrimination on grounds of sexual orientation

The provisions of the Mental Health Act dealing with nearest relative were discriminatory and resulted in same sex couples who had been living together for six months being treated differently to unmarried heterosexual couples living together for the same period. This difference in treatment could not be justified so was contrary to articles 8 and 14 ECHR. The provisions were re-interpreted by the court, using their powers under s3, to apply an identical qualifying period to same-sex and opposite-sex couples.

OUTCOME:

The Secretary of State accepted that the present interpretation of the provision for naming a "nearest relative" under the Mental Health Act 1983 was discriminatory against people in same sex relationships. The matter was accordingly dealt with by consent but was approved by the High Court.

F RELIGION / BELIEF**1. Corporal punishment in independent schools*****R (on the application of Williamson and others) v Secretary of State for Education and Employment and others***

House of Lords, 24 February 2005

FACTS:

A group of head teachers, teachers and parents of children at four independent schools applied to the court. They claimed to speak on behalf of "a large body of the Christian community" whose fundamental beliefs include a belief that part of the duty of education in the Christian context was that teachers should be able to stand in the place of parents and administer physical punishment to children who were guilty of indiscipline. Since 1987 school teachers in state schools have been prohibited from administering corporal punishment to pupils. The group applying to the court challenged the extension of this ban to all schools, by s548 Education Act 1996 as amended by the School Standards and Framework Act 1998, claiming it was incompatible with their right under article 9 ECHR (freedom of thought, conscience and religion) to manifest their religious opinion.

PRINCIPLES RAISED: Equality and proportionality

Under article 9 there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. In a pluralist society a balance has to be held between freedom to practise one's beliefs and the interests of others affected by those practices. By placing their children in a school where corporal punishment was practised, the parents were therefore manifesting their beliefs on corporal punishment. The ban on corporal punishment in all schools interferes materially with parents' rights under article 9 and article 2 Protocol 1 (the right to freedom of education). However, the interference is necessary in a democratic society for the protection of the rights and freedoms of others. The ban pursues a legitimate aim; children are vulnerable and the aim of the legislation is to protect them and promote their well-being. Therefore, the ban does not violate the rights of either parents or teachers under article 9 and article 2 Protocol 1.

OUTCOME:

No breach of article 9 or article 2 Protocol 1 found.

2. School uniform policy***R (on the application of SB) v The Head Teacher and Governors of Denbigh High School***

Court of Appeal, 2 March 2005

FACTS:

SB sought judicial review of a decision of the head teacher and governors of Denbigh High School, who had refused to allow her to attend the school if she was not willing to comply with school uniform requirements. These permitted girls to wear a shalwar kameeze but not the jilbab, a form of dress which conceals the shape of a woman's arms and legs. SB lost nearly two years of schooling.

PRINCIPLES RAISED: Equality and proportionality

When considering breaches of school uniform policy for religious reasons, the school should start from the premise that pupils have the right to manifest their religion under article 9 ECHR (freedom of thought, conscience and religion). Under the doctrine of proportionality the onus lays on schools to justify interference with that right. Excluding a pupil from school for breaching the school uniform policy without considering her rights under article 9 was a breach of article 9 and article 2 Protocol 1 (right to freedom of education).

OUTCOME:

SB's appeal allowed. The court thought it desirable for the DfES to give schools further guidance in light of this judgment to assist them in understanding the decision making process required under the HRA.

Although the following cases do not concern UK citizens or domestic laws, the principles established at the European Court of Human Rights are applicable to the UK:

3. Proselytism

Kokkinakis v Greece

European Court of Human Rights, 25 May 1993

FACTS:

After becoming a Jehovah's Witness in 1936, K was arrested more than sixty times for proselytism. He was also interned and imprisoned on several occasions.

PRINCIPLES RAISED: Religion and proportionality

The court sought to distinguish between bearing Christian witness and improper proselytism in the context of Greek laws prohibiting proselytism. The former corresponds to true evangelism, the latter represents a corruption or deformation of it. The latter may include offering material or social advantages with a view to gaining new members, exerting improper pressure on people in distress or in need or even violence. This is not compatible with respect for freedom of thought, conscience and religion of others. A law which simply criminalized all proselytism was disproportionate and not "necessary in a democratic society...for the rights and freedoms of others". The domestic court did not sufficiently specify in what way K had attempted to convince his neighbour by improper means. It has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need.

OUTCOME:

Breach of article 9 found.

4. Positive obligations under article 9

Dubowska and Skup v Poland

European Commission on Human Rights, 18 April 1997

FACTS:

In 1994 the national weekly "Wprost" was circulated in Poland. On its cover was an image of Czestochowa Madonna and Child. D and S complained under article 9 ECHR that the Polish authorities did not provide them with sufficient protection against a violation of their right to freedom of religion, as they failed to protect them against the distorted publication of sacred images of their worship and that the criminal proceedings against the persons who had insulted the objects of their worship were discontinued.

PRINCIPLES RAISED: "Positive obligation" under article 9 to secure respect for freedom of religion

There may be certain "positive obligations" on the part of a State inherent in an effective respect for rights guaranteed under article 9 of the Convention, which may involve the adoption of measures designed to secure respect for freedom of religion even in the sphere of the relations of individuals between themselves. Such measures may, in certain circumstances, constitute a legal means of ensuring that an individual will not be disturbed in his worship by the activities of others.

In this case D and S were not inhibited from exercising their freedom to hold and express their belief. The authorities had carried out investigations against the publisher on suspicion of publicly insulting religious feelings and had found that no offence was committed. There had not been a failure to protect their rights under article 9 of the Convention.

OUTCOME:

No violation of article 9 found. Case was found to be inadmissible to the European Court of Human Rights.